Competition in Labor Markets

Transcript of Proceedings at the Public Workshop
Held by the Antitrust Division of the
United States Department of Justice

September 23, 2019

DOJ Conference Center
Robert F. Kennedy Department of Justice Building
950 Pennsylvania Avenue, NW
Washington, D.C., 20530

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Opening Remarks

- *Makan Delrahim, Assistant Attorney General for Antitrust*

MR. DELRAHIM: Good morning. Let me first welcome you to the RFK Main Justice Building. I'm very pleased to have the chance to open today's workshop on competition in labor markets. It's great to see a lot of friends, former colleagues, some detractors. Everybody's here today. It's good.

The workshop has been a long time in the making. I would be remiss if I did not personally thank and single out, well, a number of colleagues who helped put this together, but specifically single out Doha Mekki, counsel in our front office, who has been a true leader on these issues and in helping put this event together.

Late last year, we set out to facilitate a conversation between labor and IEO economists, antitrust practitioners, academics, and policymakers for a multidimensional discussion about the role of antitrust enforcement in labor markets.

By hearing from experts who focus on different aspects of worker welfare, the Division could obtain a more nuanced understanding of the marketplace for the employment services of the American worker and the role of antitrust enforcement therein.

I supported the effort and the calls to have greater discussion, and I'm thrilled to see that we are all here today with one of the most impressive lineups of experts and speakers in one of these workshops we've ever had.

Again, thanks to our exceptional participants and their respective organizations for agreeing to participate in the program. The value of today's panels and presentation is twofold.

First, it will help inform our competition enforcement and our advocacy efforts in this area and, second, thoughtful discussion between people with wide-ranging viewpoints, experiences, and areas of expertise is an essential public good. It's the bedrock of our democracy and a hallmark of an open society.

I thank you for taking the time to be with us today, and I'm very much looking forward to hearing the perspectives presented.

The antitrust law applies to labor markets with as much force and power as any other area of the market where we apply the antitrust laws. That it applies to the labor market is a powerful statement and an admittedly dispassionate one.

Broadly speaking, there's something special about work. People are the very objects of the law's solicitude and for many Americans, one's labor is essential to his or her sense of dignity.

Labor is both a unit with economic value and an expression of identity or values. This reminds me of a story that I found, and some of you may have heard in a prior speech, of one of my favorite former justice department officials, Robert Jackson.

In 1942, shortly after he became an associate justice of the Supreme Court, Justice Jackson recounted a parable about three stonecutters who were asked to describe their work. The first stonecutter focuses on how the job benefits him and he says, quote, "I'm earning a living."

The second narrowly describes his personal task and says, quote, "I am cutting stone." And the third man lights up as he explains what the work means to others and says, quote, "I'm helping to build a cathedral."

Other great Americans also attach personal values to labor. For example, in 1859, former President Abraham Lincoln gave an address before the Wisconsin State Agricultural Society in which he famously said, quote, "Labor is prior to and independent of capital."

Of course, Lincoln's conception of free labor was Lockean and grounded in the view that each person should have the right to enjoy the fruits of his or her own labor.

Labor was an essential aspect of property rights. As he put it, albeit with a little bit more flourish, quote, "I always thought the man that made the corn should eat the corn."

Any good antitrust lawyer will tell you the best part of our field is learning about product markets, from rocket parts to digital markets and everything in between, we get to learn about products and services that have a discernable impact on the daily lives of American consumers.

Labor cases have comprised a significantly smaller portion of antitrust enforcement efforts than enforcements actions involving tangible goods and services. A labor market, like any other market, however, is ripe for manipulation due to potential anticompetitive conduct and transactions.

Accordingly, enforcers, policymakers, and courts alike have reaffirmed that antitrust law seeks to preserve the free-market opportunities of buyers and sellers of employment services.

Indeed, the Antitrust Division has taken corporations to court in wage-fixing as well as no poach agreements in order to give meaning to this fundamental proposition of law. The idea that unlawful corporate power can harm both buyers and sellers rests in the foundation of U.S. antitrust law.

In supporting the passage of the law that came to bear his name, Senator John Sherman of Ohio warned that monopoly power, quote, "can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition, and advance prices at will where competition does not exist.

The law of selfishness, uncontrolled by competition, compels it to disregard the interests of the consumer. It dictates terms of transportation companies. It commands the price of labor without fear of strikes, for in its field it allows no competitors.

Such a combination is far more dangerous than any heretofore invented and, by the rule of both the common and the civil law, is null and void and the just subject of restraints by the courts, of forfeiture of corporate rights and privileges, and in some cases should be denounced as a crime and the individuals engaged in it should be punished as criminals."

The notion of employer collusion was not even a novel idea in 1890 when the Sherman Act was passed. More than a hundred years earlier, Adam Smith observed, and I quote, "We rarely hear, it has been said, of the combinations of masters, though frequently of those of workmen. But whoever imagines upon this account that masters rarely combine is as ignorant of the rule as of the subject. Masters are always and everywhere in a sort of tacit, but constant and uniform combination, not to raise the wages of labor above their actual price."

That Adam Smith is simultaneously revered as the leader of free-market economics and also concerned about the position of workers parallels an important point: sound competition enforcement and policy can help promote a competitive marketplace for both buyers and sellers of employment services.

In my view, Smith's observations and world view offer a broader lesson to all of us: labor competition matters do not belong the political left or the ideological right. They are not inherently pro-worker or pro-business.

Labor issues, broadly speaking, are quite complex. While antitrust is not a panacea for every issue facing the American worker, we know that timely and effective antitrust enforcement can go a long way towards promoting robust competition in the marketplace for employment services. Such action is grounded in the rule of law and faithful to Congress' intent in enacting the Sherman Act.

Undoubtedly, the history of antitrust enforcement in labor markets has been uneven. While several early cases marshaled the antitrust laws against labor unions, in the modern era, enforcement has largely focused on mergers, information exchanges, and collusive agreements.

The United States v. Utah Society of Healthcare Human Resource Administrators, for example, was a case where the Division sued a group of human resource professionals at Utah hospitals for conspiring to exchange non-public prospective and current wage information about registered nurses.

The exchange caused defendant hospitals to match each other's wages, keeping the pay of registered nurses in Salt Lake County and elsewhere in Utah artificially low.

In 2007, the Antitrust Division sued the Arizona Hospital and Healthcare Association, a trade group acting on behalf of Arizona hospitals, that used their registry program to fix certain terms and conditions about temporary nursing personnel.

It also set a uniform bill — a uniform rate schedule that the hospitals would pay for temporary and per diem nurses. Between 2010 and 2012, the Antitrust Division sued Adobe, Apple, Google, Intel, Intuit, Lucasfilm, Pixar, and EBay for entering into unlawful no-poach agreements.

Most recently, the Antitrust Division sued train equipment manufacturers, Knorr and Wabtec, for entering into unlawful no-poach agreements.

With respect to mergers, the Division also has challenged transactions where the merged firm would likely have the ability to depress reimbursement rates to physicians, including the Anthem/Cigna merger challenge a few years ago.

Those cases made clear that the consumer welfare standard is flexible enough to take into account harm to competition that is localized in an upstream labor market, not just a downstream product market.

One labor competition topic that is not on today's workshop agenda is criminal enforcement. While we cannot comment on the status or the timing of criminal no-poach and wage-fixing investigations, I want to reaffirm that criminal prosecution of naked agreements remains a high priority for the Antitrust Division.

As former Attorney General Robert Jackson observed, “Justice is neither automatic nor blind.” The success of the department in this initiative is not based on quantitative metrics, but on the qualitative performance of our investigative work in accordance with the standards of law we need to meet.

That's especially true in matters implicating an individual's liberty interest. Today's workshop will explore thought-provoking issues and trends at the intersection of competition law and labor.

After a framing presentation about the economics of labor and key questions for the workshop, Dr. Ron Drennan, one of the Division's most talented economists, will moderate a discussion about approaches to defining labor markets.

After a lunch break, guests will return for the afternoon session, which will open with the remarks from Mr. Ramogi Huma of the National College Players Association. A former UCLA football player himself, he will talk about his experiences advocating for college athletes, a fascinating and distinctive group of laborers, in antitrust cases and through policy proposals.

After Mr. Huma's remarks, a truly stellar panel will discuss agreements affecting worker mobility and complex business settings with special focus on franchises and the gig economy.

After a short break, we will conclude the day's substantive programming with a panel about the statutory and non-statutory antitrust exemptions for collective bargaining and other labor union activity. The panel will feature outstanding panelists, including lawyers, a professor, a

number of economists, and a senior official from the U.S. Department of Labor.

As you may know, today's workshop is the first in a two-part series that we are hosting in partnership with our friends at the Federal Trade Commission. The second day of the workshop will be hosted by the FTC and will focus on issues associated with the use of non-compete clauses in employment contracts.

The workshop will examine the current state of economic research on the effects of non-compete clauses and whether additional research would allow the agencies to better understand the short-term and long-term micro and macro effects of such clauses.

The Federal Trade Commission and we will announce the date and agenda for the second workshop in an upcoming announcement.

Workshops give us the opportunity to have a candid and substantive dialogue with stakeholders and thought leaders to ensure that we have the benefit of their expertise and experience. They also help identify and incentivize areas for continuing research and study.

Again, I want to thank each of our panelists for your willingness to participate in today's workshop and for the perspectives you bring. I look forward to that discussion.

Let me also just note and introduce professors Ioana Marinescu and Elena Prager. Dr. Marinescu is a labor economist and a professor in the School of Social Policy and Practice at the University of Pennsylvania.

Her research includes antitrust and workers, online job search, employment contracts, unemployment insurance and policies designed to help employment productivity and economic security. She's also a faculty research fellow at the National Bureau of Economic Research.

Dr. Prager is a professor at the Kellogg School of Management at Northwestern University, where she teaches data analysis and economics. Her research focuses on predetermination, insurance plan design and the drivers and effects of mergers in the healthcare sector.

In 2018, she co-authored a significant paper that measured wage growth for workers following consolidation by examining a decade worth of hospital mergers.

We could not have asked for better presenters to kick off our event. I want to thank you, Drs. Prager and Marinescu, for being with us today and sharing with us your expertise. And I want to thank all of you for being here today to hear from our distinguished panels and panelists.

With that, I want to turn it over to you and start off the day. Thank you so much.

(Applause.)

Presentation: Economics of Labor Markets and Key Questions for the Workshop

- *Ioana Marinescu, Assistant Professor, School of Social Policy & Practice, University of Pennsylvania*
- *Elena Prager, Assistant Professor of Strategy, Kellogg School of Management, Northwestern University*

DR. MARINESCU: Good morning, everyone. I'm very happy to be here today to talk to you about some of the key advances in the economics of labor markets in respects in which this is related to antitrust enforcement.

I'm really happy that the prior remarks introduced the topic already. Indeed, recently we've seen a growth of labor antitrust enforcement and, in a way, you could say that this is an infinite growth because we're starting from almost zero.

While labor antitrust enforcement exists, it is, as has been said before, muted compared to product market antitrust enforcement. And this creates a litigation gap that we discussed in my paper with Eric Posner.

And looking at this, you might think that this implies that obviously labor markets are competitive. Obviously, there is no issue with competition in the labor market.

So today, I want to convince you that, in fact, labor markets are not perfectly competitive and it is worthwhile to look at the ways in which anticompetitive practices affect workers in the labor market.

Why should we care about this? Why are we interested in this? For many reasons, but one recent reason is that there has been slow wage growth since the last recession and even before that. And this has ignited government interest in addressing impediments to wage growth, which include a lack of competition in the labor market, among many other factors.

Just to illustrate the growing interest in antitrust from the DOJ and the FTC, as has been already mentioned, in 2010, the DOJ sued Silicon Valley companies for no-poach agreements. Also, to me, very interestingly, in 2016, they issued an antitrust guidance for human resource professionals detailing the kinds of behaviors by human resource professionals that are acceptable or unacceptable from an antitrust perspective.

I think that's very important to put it out there for everyone to see because it's not always intuitive what is and isn't acceptable in this area.

More recently, in 2018, FTC's chairman said in a congressional hearing, quote, "We've told the staff that they're supposed to look at potential effects on the labor market with every merger that they review."

On the issue of mergers and their impact on the labor market, with respect to potential anticompetitive effects, I invite you to have a look at my paper with Herbert Hovenkamp, which has recently been published.

Alright, this is — just to set the stage, now let me introduce to you a key economic concept that is going to help you think about competition in the labor market, namely the labor supply elasticity.

What is the labor supply elasticity and why does it matter to understand competition in the labor market? Think of it this way: if you think about this elasticity — another synonym for it might be sensitivity — one way you can think about it is to think about a worker who's currently in a job and ask what would it take for this worker to quit.

More specifically, how much of a wage decrease would a worker endure before they would

quit their current job? So why is this relevant here? Well, if you think about it, if the elasticity is low, meaning that the worker isn't very sensitive to such a wage decrease, that creates an opportunity for employers to pay workers less because the workers will not quit or not easily quit for a given wage decrease.

If workers — in this perspective, if workers have low sensitivity to wages, a.k.a. low elasticity, that means that employers are able to pay them less and less below their actual contribution to production and still have workers not quit or few workers are quitting.

Oops, I think I just lost my slides here. All right. I think I remember what I want to say next, which is so that's one way of looking at the problem. And I want to tell you about another way of looking at the problem.

By the way, this first way, looking at the quit elasticity, there's a whole literature in labor economics addressing that. Another way of looking at it, so I told you a story about workers leaving their jobs.

Now, let's think about workers wanting to go to another job, so more like the hiring side of this. There we can think about the application elasticity. When workers are looking for a job, how sensitive are they to wages? And in particular, how much can a firm who's trying to recruit underpay workers before nobody will come or very few workers will come?

That's the side of the elasticity of application. When we recruit workers, how much do workers care about wages? How sensitive are they to wages? The basic conclusion from this concept is that the elasticity of labor supply is a good measure for competition and that lower elasticity means lower competition.

From these two examples, you can see that if workers have low elasticity, that means that I can pay them less and not have them quit in droves. I can pay them less and still get workers apply to my vacancy. That's the key idea here. The lower the elasticity, the lower the state of competition in the labor market.

Conversely, think about this—think about a perfectly competitive labor market. That means that nobody can short-change me as a worker because there's somebody else next door who will immediately take me up at the competitive wage level.

In that sense, the elasticity is infinite in an extreme case. Any small change in wages will make me quit and go to the next best option next door, and there's many, many of those by assumption of a very competitive labor market.

Let's think about the determinants of this elasticity. What makes the elasticity lower, which implies lower competition in the labor market? There are many factors that you can think of, and I invite you to think of examples from your own practice.

But I want to highlight here two particular factors. One is job differentiation. Jobs are different from each other and one very important dimension for workers, as my work has shown, is distance from their home.

Workers tend to prefer jobs that are close to home. And that limits the labor supply elasticity because, you know, there might be a relevant job that is quite far.

If the job that's closer to me underpays me, I might still take it because the faraway job isn't really equivalent, from my perspective, because it's too far from where I live. So that's one aspect, job differentiation. Of course, the jobs could differ in many other dimensions.

And the second aspect that I want to talk to you about, and is highly relevant to enforcement, is job availability. And in particular, I want to make an important distinction between jobs that are nominally available, that I'm going to be able to capture through looking at the number of vacancies in a certain labor market.

These jobs you might think are available. But I want to turn your attention to the fact that even if those jobs are nominally there, there are vacancies open, that doesn't fully represent the state of competition in that labor market for a number of reasons.

First of all, if you have a no-poaching agreement, well, there might be a vacancy. But workers who are coming from competitors are going to be essentially not able to take up that vacancy because the two firms agree not to poach each other's employees.

The opportunity for a given worker to move to a competitor is going to be lower. Even though the vacancy is there, in fact the chances that the worker will move to the job of the competitors is lower because of the no-poach agreement.

The no-poach agreement is one thing. More severely curtailing is the non-compete because the non-compete applies to all competitors, not just a competitor that we agreed with, but any competitor that satisfied the condition in the non-compete.

Now I have all these jobs around me that potentially I could apply to. But in fact, my non-compete might say that within two years, I'm not allowed to work for any competitors within a five-mile, 10-mile radius.

Even if there's jobs there, in reality, those jobs are not for me because of the non-compete. Again, this reduces job availability, compared to what you might think in the presence of non-competes.

And the third factor I want to talk to you about is labor market concentration. That too decreases effective job availability. For example, in a given labor market, you might have, who knows, a hundred Starbucks jobs.

It looks like there's a lot of jobs. But if they are all controlled by the same entity, the degree of competition between those two jobs is very different because, as I go to one job, maybe I got an offer from two of those jobs, but it's still Starbucks. They're not going to go into a bidding war with themselves in order to hire me.

That's another way in which labor market concentration decreases job availability compared to the exact same situation with the same number of jobs but where every employer would be just posting one vacancy.

The upshot of this is that lower labor supply elasticity means lower competition and that restrains and other features that I just talked to you about lower the labor supply elasticity — is expected to lower it and to lower the competition in the labor market.

Now, I want to tell you about a new paper that I just finished a draft of with my co-author Jose Azar and Steve Berry. In this paper, we use a state-of-the-art model from industrial organization, which is the branch of economics that you would find most commonly in antitrust litigation because it deals with issues of pricing in the product market.

But now, I want to import those tools into the labor market and specifically what I'm going to do is to use application data, so looking at workers, what kinds of jobs they apply to, so this is a big data kind of project. Here you go, I said the buzzword.

In the model, we have the worker first choosing which market they're going to apply to. I define a market by an occupation at the SOC-6 level of detail and the commuting zone. Such a market would be something like accountants and auditors in D.C., okay?

At that first level of decision, I decide as an accountant, am I going to apply to accountant/auditor job in D.C. or maybe in the, let's say, Philadelphia area, where I'm from? Based on the wages in all those different markets, I'm going to choose which particular market to target, okay? That's the first stage.

Then in the second stage, I chose which market is the most worthwhile to me. I decide which

particular job opening to apply in that market. Let's say I chose Washington, D.C. accountants and auditors. Now, I'm going to choose a particular vacancy as a function of the wage and all the other job characteristics.

With this setup, we are able to derive one very important measurement, which is the market level elasticity of applications. That means how much the market level wage, boosting that, how much would that increase job applications to the whole market.

Again, if we think about accountant and auditors in D.C., if I increase the average wage in all vacancies, how many more people are going to come from other markets and apply to my market? This elasticity is highly relevant because it speaks to the ability of a hypothetical monopsonist, an employer who would monopsonize this market, to lower wages.

If the elasticity is low, that means that the hypothetical monopsonist could lower wages quite a bit without fear that the workers would go elsewhere. This is what we are going to measure here. And in the next slide, I'm going to show you results, looking at different occupations, estimating their market level elasticities and comparing those estimates with the critical elasticity from the hypothetical monopsonist tests.

And the logic there is that if the elasticity is low, and in this case below that critical elasticity, then the hypothetical monopsonist would be able to profitably decrease wages by 5 percent, okay? That's the fundamental test here.

Let's look at the results. I'm sorry. This might be a little bit hard to read in terms of the details. You have there the most common occupations in the U.S. and they are ranked by their median elasticity.

For each occupation, what you see there is a box plot. And I want to — because, you know, in the interest of time, I want to direct your attention to the median, which is the little, you know, line in the middle of the box.

That's the median. It means that 50 percent have elasticity higher than that, 50 percent below. And this is estimated for each occupation. Now, why does an occupation have different elasticities? Because remember I'm also considering the commuting zone. Some commuting zones, therefore some areas in the country, might have lower or higher elasticity.

That's the whole range of elasticities for each occupation. And you see the maximum and the minimum are at the extremes. What you see is that in every, in every of the most common occupations, the median elasticity is below the critical elasticity, implying that this market definition is plausible by the hypothetical monopsonist test for all of these most common occupations.

And because they are common occupations, that would mean that there are relatively many jobs because that's how I define common, by how many jobs are there in these occupations. Presumably, for less common occupations, it might be that the elasticity is even lower.

Furthermore, you can see that, for example, the most elastic, so the areas, the kinds of occupations with more competition are things like sales representatives and telemarketers and the least elastic occupations are in trucking. Both light truck and heavy truck have very low elasticities, meaning that there is relatively little competition in those specific types of occupations.

Furthermore, we also look at is there a difference between high- and low-skilled occupations and we don’t find a systematic difference. Depending on how you look at the data, sometimes the low-skilled or the high-skilled occupations have high elasticities.

The upshot is that from our data, there is no systematic difference in competition between low- and high-skilled markets. Basically, it depends what market we're looking at.

It's important to look at the particular market. You can't assume that obviously low-skilled markets mean the workers have so many opportunities and they can go anywhere, so the elasticity is really high. That's not the case.

It might be the case in some markets. But generally speaking, there's no systematic pattern right here. That's important because it goes against, again, a common intuition that, as a low-skilled market worker, I can obviously just go to another job. This data shows that that's not the case, at least not systematically.

We also show in this paper that rural areas have lower elasticities. Generally speaking, if we are comparing less densely populated areas with more densely populated areas, systematically less densely populated areas tend to have lower elasticity, meaning lower competition. That is something that could be of concern for enforcement.

I just established that an occupation by commuting zone is a plausible market definition. Now let's zoom in on labor market concentration, which is one of the reasons why competition might be low.

From a paper with Jose Azar and Marshall Steinbaum, who's here, and Bledi Taska, we have data on all U.S. vacancies and we look at the concentration of U.S. labor markets by geography.

We find that the majority, or 60 percent of labor markets are highly concentrated. And furthermore, as we can see, concentration tends to be higher in less densely populated areas.

Secondly, we also look at the link between labor market concentration and wages and we show that higher labor market concentration is associated with lower wages in that market. This graph you are seeing here doesn't control for anything, but in our analysis, we looked at many potential confounding factors and we find that the relationship is solid to many potential other factors that we have accounted for. And furthermore, there's now a huge literature that I am citing here confirming this negative relationship in the U.S. between wages and labor market concentration. And this uses very different data sources and also different market definitions.

But the fact is there. I think at this point we can call it a stylized fact. Generally speaking, higher concentration is associated with lower wages in the labor market.

This is the end of my remarks, and I'd like to give the floor to Professor Prager.

(Applause.)

DR. PRAGER: Great. Thanks, Ioana. Good morning, everyone. Before I get started, I want to thank the Department of Justice, and especially Doha Mekki for organizing today's workshop. I'm really delighted that the DOJ and FTC are both taking issues of labor market concentration quite seriously.

Let me just pick up right where Ioana left off. Ioana has already laid out for us the evidence for a link between employer concentration and worker pay.

And this last plot that she has put up is really a great example of what a wide variety of papers in the academic literature have recently established, which is that labor markets with high employer concentration tend to have low wages.

The evidence on this point, as Ioana said, is pretty compelling. But it doesn't necessarily have to imply that limited competition in labor markets is itself the cause of lower wages. This is an important point because if labor market concentration and low wages tend to go together for some other reason that isn't necessarily causal, then the agency's attempt to shore up labor competition may not result in the desired salutary effects on labor itself.

Let me give you one very simplified example from actually Ioana's map. And I think I had another label on this. There we go. Okay. This green low concentration market that's on the left of the map where you're looking is the San Francisco commuting zone.

Now, San Francisco, as you know, is a dense urban area. It's got many employers, which means that labor concentration is going to be quite low. No single employer or small group of employers can by themselves dominate the labor market.

Wages in San Francisco are also quite high by national standards, especially if we compare them to a place like Northern Maine. So that's my other little red-highlighted market at the top right of the map. This part of Maine is quite rural, with relatively few employers and therefore a very highly concentrated labor market by the definition that's been used in the literature.

Wages here are a lot lower than they are in San Francisco, about 30 percent for hospital-employed nursing administrators and pharmacists. But the cost of living is also substantially lower. In fact, it's about 40 percent lower than it is in San Francisco, so it's actually not clear that the workers in Northern Maine are the ones getting the raw deal.

Now, economists do control for these kinds of patterns. And in fact, Ioana's work and some of the other papers that she has mentioned also control of these kinds of issues. But I think this is still a good illustrative example because it highlights some of the issues that might come up.

In particular, if you've got things that co-move with employer concentration and wages that are a little bit more complicated than cost of living, and especially if they're changing within a single labor market over time, then that can contaminate the results.

What should be clear hopefully from this example is that high concentration going hand in hand with low wages is not necessarily a sign that lack of labor market competition is really to blame.

And since the rest of today's workshop will be spent talking about anticompetitive behavior and possible antitrust remedies, I want to spend the remainder of my remarks on why we should not dismiss these issues out of hand, why, despite the fact that there are other mechanisms that might explain at least some of the patterns that Ioana has mentioned, there's reason to think that some of these findings are indeed explained by high concentration causing low wages.

Before I do that, let me first walk through another way of thinking about the conceptual explanations for how employer market power can result in low wages.

When employers are concentrated and possess market power, that market power can result in lower wages in a couple of different ways. The first one that you'll often hear economists talk about is one that I refer to as classical monopsony. Classical monopsony is the theoretical construct that directly mirrors the type of market power that a monopolist seller has when it is the only seller of a good.

This is something Ioana already mentioned, but let me give you sort of the more typical definition, which is that a classical monopsonist is an employer that is the only game in town, meaning workers can either work for that employer or be out of a job entirely.

Now, for every worker, as Ioana has already explained, there's a certain wage that the employer has to pay in order to keep that worker there rather than preferring to be unemployed. For instance that could be a wage that's just enough to cover the cost of the commute and childcare, as a bare minimum.

Normally employers have to compete for a worker. And one way they do that is by bidding up wages. But a monopsonist employer can just decide, you know what, I'm going to pay workers less than what the going wage would be if the labor market were perfectly competitive and I'm going to accept that that means I'm going to get fewer employees. Some workers will not be willing to work at that wage.

I'm going to have fewer employees producing my good and generating revenue. But on the other hand, I'll be able to pay them less and so I might actually end up more profitable in the long

run. And that's exactly this hypothetical monopsonist test that was discussed.

Classical monopsony where the employer really has a great deal of labor market power is one possible mechanism for concentration to drive down wages. But this classical monopsony picture that I've just described is really more of a useful abstraction than a description of how actual labor markets work in practice.

Very few employers have a truly captive audience of potential workers, right? If conditions get bad enough, some workers might pick up and move to a new city. Others might invest in retraining for a different career in a different industry.

The other issue here is that the classical monopsony mechanism really only works for reducing wages if every worker in the company that's doing the same job is paid the same wage. Otherwise, it's not really a classical monopsonist.

In practice, what that ends up meaning is that a much larger concern about employer concentration is what it does to workers' so-called bargaining leverage.

When an employer grows bigger, whether that's organically or via merger and acquisition activity, that means workers in that industry now have fewer employers competing to hire them, fewer employers trying to win them over by offering pay raises or improvements in working conditions and frankly just fewer new job openings or vacancies, in Ioana's terminology, outside of their current employer where they already work.

This means that a juggernaut employer can put downward pressure on wages and that can push down wages that are the going market wage and affect workers who are working throughout that labor market, not just at the large employer itself.

Basically, when an employer concentrates or consolidates, that's going to lead to worst outside options for workers and that will eventually affect equilibrium wages in that labor market.

And unlike classical monopsony, this bargaining leverage is something that can work even when workers doing the same job aren't necessarily all paid the same. It's much more applicable to real-world labor markets than a classical monopsony mechanism might appear to be.

But whether it's classical monopsony or bargaining leverage, the end result is the same. It's that higher employer concentration is going to put downward pressure on wages and that can indeed be a causal mechanism.

Now, thinking about employer concentration leading to employers having market power over workers requires a little bit of mental gymnastics if you're coming from a standard antitrust background.

In most antitrust applications, the entity that has the market power is the producer or seller of a good or service and the entities that can be harmed are the purchasers of that good.

When we're talking about labor market power, we have to turn this intuition on its head. In other words, the entity that has the market power is now the purchaser of workers' labor and the entities that can suffer harm are the workers that sell their services to the employer.

But the good news is that the intuition that you already possess from applications where the seller has monopoly power translates pretty easily into applications where the buyer has monopsony power. You just have to invert a few things.

We've inverted who has the market power. It's now the buyer of the labor instead of the seller of the good. And we've got to invert what the effect is. The powerful buyer wants lower prices of labor instead of a powerful seller wanting higher prices of the good that it is selling. And so, the effect is to drive wages down instead of driving product prices up.

With that inverted intuition in place, we can also think about extending many of the familiar

tests from antitrust and many of the familiar tools to the labor market power context. The hypothetical monopsonist — or sorry, the hypothetical monopolist test, which we would normally use to ask whether a monopolist seller could, in principle, increase prices by a small but significant and non-transitory amount becomes the hypothetical monopsonist test which then asks whether a monopsonist employer could in principle decrease wages by a small but significant and non-transitory amount.

Similarly, the upward pricing pressure index, or UPP, which normally measures the relative price markup that a merger can generate can become the downward wage pressure index to measure the relative mark down in wages that an employer merger might generate.

The bottom line is that although we're used to thinking of market power in the hands of sellers, the tools that antitrust practitioners have also developed can also equally be used to analyze market power in the hands of employers.

Let's say we have the tools to analyze employer market power. The question is does that mean the DOJ or FTC could actually act to enforce competition in labor markets when competition is threatened. Well, we've gotten some examples of that in the introductory remarks already. And here again, I'd like to draw some parallels to what we're used to thinking about from enforcement in product markets.

For example, existing high levels of concentration in market power are not actionable in and of themselves. So even if there were only a handful of key employers in Northern Maine, the agencies can't just break up those employers without good reason. And a good reason might be something like anticompetitive conduct by those employers.

If they have no-poaching agreements in place in which they agree not to hire each other's workers away by offering them a raise, that's essentially analogous to price-fixing by sellers or if those employers have punitive, unnecessarily punitive non-compete clauses that prevent their workers from being able to leave and work at a different job, that's somewhat analogous to a predatory contract termination fee.

These are the types of cases that might be actionable, and they'll be discussed in a lot more detail in the second panel, so I won't get into the weeds now.

But what I do want to draw your attention to is a second potential area for enforcement, which is mergers of employers. The horizontal merger guidelines, of course, outline thresholds such that if a proposed merger of two sellers increases product market concentration by more than that threshold amount, then the merger is automatically subject to some scrutiny.

Analogously, if a merger of two employers increases labor market concentration, then there's an argument to be made that that should or could also be subject to similar types of scrutiny from the agencies.

And crucially here, economic theory is informative about when we might expect an employer merger to generate such downward wage pressure. If workers can't easily move to a different job, whether that's because they're geographically tied to their area because they prefer things that are close to home or because it would take years of training to switch to a different occupation with a similar level of pay or because the work they do is highly specific to that employer, like operating high-tech, custom-built machinery, then the merger will generate more downward wage pressure for those workers.

As an example, and to my knowledge, this is purely hypothetical, suppose Amazon and Microsoft were to merge. Purely hypothetical. They are currently the two tech giants in the Seattle area, of course.

And economic theory tells us to expect that tech workers who can easily pick up and move to

Silicon Valley after Amazon and Microsoft merge are going to be much less affected than Seattle-area tech workers who are tied to Seattle and are then probably going to have to accept lower wages or at least slower wage growth from the new supergiant "Amaz-Soft" or however you want to abbreviate the two.

Now, since mergers aren't really a focus of any of today's panels but are presumable are of interest for this audience, I want to spend the rest of my remarks elaborating on them a little bit.

I discussed earlier why the fact that wages tend to be lower in places that have high employer concentration doesn't necessarily mean that the lower wages are about the concentration itself, although the evidence does seem to point in that direction. It could be correlation rather than causation.

So for determining whether labor market concentration can actually cause low wages, we can use some of the tools that Ioana described earlier. But there are also other types of evidence that we might turn to in order to bolster the case.

It's useful, for example, to look at a different type of evidence where concentration is changing in a local labor market. And we can look at what happens to wages as that concentration changes. Mergers are a very natural way to do this. And that's what I did in a recent academic study with my co-author, Matt Schmitt.

In the study, we examined what happens to hospital workers' pay growth after a hospital merger. We looked at 10 years of consummated hospital mergers in the U.S. from 2000 through 2010. And we categorized hospital labor markets as falling into one of five bins, depending on their merger activity.

Over a given time period, a labor market might experience no within-market hospital mergers, in which case it's assigned to our empirical control group, or a labor market might experience hospital mergers that affect the labor market concentration to differing degrees.

We measure how much concentration is affected by a merger using the change in the employment Herfindahl index induced by the merger. This is actually the same measure that shows up on Ioana's maps.

And if employer HHI or Herfindahl goes up by a lot due to the merger, then the labor market becomes less green and more red on one of her lovely maps. We binned our mergers into four categories, from the smallest to the largest increases in HHI.

Now let me walk you through sort of the economic hypotheses this theory might suggest to us. If employer concentration actually causes downward wage pressure, then what we would expect to see is that wages grow slower after the mergers that generate the largest increases in local labor market HHI.

If wages in those markets grow at the same rate as in other markets that either have smaller mergers or no merger activity, then that might imply that increasing employer concentration isn't actually what's slowing down the wage growth.

Similarly, if employer concentration is in fact the culprit, then we would expect to see workers that re more specialized to the hospital industry being more affected by wage slowdowns following a hospital merger.

And in the study, the way that we look at this is by binning workers into three categories. We've got some blue-collar workers like custodial staff and cafeteria workers, who are generally not very specialized to the healthcare context.

We've got some higher skilled, but still somewhat specialize and somewhat generalist workers. These are mostly white-collar staff, folks like social workers and insurance claims professionals. And then our third and most highly specialized category of workers are nursing

administration people and pharmacists, who are the most healthcare-specific workers that we can observe in the data.

If employer concentration actually causes downward wage pressure, the group we would expect to see affected the most by hospital mergers are the nurses and pharmacists. And we would expect to see those effects most of the largest mergers that move local employer HHI the most.

And in fact, that is exactly what we see. For our least specialized blue-collar category, which are the four bars on the left of the plot, we see no effects of hospital mergers on subsequent wage growth, no matter the size of the concentration increase induced by the merger.

For the two more specialized worker groups, so our sort of white-collar non-medical staff in the middle, and then the nursing and pharmacy category being the right-hand set of bars, we actually do see wages growing slower following the largest HHI increase in mergers, although not so much when you look at the smaller mergers that only move HHI by a little bit.

Now in the paper, we've got a bunch of additional analyses that suggest these estimates are genuinely picking up an effect of employer labor market power on wages rather than other mechanisms.

But the bottom line that I want you to take away from this is what we have corroborating evidence that at least some of the patterns that Ioana has documented in terms of the correlation between high concentration and low wages really can be attributed to a story of probable causation rather than just correlation.

What that means is that an antitrust environment that supports competitive labor markets might actually be effective at combating downward wage pressure. And that means that the discussions that'll take place for the rest of today are both meaningful and important, so I encourage everyone to stick around for the rest of the day. Thanks.

(Applause.)

Panel 1: Approaching Labor Market Definition

- *Orley Ashenfelter, Joseph Douglas Green 1895 Professor of Economics, Princeton University*
- *Patrick Greenlee, Economist, Antitrust Division, United States Department of Justice*
- *Dean Harvey, Lieff Cabraser Heimann & Bernstein, LLP*
- *Kevin Murphy, George J. Stigler Distinguished Service Professor of Economics, Booth School of Business, University of Chicago*
- *Moderator: Ronald Drennan, Acting Economics Director of Enforcement*

DR. DRENNAN: Okay, everyone, let's get started. If we are presented with a particular merger or other market behavior that raises a potential antitrust concern in the labor market, how does one investigate that? How do you gather the right information, in a hopefully efficient way, and make a determination as to whether there is or is not a violation of antitrust laws?

Our current panel will discuss how we might approach market definition in the context of exploring these labor issues. Market definition is only one step in this process, but it can be an important step, as the breadth of the market may go a long way to explaining why the behavior we are investigating should or should not be expected to lead to harm.

For this discussion, we are extremely fortunate to have a very distinguished panel assembled here. While I'm sure it's only going to touch on some of these topics, hopefully this discussion will build upon the excellent overview provided by Professors Marinescu and Prager.

Let me introduce our panel. Seated directly next to me is Patrick Greenlee. Dr. Greenlee is an outstanding economist who's been with the Antitrust Division since 1995. During this time, he's worked on several important matters, including matters that raise buy-side or monopsony issues.

In 2000-2001, he was selected as the Victor H. Kramer Foundation fellow at the University of Chicago Law School. Dr. Greenlee has taught economics in the PhD and master's programs at the Universities of Maryland, of Virginia and Johns Hopkins. He's also an active researcher who's published articles in several economic and antitrust journals.

And let me take this opportunity to cover Patrick, myself, and the other DOJ moderators that follow with a disclaimer. We DOJ speakers do not purport that our views reflect those of the U.S. Department of Justice, and thus nothing in this presentation may be cited in any enforcement proceeding against the U.S. Department of Justice.

The purpose of today is to stimulate discussion. Sometimes that involves playing devil's advocate, et cetera.

MR. GREENLEE: Thank you, Ron.

DR. DRENNAN: Yes. I saved you from having to do it. Seated next to Patrick is Dean Harvey. Dean Harvey is an attorney with Lieff Cabraser Heimann & Bernstein. He represents individuals and companies in antitrust, business tort, employment, and intellectual property litigation.

He has experience representing employees asserting antitrust claims, including high-tech workers, doctors, rail equipment workers, and fast food workers. He has also represented consumers in litigation against generic drug makers.

Dean was previously with the Antitrust Division and was a law clerk for the Honorable James V. Selna of the U.S. District Court in California.

Seated next to Dean is Dr. Kevin Murphy. Dr. Murphy is a professor of economics at the

Booth School of Business at the University of Chicago. He is also a research associate at the National Bureau of Economic Research and a member of the Hoover Institution.

He has received the highly prestigious John Bates Clark Medal, the MacArthur Fellowship and the John von Neumann Award. Professor Murphy has published scores of scholarly articles across a wide range of topics, including economic growth, competition, relative wages, unemployment, as well as income inequality and how it is linked to demand for skilled and unskilled labor.

And finally, at the end of the table is Dr. Orley Ashenfelter. Dr. Ashenfelter is a professor of economics at Princeton University. Professor Ashenfelter has also been the director of the Industrial Relations Section at Princeton, a director at the U.S. Department of Labor, a Guggenheim fellow. He is a recipient of the IZA prize in labor economics, the Mincer Award for lifetime achievement in labor economics and the Karel Englis Medal.

His areas of specialization include labor economics, econometrics, and the intersection of economics and law. His research has explored wage rates and many other issues related to the economics of labor markets.

That's our panel. As I said, I'm very happy, and thank them all for being here and their preparation.

What I'd like to start with, before we get into it, is make use of having our attorney on the panel and ask for just a little antitrust labor 101, if you will, and what role — and within that, what role does market definition play. Is it always relevant or is it only in a subset of cases? So, Dean, would you?

MR. HARVEY: Thank you, Ron. First, let me say it's an honor to be here. I think it's an important topic and I'm delighted that it's receiving all the attention that it's getting lately.

Before I start, I'd love to get a sense of the audience. If you consider yourself not to be an antitrust specialist, could you please raise your hand? Good. Who here considers themselves primarily to be an employee or a labor lawyer? Great, okay.

In terms of the basics of antitrust in this area, I think the main reference is the joint DOJ/FTC 2016 guidelines for HR professionals. As was stated by I think two of our prior speakers, the antitrust laws apply in the employment setting in just the same way as they apply in the product setting.

Competing employers cannot agree to set salaries, just as competing sellers of products cannot agree to set prices. Competing employers also cannot agree not to hire or even not to actively solicit each other's employees.

And this is kind of a subtle distinction where it is just as unlawful under this guidance to agree not to affirmatively seek out an employee but still allow someone to apply and get hired. That, if it's naked, is still a per se violation.

The relevant harm here is suppressed pay to employees, not increased prices to consumers. There is I think a big debate in the antitrust world about the consumer welfare standard, should that be the end all and be all. I think this should play an interesting role in that debate because the prices to consumers play almost no role in these cases. It's all about whether the conduct at issue suppresses pay to employees.

When agreements are naked, that is, when they are not reasonably necessary to some pro-competitive collaboration between the companies, then the misconduct, the agreement is considered to be a per se violation of the antitrust laws. That is, it is an unlawful act without doing anything else to investigate it.

If the agreement is arguably or it is in fact reasonably necessary to some pro-competitive

endeavor, then a more deferential standard, the rule of reason, may apply, in which case the first step of that may be to define a relevant market, which is what our panel is about.

Violations can also give rise to private causes of action for treble damages. And in those cases, typically it's a class of employees who were affected by the misconduct who bring a private class action to seek treble damages for lost pay. I should also mention that per se violations are also potential criminal violations, as was described earlier today.

In terms of market definition, I think there was a description of that earlier this morning, so I won't repeat it, but I think I would just ask why do we bother with market definition.

The reason why we do it is to test whether the alleged monopolist or the alleged monopsonist or a group of competing employers have enough power to have an impact on price. That is, do they have the ability to suppress pay below the competitive level? And I think with that, I'll stop on the 101 portion of this.

DR. DRENNAN: Sure. Thanks. As we get in closer to market definition itself, maybe a time for our other panelists, starting with Patrick, to think about — to talk about how do labor market concerns compare to antitrust concerns more broadly.

MR. GREENLEE: Thanks, Ron. My comments here are going to echo a little bit of what we heard from our economists on the initial panel and that's just let's focus on thinking about labor markets in a merger context. This would be sort of the example of the hospital study that was at the end of our intro.

Horizontal merger guidelines are written focusing on competing sellers selling products to consumers. But they say that they apply equally as well to consuming buyers purchasing inputs. We can think of labor being as one particular category of input and then ask how well do the horizontal merger guidelines apply.

Whether it's selling goods to consumers or purchasing inputs, either labor services or other widgets that get added to create a final product, a merger's going to have adverse competitive effects when the merging parties compete against each other vigorously. In some sense, it's kind of obvious.

It's also going to need to be the case that there are not a large number of third-party alternatives for that input supplier to sell their services to. An employer has market power or differentiation if it's the case that it's difficult for an employee to switch to another job or an input supplier to sell their products to another creator, another producer.

Then there's the other categories we have in the merger guidelines that sort of need to be satisfied if we're going to end up with an adverse competitive effect. These include that entry or expansion by other competitors would not defeat an attempted exercise of market power.

In the input case or a labor case, this would be a situation in which, as a result of a merger, two firms attempt to reduce wages and, as a result, some other employer perhaps already established in the market or in an adjacent market swoops in and says, “Hey look, I can purchase labor very cheaply now” because these guys are trying to exercise market power following their merger. Entry expansion could potentially defeat an attempt at merger-induced market power.

Another potential effect would be whether or not a merger makes collusion easier. In the antitrust lingo, this would be whether or not the merger's causing — taking out a maverick who otherwise is behaving very competitively, very aggressively with respect to purchasing the input.

And then finally, in merger review, we have to consider the possibility that there might be some efficiencies that result from a merger and assess whether those efficiencies are actually specific to the merger, but they couldn't be otherwise achieved and sort of what the magnitude of those are. Is it enough to counterbalance some opportunity to exercise market power?

That's a reminder of what the basic components of the merger guidelines are. At the Division, we do look at output markets and we look at input markets. In many cases, a particular input market might be much broader than the output markets we are focused on.

For example, consider a hypothetical merger of two producers who make manufactured goods, maybe kitchen appliances of some type. And they use railroad services to deliver their finished goods.

They are purchasers of the input railroad services. It's probably not an input market that we would spend a lot of time focusing on if we think that these two particular producers of manufactured goods don't represent a very large portion of purchasers of rail services in a particular geographic area or nationally.

That would be an example where we might have two firms competing very aggressively head to head in an output market with very few competitors in the output market, but they're not able to exercise market power in purchasing the input. That's a case where the input market may be much broader, more competitive than the output market. We do have examples that are the reverse. In many agricultural markets, it's not economical for an individual grower to ship their finished good, whether it's a crop that they've harvested or livestock that they've fed, it's not economical for them to ship them far, long distances to a processor to, you know, turn that steer into steak.

And as a result, it may be the case that the market for the finished goods, the, you know, grocery store items might be national or perhaps even broader.

But for a particular grower, you know, on their farm, they may have very few alternatives for where they can sell their input. It may be that, hey, the two processors that are the closest to that particular farm are the ones that are merging.

If the next best alternative for that particular grower is quite a bit — quite a distance away, you can imagine that the merged firm would be able to strategically reduce the price that they pay that particular grower for their good. This would be an exercise of buyer market power.

We look at input markets and we don't — it's not the case that we assume that an input market is the same size or breadth as an output market. I guess before I conclude this part, input markets, labor is an input. We think that the guidelines should apply or the approach should apply.

But I do recognize that there are several characteristics of labor markets that — characteristics not necessarily unique to labor markets but maybe play an especially prominent role in those, in labor markets.

The first one is that if you're thinking about a specific interaction between an employer and an employee, it's not just the wage that matters presumably. It's other work conditions, sort of flexibility in hours.

Some of those things, like where the establishment is located, maybe is fixed. Some of those other attributes might be things that the employer can adjust, like "Maybe I'm going to hire fewer workers and people are going to have to work more hours if they want to keep the job," that sort of thing.

And that's not to say that in output markets we don't face a similar issue. We may be able to observe price. We might not know all the attributes of a particular product. But this may be a larger issue in labor markets.

Another feature of labor markets that might be different than many output markets or even other input markets would be that employment is typically, in many cases, a long-term relationship.

We don't have a spot market where — in most, in many labor situations, we don't have a spot market where each day or each week we're deciding what the prevailing price for labor is going to be that week and we go week to week.

Instead, long-term relationships, in that setting, you can think of it being the case that the employer's making some relationship-specific investments, you know, training the employee on how to do the job and the employee is also making some relationship-specific investments. They're learning how to do this particular job or the peculiarities of a given employer.

Finally, the last two attributes that are perhaps distinctive for labor markets that we don't see as much in other markets would be the labor markets are characterized as being search markets and being matching markets. Search market being that it takes effort for a jobseeker to actually find a job. It also takes effort by the employer to try to identify productive, useful workers to work at that job.

There's search plays a perhaps prominent role. And matching, here I mean that the benefit of having an employer/employee relationship, the quality of that relationship matters to both the employee, sort of how satisfied they are with their job and all that it provides, but the employer also cares about the productivity or how useful, how reliable the particular employee is.

And you think of this as being quite a bit different than a grocery store that's selling bottles of shampoo. They probably don't care just how I'm using the shampoo or what my relationship is with it.

In this way, labor markets might be quite a bit different than a lot of the markets we study that are not labor markets.

DR. DRENNAN: Thanks, Patrick. In that regard, let's maybe now turn to our labor economist to discuss for us antitrust practitioners what are the important aspects about labor markets to recognize. Kevin, would you like to?

DR. MURPHY: Yeah, thank you. Patrick covered a lot of it. A couple of things I would bring in, and it's not — there's not a complete difference between labor markets and product markets. There's some overlap. I think many of the ingredients are similar. But I think the mix is often quite different.

For example, in many product markets, particularly the ones we tend to study in antitrust, we often see relatively few alternatives on the buyer side, that you look at if I stop buying from firm A, the vast majority of customers go to either B, C or D, for example, in a market where there's four primary sellers of the product. We're sort of used to dealing with kind of small numbers, oligopoly-type models in those markets.

Many labor markets, not all labor markets, don't look anything like that. If you look at where people go when they leave a firm or where people come from when they go to the firm, often very diffuse. People go many, many different places.

If you look at employer data and you ask where do people go when they leave, often you'll find no more than 5 percent of them go to any one firm, that they go all over the place. And some go in the same industry. Some go in other industries. Some change occupations. Some don't.

You look at plant closings, where people go. Again, not so often a big concentration of where they go to. If you look at data on where people are hired from, you see much the same patterns. That's kind of a much more diffuse nature.

Now, that's going to depend on the geography. In a small town, that probably isn't as true as it is in a big city. But the kind of boundaries of where workers' alternatives are and the commonalities of those alternatives across workers are much less it tends to be than for

customers in a product market.

The second part that's a little bit different as well is that virtually all labor contracts are negotiated. And you might say, ”Well, wait a minute, what about the case where people place a wage?” but there are very few contracts where you just post a wage and hire anybody who wants to show up at that wage.

Almost any contract, whether it's a contract where we negotiate individually the terms of the deal or one where I post a wage rate are ones where the employer makes the decision whether you get hired or not.

And because of that, the effects on me of various labor market practices might be quite different for different workers. That is, it's not sufficient to ask the question what happened to the wage rate. You also ask did I get the job because if the wage rate's higher but you don't get the job, you didn't benefit very much from that.

Now, it might affect other wages. You've got to think about that too. But there are two aspects, even in a very commoditized labor market: what's the pay, whether I got the job, whether I got a promotion, more opportunities for some workers often translate into less opportunities for others, so things you have to worry about there. I think those are two, I think, significant differences.

A third one that makes really all input markets more complicated from an economic standpoint is, usually, we fall back on output. What happens to the output in an output market to judge the difference between efficiency effects and competitive effects?

More efficient markets, we expect output to rise. Less efficient markets, we expect output to fall. And that's a good test for thinking about which way it goes.

Unfortunately, in input markets, that test doesn't work. That is, efficiency enhancement can reduce usage of inputs, right? The goal is not to use more inputs. The goal is to produce more output. And the effect on inputs of efficiency is ambiguous.

On the one hand, more output tends to lead to more inputs. On the other hand, more output per unit input tends to lead to less inputs. Separating efficiency explanations from other explanations, not as easy in input markets because if inputs go down and maybe even prices of inputs are driven down because demand for input falls, that doesn't rule out efficiency as the driver. You can't use the same test you'd use in output markets.

One thing I will say, and this is true in some output markets, is frictions are a big part of the labor market. They have to be. It's individually transacted, right?

It's not generally done on a big scale. Each person is supplying your own labor. They don’t search for jobs for other people, generally. There are intermediaries that help you search for jobs. Frictions are an important part.

But in a world where there are frictions, frictions and antitrust aren't the same thing, you always have to remember individual firm-level elasticities are something interesting to measure. But they don’t tell you about wage suppression.

Fexample, if we were to look at the grocery business, we'd say in a grocery business, the typical grocery store faces an elasticity maybe of about five. We wouldn't conclude from that that groceries are priced 25 percent above the competitive level because grocery stores face an elasticity of about five.

Be careful what you make out of the measurements that we get. The basic issue is you can move back up, in this case, the labor demand curve and therefore the gap between marginal product and wage doesn't measure the effect on the wage rate. I'll stop there.

DR. DRENNAN: Thank you, Kevin. Orley, what are some thoughts you have on what we

should know about labor markets as we think through these problems?

DR. ASHENFELTER: Let me say a few things about that. It's a pleasure to be here, and especially because I think, at least for many decades, I've always thought there were missed opportunities in the use of and implementation of antitrust remedies in the context of labor markets.

Historically, the most obvious cases have been in the healthcare business, but there have been others as well. And almost everyone has been very reluctant to make this connection. It's really a great pleasure. I consider it a victory lap to see that someone is actually using antitrust cases. I've testified in a few.

The first point I'd like to make is I think, with respect to the market definition issue, it makes a huge difference whether what you're doing.

Dean Harvey has made the case that for many antitrust applications, what we're looking at are direct effects, the no-poaching agreements in Silicon Valley were a result ultimately, originally of — the origin of that is because Steve Jobs and George Lucas made a deal where Jobs bought the computer division of Lucas' film industry company at a time when Lucas had bought the New York Institute of Technology computer science department.

And notice the way I said that. He bought it. That's the way he thought about it. Moved it to Marin County and the idea was they would make animated pictures.

But they couldn't actually produce any animated pictures at that time because Moore's law, the famous example of how computer power increases at an exponential rate, just hadn't quite caught up to the software they were using. And it was during a period when Jobs wasn't at Apple. He had been kicked out.

The deal they made was he would buy this animation production facility from Lucas and they wouldn't hire from each other and that was the deal. That's what led to the other — I think Jobs realized this worked out so well. It made a lot of sense to make this arrangement with Google and Adobe and everybody else.

Well, and by the way, in case what you don't know, what he bought turned out to be Pixar. I'm sure everyone, if you have either children or grandchildren, you've seen *Toy Story*. That was their first movie, and it's gone on forever since.

Now of course it's owned by Disney, which raises a whole separate question because there was actually a lawsuit brought over the issue of animators and Lucasfilm and Pixar and others were defendants. Of course, Disney owns all those companies now. There's no — there isn't going to be any more lawsuit about that. They can do whatever they want with their animators. They've all merged up.

I think the point I want to make is that whether you think carefully about market definition depends. The importance of that depends on whether you're looking at direct violation. There was no need for a market definition in the case of the no-poaching because they were basically naked agreements.

And even though it's no doubt the case that animators or software engineers don't have a million different places they can work, it's not really relevant for the fact that there was a set of naked agreements.

I think a lot of what Dean's point about there's no need for, or irrelevant really, relevancy of markets, it's very similar to the example in the case of price-fixing in the product market. You don't need to know. As long as two firms are engaged — you may have to know something about it for collecting — figuring out how to collect the money you're going to collect off the damages, but you don't need to know about what that market was to do that.

Now, there's a second issue however. And this is a much more interesting in some ways and les developed. And I don't take any credit for this. And that's the issue of mergers and what effect they have on labor markets.

Actually, Dan Hosken, who's trained as a labor economist, is in this room, a friend of mine. We wrote several papers doing ex-post evaluations. This is now a business, I guess. EU has the whole — has an entire office that just does ex-post evaluations of mergers. But we never thought to actually ask whether any of these mergers affected wages.

(Laughter.)

And we're labor economists. So that goes to show you that it's easy to forget. I regret that and I don't know if it would have shown anything. But it would have been interesting to try. And at the time, it just didn't occur, I don't think, to either of us to think carefully about that. We were more interested in what happened to prices.

I think, on the merger side, this is very similar, measuring demand elasticities and crossflow elasticity is the critical issue for a merger analysis or any kind of merger simulation that's going to involve something like that. And that's similar, I think, in the case of the labor market.

Market definition now becomes a pretty critical issue. And as Kevin said, a lot of it has — the one way — the easiest way to think about it is where do these workers — where do they move to, to and from.

You could think of — there's easy cases like maybe a commuting zone that has two or three major hospitals and they're thinking about merging. It's most likely the elasticity, the commuting zone elasticity of supply of registered nurses, say, is not going to be — is not going to be very high.

That could easily lead to some suppression of wages. But you'd need to figure out, it would matter how much competition there was in that area and how much people moved across from one part of the firm to the other. And that is not so different, I don't think, from exactly the same problem. We get into the same problem in the product market measuring cross elasticities.

We should never — I used to have a red light in our — we had all of our computers were in one room at one time. And we had a red light. And if you were measuring elasticities, you had to turn the red light on because it was dangerous. It was a very dangerous thing to do.

So that's a — now, I would say one further thing about that. That's very similar, I think and the burden's I don't think are any greater.

There's one little extra piece to this though that applies, I think. It hasn't been mentioned yet, and it's not very well researched. And I'm not sure how anybody can study it, which applies to both the merger issue as well as the naked no-poaching or product wage-fixing cases.

And that's the issue of third parties who collect information and disseminate information on wage rates across firms. The BLS has a long history of doing industry wage surveys. They always have been historically considered pro-competitive, so you could figure out what's going on.

But almost everybody, including — I mean, I have seen some very privileged information at some universities where it's pretty obvious that there is a — the administrators are taking a look at the salaries of economists, observing how much higher they are than many other people in their universities, but observing also that that's true in other places.

It's quite very detailed information, a lot of times being exchanged in a little unclear way. You know, some third party collects information from a bunch of firms and then gives you back some information.

Supposedly you can't tell exactly what the other places look like. I don't know. It's very easy

to see how that could be misused. And I don't know that it's possible to — I don't know how you find that out.

I don't know how often — it's my impression that those third-party data collection enterprises exist at very low levels. Wage rates are collected and shared at — for workers that are not at a very high level. They certainly are compared at universities where people are at very high level.

That's an issue. It's come up in the guidelines as to what can or can't be shared, but it's one of those areas where you can see something related to it in litigation. But otherwise, you're never going to see much because no one's ever going to tell you what exactly they're sharing.

The guidelines for the HR people, they may just be guidelines. You don't really know whether any of that's actually being implemented. That's always been a disturbing feature for me.

Now, there's one last thing I just want to say and it's related to Kevin's point about the differences between product and labor markets.

When you think about fixing prices in the product market, you can think about — the concern you have is that you don't want to lose demand. You don't want to lose sales.

The concern a firm has is that you may get engaged in some kind of price-fixing. And then, there's an issue about how much demand you're going to lose. And that's where this cross-substitutability matters so much.

But the question is what's the fixation on. Is the fixation on determining the quantities, because you can do it that way. You can agree on quantities sold, and that'll just determine the price. Or is it on prices, and then trying to fiddle around with a void, quantity declines.

Now, the same thing is true in labor markets. Much of what people try to — I think much of the noncompetitive behavior comes with issues associated with turnover.

The goal typically is, at a given wage rate, you're going to have a certain turnover. What you'd like to do is keep that wage rate the same perhaps and reduce turnover. Noncompetitive behavior can do that.

But it's the relationship — you need to really know a little bit about what the turnover is before you can say how much the wage is or isn't suppressed. And I think it might be the case in labor markets that the fixation is probably greater on reducing turnover than it is on the suppression of wages.

Right now, for example, in the U.S. economy, or certainly in the town I live in, you can walk down the street. In fact, I just passed through an airport where there's actually a posting of the wage rate at the McDonald's.

That's how hard it was for them to — this was in California, hard for them to get people. They'd actually posted the wage rate. I'd never seen that before. Pretty high too, more than the minimum wage there. Clearly, there I don't think the wage is probably fixed.

But then, the issue is how can they reduce turnover. When you think about an investigation, you need to think a little bit more carefully about the quantity side, not just the price side because things that restrict the quantity, I mean, this is true in the product market side too, but may be more important in the labor market side.

DR. DRENNAN: Thank you, Orley. Patrick, you talked before about the guidelines approach and how it applies generally to an investigation.

How about, specifically now, focusing on the market definition aspect of it? Can you just touch briefly on thoughts about what questions arise?

MR. GREENLEE: Yeah, sure. This would echo a little bit about what we heard in the economics presentation initially and it's perhaps going to preview some disagreement or different

views here that we have on the panel.

But in terms of market definition, when we're analyzing, say, a merger, the idea is trying to identify which collection of competitors, whether it's people selling products in an output market or employers or purchasing inputs, which collection of economic agents compete against one another.

The hypothetical monopolist test or the hypothetical monopsonist test is basically just saying, hey, "We want to make sure that our focus is broad enough that it includes all competitors that can have a disciplining effect on potential exercises of market power."

On the sell side, the question is if I have a candidate product market, "Would a hypothetical monopolist that controlled all of those, so eliminated the competition between those products, would they be able to significantly increase the price that they sold the product to?"

If it turns out that, no, they wouldn't be able to because there would be a sufficient diversion to a product that was not in your candidate market, then the analyst would have to expand to include other products that make the candidate product market larger.

The goal here is to make sure that our focus is not too narrow, that we're including all sort of significant competitors that can have an effect on competition so that it's not the case that we're looking at merger and we think, "Oh look, this is a two-to-one," when in fact there are several other competitors out there that, even after the merger takes place, would be able to help keep prices in check.

I described it in terms of a hypothetical monopolist on the output market. The similar issue on the hypothetical monopsonist would be just the mirror image of that.

Would a collection of buyers if there was a hypothetical merger between them, they acted as a monopsonist, would they be able to suppress the price they paid for the input by a small but significant non-transitory amount, so SSNRP, instead of SSNIP, for reductions in the price paid versus increases in the price demanded?

That's the sort of market definition exercise that we typically perform, especially in merger contexts. But understand that Dean perhaps has a different view with respect, at least in the non-merger context, of whether this applies.

MR. HARVEY: Let me ask another question. For the employment lawyers or labor lawyers in the room, who here has ever in their careers, in litigating those cases, have ever defined a relevant market? Oh, one person, okay. That's interesting. I'd love to hear more about that, by the way.

But, no one else raised their hand and people generally laughed because I think the question strikes us as absurd. And I think there's a profound truth in that. Why does it strike us as absurd? I think there's a very good reason for it.

Let me give you an example. Suppose, in a discrimination case, we learn that a firm, as a matter of policy, pays its female employees 10 percent less, just an internal rule. And we learn about this.

Okay, an antitrust lawyer would say, "Oh, let's define a relevant market. Let's figure out if that employer controls a relevant share of the geographic market skills at issue that the women have. And if that employer doesn't have, say, a 50 percent share, then we say, all right, well, I guess that discriminatory policy, while it exists, couldn't possibly have an effect, right?"

That's insane. Why is that insane? I think what I would submit is that every employer has a certain amount of market power over its employees. The only question is how much. And so, for — when these cases have been litigated in the antitrust context, they're perhaps all — I don't know if I can think of a single example to the contrary — are examples where there's a certain

act that has occurred that the plaintiffs are challenging: a no-poach agreement, a wage-fixing agreement.

There, as Orley indicated, I think the appropriate way is, one, not to concoct some market definition step that only exists because we call ourselves antitrust lawyers and it has nothing to do with what we're looking at.

You look at the standard array of econometric tools in the toolbox. And if you have a before and after, you try to control for as much as you can and you try to figure out the impact of the misconduct on the pay. And that's the claim, if you are a private plaintiff, or if you're a government looking at it, that's the way you try to assess the harm.

I do agree that, in the merger context, you do have to do some version of market analysis. And I think to do the kinds of research that we heard about this morning, you have to figure out what kind of markets are you talking about. You have to have some way to do that. And that research is very valuable.

But I think when we're assessing certain acts that we deem to be anticompetitive, I don’t think they have any place. And I think actually that they're very counterproductive. We could conclude erroneously, such as my example of gender discrimination, that there is nothing to see here, when in fact there very likely is.

Some other differences that I think are important between the kinds of product cases that antitrust lawyers are comfortable with and labor cases, that I would just say in addition to what's been described, one is that, as Patrick and others said, it's a matching market, which is really interesting where both sides are trying to figure out all kinds of characteristics about the other to decide whether they want to engage in this long-term relationship where someone is going to be in the office down from you and you're going to work with that person for a long time.

I know there's a sort of cliché. When lawyers are applying to law firms, the question is do you want to work with this person at 2 a.m. on some brief. You don’t ask these kinds of questions when you're deciding what brand of soap to buy in the grocery store, right? They're totally different situations.

And that bond is akin to a family relationship. It's an emotional bond. And there have been studies about this where, for example, people have been asked to rank the most important events in their lives, the most disruptive.

Right up there with a death in their family or the death of a family member and a divorce is getting fired from your job. It's a major event in your life in a way that not being able to buy a product just doesn't compare.

One other aspect that I think is very interesting is that the value of an employee in the marketplace can go down the more the employee switches. If an employee say only works for an employer for a month and then switches again and switches again, and you're an employer and you're looking at this resume where you see the person can't hold a job for longer than a month, very unlikely you're going to hire that person.

There's no equivalent like that in the product space. You're not penalized as a customer if you switch products. And it's one of the sources of friction that Kevin described.

With respect to what do we compare it to, to try to figure out if there's some misuse of market power, you're comparing current pay rates against some competitive pay rate. And the perfectly competitive pay rate would be where the wage equals the marginal benefit of that employee. And the employer isn't pocketing some surplus of that and the employee isn't either.

That I don’t think is a fair description of probably any employer/employee relationship. Perhaps at the start, but then think about this. This is a long-term relationship generally. When

you first decide where to work or you first hire an employee, that pay rate is generally set in a fairly competitive way. You're telling that person what the pay rate is and they may make comparisons and they decide to start working.

Once that bond has been created though, over time, the employer is investing training and other activities in the employee. The employee becomes more knowledgeable, more valuable, more productive over time and does the pay for that employee match lockstep with that increase in value. I would say probably almost never. The employer is absorbing some of that over time.

And, for example, I think Orley said that, you know, if a certain kind of misconduct decreases turnover, the employee has fewer places to go. As that employee's value goes up, there's less and less incentive to have the employer increase the pay rate to match it.

Another aspect of it is in the price-setting mechanism. In the product space, prices are changing all the time. They can often be very discriminatory. For example, for those of us who flew here, you're sitting on a plane and you paid a certain price for your plane ticket. The person sitting next to you probably paid a very different price. And it's a function of this very complicated way that airlines try to extract the most willingness to pay out of every passenger.

In the employee space, you set a wage rate or a salary and that is very sticky in a couple of different ways. One, it's typically a one-way ratchet. It's very unusual for your pay to actually go down in an absolute sense. It may not keep up with inflation. But very rarely do you have a 5 percent pay cut. It's a one-way ratchet.

Secondly, your pay is not set by in large through an individual negotiation, in the vast majority of cases. Say, in the classic example, the civil service pay scale in the government, there's no negotiation there. You apply for a certain job and maybe there is in terms of what job you slide into.

But once you have that title, there's just a set pay rate and it's fixed. And in terms of how those pay rates are changed, typically it's changed once a year as part of a firm-wide, very complex budgetary procedure where say there's a merit increase of say 1.5 percent. All kinds of factors go into that. The CEO is involved, HR professionals and they decide for employees in good standing, everyone will get a raise of at least 1.5 percent. Mayne there's some variance for performance, but — and that also is very unusual.

One big category that has not come up today, and I think if there's a blind spot in the way people are looking at these issues, I think it's this. It's that people examining this space tend to ignore the dynamics within the firm. They look only at the dynamics outside the firm and ask, well, if competition goes up, what effect does that have on the pay within the firm.

What we've seen in all the cases we've litigated is that a large company does not look only to external competition in setting pay. There's a pay structure within the firm that is — one of the main goals is to maintain morale, decrease turnover and keep people happy within the firm because people make comparisons primarily with other people within the firm.

And again, one of the great things about this is that we all have our own personal experience. It's not — you know, as fun as it is studying rocket markets, we're not all rocket scientists. But we're all employees. We all can really turn on personal experience.

Just ask yourself what comparison means more to you, if you know of someone who does your job at a different employer who gets a raise and you don't versus someone at your own employer who's just like you who gets a raise and you don't. Which one bothers you more? It's the within-firm comparisons.

And firms know this. There's a great deal of research about this. And HR professionals get graduate degrees in how to set up pay structures within the firm.

And so, that is important, particularly in private cases, and also, I would say one of the slides that I saw this morning made me think of this, in the analysis of hospital mergers where there's an analysis breaking up different kinds of employees by skills.

And I would love to see an analysis of, within the same hospital, for hospitals that have the greatest impact on the highly skilled because of the within-firm dynamics, is that also suppressing pay of the lowest skilled. And those are I think very interesting questions that I would love people to look at.

DR. DRENNAN: Thank you. Go ahead, Kevin.

DR. MURPHY: I think your study kind of did that. I mean, you don't find any effect on the — I think the charts didn't show any effect on the least skilled groups in those pictures. You had effects on the most skilled, but very little effects.

A couple of things. One is, again, related to what I said before about own elasticities, I mean, for most competitive effects, what we care about is cross-elasticities, whether it's a merger or indeed even if it's an agreement of some type.

Whether it's legal or not, maybe you don't need to measure anything for legality purposes because it's per se or whatever. But for impact, you really probably do care about cross-elasticity. What fraction of the outside alternatives are being affected and how important are those relative to other alternatives?

And that's one of the things that market definition helps with because while it usually doesn't answer things at the end of the day, it gives you some information about what those cross-elasticities are likely to be and therefore the impacts are likely to be which is I think exactly why when they studied the nurses' case, they had a prior that it was likely to have much less of an effect on one group of employees than on another. That's one — that's one aspect that I'd like to pick up on.

In terms of, you know, well, if we see discrimination, then it can't be that firms are competitive, to me that just does not tell you one way or another. Lack of discrimination wouldn't tell us the firms are not competitive.

Go back to Gary Becker's 1950s work. We know that you could have discrimination affect wages. And the key is, you know, you see wage differentials by race or by gender within a firm and you say, "Well geez, competition would eliminate that."

Yeah, that'd be great in a world in which outside the firm blacks and whites were paid equally and outside the firm men and women were paid equally. But that's not the world we live in.

In fact, the differentials in pay between race and gender are bigger in the economy as a whole than they are within your typical firm. That is, the typical within-firm differentials are smaller than the aggregate differentials that you see.

And therefore, I don't think it tells you one way or the other whether there's competition or not, that you see differentials in pay between men and women or blacks and whites within a firm. That's the fact they're represented in the market as a whole.

In terms of wage structures, and I agree there are wage structures out there in the marketplace and they're certainly a part of human resource practice. Some of the methodologies people have used to try to prove that there are wage structures, for example, regressing the wage change for individuals on wage changes for the average simply are not informative for that question.

Individual wages are going to move with average wages, I don't care, in any system that makes a lot of sense. And people who purport that a regression of individual outcomes on average outcomes tells us that there's this transmission mechanism and all this other stuff, they're just playing games with statistics, to tell you the truth.

There's nothing in valid statistical methodology would tell that that inference is valid. I would be very careful about those things.

In terms of Orley's point, I think turnover is part of what firms think about all the time. And turnover's costly, for the reasons I said before. Turnover's costly to workers. Turnover's costly to firms. And in fact, you were talking about people being very competitive when they start.

We know that, for example, for most senior workers, it's not like firms — both firms and workers are invested in the relationship. We know, for example, in a plant closing, older workers lose a lot. They're doing much better than their next best outside alternative.

One of the most established things in labor economics is that if you have an unexpected closing of a plant or a firm disruption, guys with tenure in those firms are going to lose a substantial amount. They're earning much more than their next best outside alternative. That's a reality of labor markets. I'll stop there.

DR. DRENNAN: Orley, your thoughts?

DR. ASHENFELTER: I don't have much to add to that really. I mean, much of the labor market literature, as Kevin is alluding to here, is about the fact that much labor doesn't operate in a simple spot market, which means that it isn't as if the value of a worker's marginal product is always equal to their wage.

It could be higher at some points and lower at other points in some kind of a lifecycle context where there's a long-term relationship between the firm and the employee. What Kevin's referring to is the kind of classic analysis of pay in a firm typically relates — I've seen these regressions in virtually every country in the world. It's one of the most well-documented things that we have.

There'll be an effective schooling or some kind of credentials, an effective how much total labor market experience you have and then, in most jobs, but not all, time spent with the firm that you're currently at will also have an effect.

That's often associated with specific human capital, something that the employee gets some part of in order to reduce turnover.

There is — I'd like to comment on something related to this though which is that — an interesting question to me is I really — I don't know who wrote Delrahim's speech, but congratulations, whoever that was, especially to pick up on the Adam Smith reference, which is one of my absolute favorites. He just read a short part of it. It goes on very several pages in Smith.

In fact, there is no long discussion of collusion amongst firms in the product market, in the entirety of Smith. His main discussion of collusion is amongst employers. And this tacit notion of a tacit understanding about not raising wage rates.

It sounds very familiar, right? We are observing that there's excess demand everywhere in the economy and very little upward pressure on wage rates.

But I say that because it does raise a question. There is, at least in my opinion, there seems to be much greater interest, at least at the public level, as, for example, in a government agency, not so much on the academic side.

You've heard a couple of people speak about academic studies of a failure of competition in labor markets. There's not very much of that. It hasn't been very successful. How do we know that?

Well, what do the MIT and Harvard graduate students write for their dissertations? That's what all the economists are going to be in the next — or Chicago or Princeton, whatever. We actually have a student working on this, but it's very rare.

The public interest is much greater. And I think there's a sense maybe that there's something more going on here that's disturbing to people.

A couple of things that I've noticed, for example, one of the ancient, ancient, ancient things from my days as an economist was that aggregate productivity growth in the economy typically was equal to real wage growth. That relationship has been broken. It's not true anymore.

That happens to be identical to the statement that labor's share of output is declining because they're more or less the same, not exactly the same because it turns out there's more to it than that. It's a little bit surprising, I think, to a lot of people.

It's not clear, by the way, whether it's — I say labor share is declining. It doesn't mean capital share is increasing. It could just be margins are going up. Margins going up is one of the natural things associated with mergers.

And remember there's no way to distinguish between that. Labor's share going down, there are two ways that can happen. Wages can go down compared to marginal products or prices can go up compared to marginal values. That's not identified. The failure of competition can be on either side of that market.

But it seems to me that there's more — for some reasons that I can't quite understand, there's considerably more interest in this in the general public. I don't know.

Maybe there are some examples or maybe people are aware of failures of competition that most of us don't get to see very much or maybe the mergers are now at such a scale that people, it's suddenly dawned on them that maybe there is going to be an effect in the labor markets too.

But it was a comment I couldn't resist because it's relevant to what Kevin was saying about many aspects of the characteristics of labor markets that are unusual.

DR. DRENNAN: Thank you. Go ahead, Kevin, please.

DR. MURPHY: I just want to follow up on what Orley said. I mean, labor's share can change for lots of reasons, some of which would be related to competition in either the input or output markets, but there are many other things that would change labor's share. It's not limited. You don't want to think change in labor share tells us immediately there's competition effects on either side.

Obviously changes in relative factor ratios and things like that like would also potentially affect labor share depending on the degree of substitutability and the like. You have to think about that as well.

DR. DRENNAN: Thank you. Dean, anything, early indications to take away from the early litigated cases about the implications for how this is being viewed?

MR. HARVEY: I think in terms of the litigated cases, there are a couple of lessons. One is what kind of classes are courts certifying. So, for example, in the no-poach space, the employers agree with their competitors not to recruit each other's employees, period. It's not as to a specific category of employees. It's all employees. And so, we've tried to — when we've represented plaintiffs in these cases, tried to figure out who's injured.

And, for example, in the high-tech employees case, there you had certified class of over 64,000 workers across the country. It was a national class that included everyone from a storyboard artist at Pixar to a hardware engineer at Intel, all part of the same class.

Now, the court there was not thinking of these employees as substitutes for each other, you know, which is what you would typically do in a product case.

The class would consist of customers of a particular product and you would do the usual market definition product substitute stuff. So that is just not happening in the cases, and I think for very good reasons.

The other takeaway, which is kind of a corollary to that, is that courts do take a good look at what's going on within the firm to try to figure out if pay is suppressed for one group within the firm, to what extent is that pay suppression translated into harm for others at the firm. And I think, you know, those are the two takeaways.

DR. DRENNAN: Okay, thank you. I know as an antitrust practitioner, we often look to the academic literature to give us insights about where to look and what information to get and in instances when it's hard, difficult to measure a key parameter, elasticity, et cetera, in the context of an investigation, what benchmark values might be out there that have already been produced.

Kevin, do you have any — sort of two parts. Do you have any thoughts that are important for us to keep in mind as we look to the growing academic literature in this space and any recommendations for whether this would be a great next thing to be addressed in the literature going forward relevant to these issues?

DR. MURPHY: No, I think one thing is you want to kind of look at the academic literature and ask is it asking the question that I need to answer here and is it helping me with guidance because, as I said before, there's a wide range of labor markets. Labor markets, some involve, you know, very specialized workers with a small number of employers and many other labor markets have very broad employee bases. You don’t want to generalize too far from what you saw in one case to the other.

Also, I think the academic literature needs to be more careful in terms of, like I said before, differences between effects on wages versus establishing differences between, say, you know, the elasticity of supply or something like that. Those two are not synonymous, even though they are in simple models.

Another recommendation for the academic literature is it's kind of odd to think of a static labor supply curve in most of these marketplaces that you don’t get the same number of applications if you're a big employer as you do if you're a small employer.

That means long-run supply elasticities are likely quite different than short-run supply elasticities. And when that's the case, even the short-run can't be analyzed using the short-run elasticity because a hiring decision today affects supplies in the future as well.

Another thing I would say in the academic literature: be careful about using things like vacancies or applications as measures of quantities. They're not. They're measures of propensities to transact at the market equilibrium.

You know, it's a measure of how much slippage there is in some sense in getting to that market equilibrium. They don’t really measure supply and demand. They don’t really measure the fundamental determinants of prices.

Just like you wouldn't say if I have the only house for sale in my neighborhood, I've got a monopoly on selling houses in my neighborhood, you know?

It's like, no, that's not how prices for houses in my neighborhood are going to be determined. When we go from three houses for sale to one house for sale, it's not going to be a big difference in the way that marketplace operates.

Again, so as the marketplace changes, you could see vacancies move one way or the other. That reflects things other than what we would think of as the principles of supply and demand. That's really what I have, so as much of a cautionary tale for the literature as it is for the practitioners.

DR. DRENNAN: Before we go on to Orley's thoughts —

DR. ASHENFELTER: Yeah, let me make a comment about that.

DR. DRENNAN: Go ahead.

DR. ASHENFELTER: That's a very interesting question, a practical question really of where do you look for potential anticompetitive behavior that's actionable. I don't really have a good answer to that.

Many of the examples, many of the applications we know about seem to be kind of hit-or-miss. Let's take the high-tech case. The way that really got started is because I don't know who did this, and it's never come out. Someone complained to the Department of Justice or explained that there were no-poaching agreements.

We know that because the same day that the case was filed, there was a settlement filed, which I thought was, at the time, extremely annoying because we didn't learn anything, like a two-page piece of information.

Somebody was really screwing around with no-poaching agreements. We don't know how they learned about it. We don't know where it came from. And now we say we're not going to do it anymore, end of story.

Now luckily Lieff Cabraser, here's the man with the big bucks. Lieff Cabraser showed up and a lot of discovery occurred after that.

There's a very, very nice set of articles that I've collected in the Bloomberg Daily Labor Report, that actually has kind of a nice evolution of the thing as it came about, showing you the interactions amongst the different firms and who interacted one to the other.

But I don't know, I don't know where that — I don't even know how that case got started, right? It was like some anonymous tip, I guess, that came here to this building, which no one's ever going to tell us about.

DR. DRENNAN: Hopefully.

(Laughter.)

DR. ASHENFELTER: And even —

(Laughter.)

Hopefully. I guess once you're retired, you wouldn't think about it. And the same is true sometimes in the product market cases, that you don't know. There's something going on and the first reaction you have is it's shocking that that's actually going on, such explicit collusion.

It's very difficult to — I don't know how — the hotline I guess is the only thing I can think of for these extreme kinds of cases. I don't know that there's any very easy — I do think that one of the few things, if you could find a way to follow it, would be the information-sharing.

I think it's very tempting, once you've engaged in some kind of collusive agreement, to try to keep track on how, what other people are doing. And really in order to do that, you need some way to find out what the information is on the other places.

My favorite example is it's very well known. I don't know how you'd find out the answer to this. In the Ivy League schools, I don't know if you're in this crowd. Chicago is kind of a maverick. They're like a tough, don't play ball with the people in the tweed coats.

It's kind of known that there's a piling up at one salary in most of the Ivy League universities. There's like a lot of people make the same amount at a certain level. It's not a secret. It's not public, but it's not a secret.

DR. DRENNAN: Not anymore.

DR. ASHENFELTER: Well, I mean, it's not — it was a — you know, it's a secret like if you have a trade secret and you drop it off on the floor here and I pick it up, it's mine. It's nothing to say about — that's how I learned about it.

Now, the interesting question is — and I'd love to know the answer to this. There's no way of finding out — is so there's a piling up I think in each of these universities. There's a pile-up at

the same spot. I don’t know how you would ever find that out.

I'm sure there's a spot at Penn, for example, where there's a piling up level. And in fact, it's called a most favored nation clause, right? You get a contract as an employee that your salary will be as high as anybody else's in the institution.

Kevin might have one of these. I don't have one of these. Chicago might not do this, by the way. That's a very competitive place. It may not do that kind of stuff. There's up to no limit I guess, right? There is no maximum.

I only mention that as an example because that's one example people can know about, right? But I know about it as an accident, right? I can tell you about it. But it's not going to do any good. And the interesting question is whether there are other situations like that. We just don't have any way of finding out.

The cases — I notice when they come up — they're a lot of just accidents associated with where you find them. And it's not clear to me there's any easy way to say what would be where you'd see the most concern. Lots of times I think maybe something comes up as a result of another investigation.

In other words, there's something going on in some other area and then like ancillary to that you hear about some agreement that was something else. But all of that is really hit-or-miss.

And that's why I think the effort of enforcement, we need to make sure the enforcement margin — I mean, what you do, you don’t have to have that many cases, right?

The HR people are going to learn from the fact that there are other cases. They don’t want to go to jail or they don’t want to have their companies pay a ton of money, when it's their fault anyway.

I think as long as the enforcement level is sufficient, presumably it creates some competitive efforts to — you know, people drop out of these agreements saying, “Oh, I don’t like the sound of that.” And hopefully if there's enough enforcement, you'd get most people to say that.

DR. DRENNAN: Okay, thank you. If none of the panelists has any final thoughts — okay, Kevin?

DR. MURPHY: Yeah. I mean, information-sharing is always an issue. It's an issue in product markets, not just in labor markets. In fact, it's not that different there. That is information on what other firms are doing can be useful for enforcing a cartel.

The sad part is it's also useful even when you're not in a cartel. A lot of farmers wake up in the morning and watch the farm report and that could be true even when they're not colluding. They're interested in learning what's going on in the labor market or in the markets they're involved in.

That's what makes those cases tough. There's usually a reason for information-sharing, at least ex-post and the like. It's valuable for planning and other purposes.

That doesn't mean it can't be used for anticompetitive purposes too. But that's why these guys get paid the big bucks for the tough job, you know?

(Laughter.)

DR. DRENNAN: Okay, I feel a lot better about my pay now. Okay. Well, I want to thank this great panel for a very interesting discussion and for all the preparation that went into it. Thank you.

(Applause.)

Afternoon Remarks

- *Ramogi Huma, Executive Director, National College Players Association*

MR. DELRAHIM: Good afternoon. It is — I hope you guys have had a good session this morning, and I'm looking forward to an exciting afternoon. It's my distinct honor to introduce our speaker this afternoon, Ramogi Huma.

Ramogi and I are friends. He was a guest lecturer at least once or twice at my class at Pepperdine a few years ago. And he himself, he's a player — he was a former UCLA football player who played in the '99 Rose Bowl team. Unfortunately for us Bruin fans, Wisconsin won.

But he played from, I think, '95 through '98. He founded and is the executive director of the National Collegiate Players Association, which is a 501(c)(3) advocacy group comprised of over 20,000 Division I college athletes from over 150 campuses.

He has held numerous meetings in Washington and state capitals around the country and he, I believe, led the effort a few years back with the steelworkers' union when they were trying to get recognition for the collegiate players as a union. He's an incredible and inspirational speaker. And he has singlehandedly moved this ball forward.

He has provided the Justice Department with a lot of assistance in the various investigations that the Division has had, including the NCAA's one-year scholarship limit, as well as a consultant on the athletes' rights antitrust cases in *White v. NCAA*, *Agnew*, the *O'Bannon* and the *Jenkins* case.

A number of these cases continue, but a lot of what we're seeing in some of the changes and the debate with respect to athletes' rights is as a direct result of Ramogi's efforts and a number of folks.

Ramogi, please join us on the stage, and I want to welcome you to the Justice Department and thank you for your efforts here.

(Applause.)

MR. HUMA: Thank you very much.

MR. DELRAHIM: Absolutely.

AFTERNOON PRESENTATION

MR. HUMA: Good afternoon. First, I'd like to thank the DOJ for having me here today to discuss antitrust issues in college sports.

I'm here today because NCAA sports is a predatory economic cartel that treats players like university property rather than people. The NCAA does nothing about the seriously injured, abused and dead college athletes. Instead, instead of action, the NCAA states loudly that it has no duty to protect college athletes.

In fact, they ruled that Michigan State University team doctor Larry Nassar's multiple sexual assaults against Michigan State's athletes did not break NCAA rules simply because there are no NCAA rules that prohibit the sexual or physical assault of college athletes.

But if any of those abused athletes would have dared to benefit from the economic rights afforded to everyone else, the NCAA would have spared no expense to investigate and punish them. That's because the primary role the NCAA sports is price-fixing athlete pay.

College sports is a $14 billion a year industry, produced by half a million college athletes who are denied economic rights and freedoms that would otherwise allow them to receive an equitable portion of their hard work. College athletes are workers who, to this date, have no worker's rights.

Meanwhile colleges capitalize on their athletes' blood, sweat and brain damage to generate multibillion-dollar TV deals, multimillion-dollar apparel deals, coaches' contracts and invaluable marketing.

However, the NCAA imposes extreme player compensation restrictions that are economically harmful to tens of thousands of college athletes and leave over 80 percent of college athletes below the federal poverty line. This NCAA price-fixing is counter to America's principles of free enterprise.

In addition, there's a strong civil rights concern given that African-Americans compromise a disproportionate percentage of athletes in the revenue sports of football and basketball, yet suffer the lowest graduation rates.

The public is well aware of these glaring injustices. A recent poll found that 84 percent of regular college students and 89 percent of college athletes feel that NCAA sports exploit college athletes. The poll also found that college athlete name, image and likeness compensation was favored by 77 percent of regular students and 81 percent of college athletes.

Additionally, a Rasmussen poll in March found that two-thirds of Americans support college athlete compensation for use of their name, image and likeness.

And economists understand as well. Ninety-two percent of those surveyed by the University of Chicago said that the system generates rents for colleges at the expense of their athletes.

Current and former college athletes have stood up against the NCAA's illegal price-fixing rules in key lawsuits. Players proved in both *O'Bannon v. NCAA* and *Alston v. NCAA* antitrust lawsuits that the NCAA has been illegally price-fixing player compensation.

However, the courts have allowed ongoing price-fixing for compensation that isn't tied to educational costs.

Austin v. NCAA is a current case and has been appealed to the Ninth Circuit. The NCAA is hoping to overturn the current ruling and the plaintiffs are appealing for broader relief. And we agree with the plaintiffs 100 percent.

NCAA's cartel conduct continues to flaunt antitrust laws. And unless this ruling is expanded to provide broader relief, the NCAA will continue to price-fix players' compensation.

The NCAA has attempted to justify its mockery of antitrust law. During the *O'Bannon* trial, the NCAA's lawyers stated that the NCAA "is a cartel that does good things," rather than "a cartel that does bad things." College athletes beg to differ.

I started this organization after my teammate was suspended for eating groceries that were left on his doorstep when he was broke and hungry. The NCAA suspended him because it said he only received the food because of this athletic name and prominence, which is a violation of NCAA price-fixing rules.

Meanwhile, the NCAA was fully capable of capitalizing off of his name because they were selling his jersey in the store.

NCAA's assertions that it only imposes well-intentioned price-fixing have been exposed as false. I've made handouts available on the table to refute these NCAA arguments with facts and data. But at the end of the day, our nation's antitrust laws and principles of equal rights can't be subject to whether or not a cartel thinks its illegal activities are well-intentioned.

Another antitrust issue of great concern is that the NCAA facilitates collision to restrict players from transferring from one school to the next. The NCAA actually gives players' current schools veto power over transfers. Additionally, college athletes that participate in football, basketball, baseball and ice hockey must sit out a year after they transfer, while other sports do just fine without this penalty.

Essentially, and with few exceptions, the NCAA imposes a national, collusive non-compete agreement against players. My organization, the National College Players Association, believes that all players should be able to transfer one time in cases of abuse and when a head coach leaves without NCAA punishments or non-compete restrictions.

In 2005, the collusive agreement harmed University of Illinois women's basketball players who publicly detailed various forms of abuse by holding them out for six games after they fled to another college.

This summer, the agreement harmed University of Illinois football player Luke Ford, who was denied a transfer waiver. Ford transferred from Georgia, where he could have been a starter, to the University of Illinois to be closer to his ailing grandfather.

But the NCAA denied his request. The NCAA has taken it upon itself to determine that his grandfather's poor health isn't a good enough reason to transfer since his grandfather is not part of his nuclear family.

The NCAA also denied the transfer waiver request from Virginia Tech football player Brock Hoffman, who transferred from Coastal Carolina to help his ill mother. Apparently, her brain tumor, impaired vision, facial paralysis and hearing loss did not outweigh Coastal's claim on Hoffman's labor.

Both Ford and Hoffman would have been free to participate if all athletes were allowed to transfer one time without punishment.

The collusion to restrict player transfers comes at a great physical toll to college athletes. The NCAA's own survey found that 50 percent of Division I athletes, the trainers, the athletic trainers, knowingly return players with concussions to the same game.

This is horrific, given all that we know about chronic traumatic encephalopathy, also known as CTE, a brain condition linked to contact sports that could bring on memory loss, impulse control, depression, and suicide.

The National Athletic Trainers Association found that almost 60 percent of athletic trainers are pressured by coaches to make medical decisions that are not in the player's best interest.

Six medical associations jointly published the team physician consensus statement declaring that college athletic staff have a financial conflict of interest that puts players' health at risk. Players should not be trapped at abusive or negligent athletic programs because of NCAA transfer restrictions.

This environment contributes to a lifetime of medical expenses, as 50 percent of former college athletes suffer chronic sports-related injuries. All of this underscores the need to end NCAA collusion that takes away players' freedom to transfer.

Included among the harmful collusion in NCAA sports are rules to stifle players' eligibility to secure legal representation, a.k.a. sports agents. Murderers, murderers are guaranteed the right to full legal representation in America, but college athletes are not.

The NCAA also blocks players' ability to complete their college athletics eligibility even if those athletes reject a professional league draft offer. However, the NCAA has already demonstrated that the industry can function just fine with less restrictive alternatives.

For instance, high school recruits playing baseball and ice hockey can have sports agents. And the NCAA adopted a new rule to allow men's college basketball players to do the same thing.

As for professional drafts, baseball and ice hockey players who are drafted out of high school are allowed to play in NCAA sports if they choose to decline their draft opportunity and play in college instead.

The NCAA's new rule also allows men's college basketball players who enter the NBA draft and are not drafted to stay in college and complete their NCAA eligibility. The collusion that prevents players of all sports from exercising these freedoms cannot be justified when it has been demonstrated as unnecessary in various sports currently within the industry.

If the NCAA truly wants college athletes to be treated like regular students and graduate, then it should allow them to secure legal representation and stay in college.

Clearly, the NCAA and its colleges have been bad actors when it comes to the treatment of college athletes. To date, college athletes have been forced into second-class citizenship. No other college student risks a group boycott by thousands of colleges for daring to earn money or transfer.

This takes place in one of the most high-profile industries on the planet, right before our very eyes.

Fortunately, developments among some state legislatures may bring impactful reform in some of these areas. My organization, the National College Players Association, is a cosponsor of California Senate Bill 206, the Fair Pay to Play Act.

The Fair Pay to Play Act would allow all California college athletes to secure sports agents and receive compensation for use of their name, image, and likeness without punishment from their college, conference or the NCAA. The bill has complete bipartisan support and was approved 72-0 in the assembly and 39-0 in the senate. It's now on the governor's desk.

Legislation similar to California's Fair Pay to Play Act was introduced with bipartisan support in the state of Washington, Colorado, and the U.S. House of representatives.

Most recently, a name, image, and likeness compensation bill was introduced in New York and state lawmakers in South Carolina announced a commitment to introduce a similar bill in their upcoming legislative cycle.

My organization will do all that it can to make sure that this bill gets introduced in as many states as possible.

In response to the California Fair Pay to Play Act, the NCAA submitted letters from its leadership essentially threatening California with an illegal national group boycott in which all other NCAA colleges would be prohibited from competing against California colleges. You can bet that the NCAA will make this same threat against other states as well.

Such action would be a violation of both federal and California antitrust laws. Neither the U.S. Congress nor the state of California have granted the NCAA an antitrust exemption that it would need to take such an action, nor should they.

The NCAA is signaling that the Dormant Commerce Clause would render the Fair Pay to Play Act unconstitutional. It points to a precedent in *Miller v. NCAA*, a court ruling that the NCAA won regarding its due process rules.

However, the 1992 *Miller v. NCAA* ruling examined uniform NCAA due process rules and does not apply to today's non-uniform player compensation arrangements that exist throughout NCAA sports.

One of the pertinent questions to ask about the Dormant Commerce Clause is, one, does the Fair Pay to Play Act discriminate against other states. The answer is on. The bill does not attempt to require out-of-state colleges to allow player compensation nor does it prevent other states and colleges from choosing to allow player compensation.

It does not prohibit California entities from competing against out-of-state colleges or participating in NCAA sports and it does not exempt California entities from complying with the provisions of this bill.

The second question to ask is dose the local benefit outweigh any industry burden. The answer is yes. California has a vested interest and compelling interest in ensuring college athletes have equal rights to legal representation, economic freedoms, and antitrust protections afforded to other students and residents in the state.

This bill would not create an industry burden. It does not require colleges, conferences, and athletic associations to compensate players. It would reduce industry regulation by decreasing the burden of complying with and enforcing NCAA compensation prohibitions.

And the third question to ask is, is there a need for uniform player compensation in NCAA sports. The answer is no. Player compensation in NCAA sports already varies dramatically. For example, the Ivy League, a Division I conference, prohibits athletic scholarships while other Division I colleges provide five-year athletic scholarships.

This means that a player at an Ivy League college receives no money while a player on a five-year scholarship at a private school can get over $300,000. And yet these two economic systems compete on the court every March without harming demand.

The NCAA also granted the Power Five conferences autonomy to make many of their own rules for player compensation, while denying other Division I conferences the same autonomy.

There are also tremendous differences in player compensation amounts among players on the same team. Teammates can receive a full scholarship, partial scholarship, or no scholarship at all.

And some players are permitted to receive Olympic prize money, like the University of Texas swimmer Joseph Schooling, who won $753,000 in 2016 from his home country of Singapore for winning a gold medal.

The NCAA does not claim that all of these differences in player compensation is a burden on its industry.

In conclusion, it's my hope that this is the beginning of a continuing dialogue with the U.S. DOJ Antitrust Division about serious antitrust issues in NCAA sports.

Specifically, the National College Players Association would like the U.S. DOJ to consider the following actions to protect college athletes and uphold the integrity of federal antitrust laws.

First, to file an amicus brief in support of players in *Alston v. NCAA*; second, open an investigation into the possibility of challenging NCAA restrictions on players' transfer freedom, their ability to secure sports agents and their ability to decline a draft position to complete their college sports eligibility; and three, open an investigation into the NCAA's public threats of an illegal boycott against California colleges over the Fair Pay to Play Act.

Thank you all very much for having me.

(Applause.)

Panel 2: Ancillarity, Collaborations, and Contractual Arrangements
Assessing Antitrust Harms in Complex Business Settings

- *Rachel Brass, Gibson, Dunn & Crutcher LLP*
- *Darrell Johnson, Chief Executive Officer, FRANdata*
- *Rahul Rao, Assistant Attorney General, Washington State Attorney General*
- *Marshall Steinbaum, Assistant Professor, Department of Economics, University of Utah*
- *Randy Stutz, Vice President of Legal Advocacy, American Antitrust Institute*
- *Samuel Weglein, Managing Principal, Analysis Group, Inc.*
- *Moderators: Doha Mekki, Counsel to the Assistant Attorney General; Karina Lubell, Attorney Advisor, Competition Policy & Advocacy Section*

MS. MEKKI: Welcome, everyone. This is the second panel of the day. My name is Doha Mekki, and I've been the counsel to the assistant attorney general of the Antitrust Division since 2015, and I'm really thrilled to introduce the panel topic for the afternoon.

This was born out of a recognition that much of the action in the antitrust space really has to do with restraints occurring in –complex business settings. Those of us, if I can have a show of hands, –who are antitrust lawyers?

You probably grew up under the –redone Hovenkamp framework, so you've probably seen everything from vertical to horizontal, inter-brand versus intra-brand, — (off mic) — maybe you think of single firms or, you know, just franchises, which today I think we'll unpack that these settings are really quite a bit more complex.

And so, this panel is designed to talk about recent cases, some fascinating economic literature and we'll ask questions like what is a no-poach agreement, when is it naked or ancillary, and we'll give special attention to applications like franchise businesses, and the gig economy.

So I'll turn it over to my co-moderator, Karina Lubell, and she will introduce the panel.

MS. LUBELL: Thank you, Doha. You have a handout with detailed biographies of all of our esteemed panelists. I'm just going to give a brief description of each of their work in this area.

Starting immediately to my left is Randy Stutz, who is vice president of legal advocacy at the American Antitrust Institute. Randy has been closely following competition issues in labor markets and is responsible for the AAI's advocacy on the subject.

He's also written certainly I think one of the best summaries of the literature on labor competition to date.

Next to Randy, we have Samuel Weglein, who is a managing principal at the Analysis Group and is a labor and industrial organization economist who testifies and supports testifying experts in antitrust cases with a specialization in financial markets, healthcare markets, and technology markets. Samuel also provided economic support to the Division in its successful lawsuit to block the Anthem/Cigna merger

Next to Samuel, we have Marshall Steinbaum, who is an assistant professor of economics at the University of Utah, where he studies market power in labor markets and its policy implications, including for antitrust and competition policy.

Marshall has written a great deal on competition in various labor markets and has taken a recent interest in labor competition in the gig economy, one of the things we'll be discussing this afternoon.

Next to Marshall, we have Rahul Rao, who is an assistant attorney general for the state of

Washington in the Antitrust Division of the attorney general's office in Seattle. And he handles labor competition matters, including investigations and litigation into franchise no-poach agreements, as well as investigations into non-compete agreements. And, as many of you know, Washington State has played a leading role in no-poach enforcement.

Then we have Rachel Brass, who is a partner in the San Francisco office of Gibson, Dunn & Crutcher, whose practice focuses on investigation and litigation in antitrust, labor and employment areas. Rachel has represented a number of franchisors, including McDonald's, Pizza Hut, CKE Enterprises, and Jimmy John's in no-poach cases.

And finally, at the other end, we have Darrell Johnson, who is CEO of FRANdata, which is a franchise-focused research and advisory firm. He is a certified franchise executive who has served on the International Franchise Association's board of directors and is known as the "franchise economist."

He has advised franchisors, suppliers, media companies, lenders and privacy equity firms. We are fortunate, in our discussion of franchises this afternoon, to have the "franchise economist" with us.

MS. MEKKI: And actually, just before we get through our questions, I do want to offer a broad disclaimer. And I know some of you are going to roll your eyes thinking the DOJ is going to give their disclaimer at their own event, but bear with us.

We have a panel of experts here, many of whom are working on live cases, who are advising clients. And so, in order to have a fulsome, thoughtful, honest discussion, we're going to give the general disclaimer that, you know, the issues that we'll talk about today don't necessarily — aren't necessarily the same as our employers, clients, institutions, and so forth.

MS. LUBELL: I think we'd like to start with a little bit of background. And Marshall, I'm going to turn to you to kick things off. Can you tell us about some of the recent events that have triggered interest in labor competition matters?

DR. STEINBAUM: Yes. I don't know if this cordless microphone is — great, thank you. So I have to say it's very gratifying to be on this panel. I was just talking with Ioana, that to hear the assistant attorney general say that labor impacts of anticompetitive arrangements or mergers are of equal footing to consumer and output effects is, I think, signals a departure from where antitrust has been until pretty recently. And I think a lot of us that have taken an interest can take pride in that observation.

I guess to sort of explain, I mean, it's a little bit multifaceted how we come to be here on a panel discussing labor impacts and its overlap with antitrust.

I know I think part of it certainly has to do with the recovery from the Great Recession, how even — so unemployment stayed high for a long time and economists were worried about search and matching issues and hadn't really focused particularly on wages and then when macroeconomic unemployment came down, there was a lack of understanding of why, nonetheless, wage growth remained repressed.

And that turned a lot of people's interest towards a sort of macroeconomic imbalance of market power in the labor market. I think kind of the inside baseball within academic economics would say that we have a lot of very interesting new empirical work, empirical methods that are put to use in labor economics and those have typically focused on worker characteristics as explaining outcomes among workers and those methods are very good and very refined.

But I think one of the realizations that, at least the body of labor economists have come to is, that worker characteristics don't necessarily reflect the variation in outcomes among workers and that naturally shifts focus to characteristics of employers and characteristics of the market,

including competition in the market for workers.

And that has shifted the attention of a lot of great applied labor economists towards looking at issues of market power and concentration of labor markets, other related things like firm-specific labor supply/elasticity that Ioana and Elena were discussing.

I guess that's my — and then I would say there's sort of the political angle that I think a lot of policymakers had been at a loss to explain the wage stagnation and other ill employment effects using the sorts of policy analysis tools that had typically been directed at the labor market.

And I can just say from many of the meetings that I was in when I was working in Washington, there was kind of this like, “Oh, you know, antitrust, we haven't really been discussing antitrust in a long time,” at least not outside the walls of the DOJ Antitrust Division.

And this is a potential kind of new area where policy has previously not been directed and people who are concerned about outcomes for workers have not previously had their attention focused.

And I think that gave rise to a lot of interest on the part of political actors outside the usual stakeholders in the antitrust debate.

MS. LUBELL: Thank you. I think it would be helpful now if we had a brief overview of some of the government enforcement in labor markets and specifically the kinds of agreements that have been challenged. Rachel, why don’t we start with you, and if you could tell us a little bit about federal enforcement in this area.

MS. BRASS: Yeah, I won't spend too much time on this because I think it was addressed with a fair amount of robustness starting right off the top this morning.

But there've been, at least in recent memory, two prominent investigations in employment antitrust, the first being the high-tech matters that several people discussed this morning which involved a series of five similar bilateral agreements not to “cold call,” as the DOJ described it in its own filings.

The DOJ's position was that those restraints were not ancillary to any legitimate pro-competitive purpose and, as was lamented on the economist labor market panel this morning, on the date of the filing of that complaint, there was also a filing of a consent decree.

In terms of what exactly motivated the government investigation, there is not a great deal of transparency, but that is sort of the bulk of what we know.

More recently, there is the government's investigation into the Knorr-Bremse explicit agreements on non-hiring and wage information exchanging. That's in the railroad space. Two issues you can contrast here is: the first involved companies that may or may not be horizontal competitors in the downstream market but were alleged to be horizontal competitors in the labor market.

In the railroad case, the companies are much more clearly competitors both in the upstream and downstream markets. And there, the mechanisms included not only the express agreements between the parties, but as described in the consent decrees, agreements to inform outside recruiters not to solicit or poach each other's employees as well.

MS. LUBELL: Thank you. Rahul, next I'll turn to you to tell us a little bit about state enforcement in this area.

MR. RAO: Yes, so the bulk of the state enforcement in the labor competition space most recently has been in the franchise no-poach context. There are basically two parallel state enforcement efforts that are happening.

One is a multistate coalition that comprises about 14 jurisdictions, 13 states plus D.C., that have been looking into the use of no-poach provisions in franchise agreements. That multistate

coalition has secured a number of settlement agreements earlier this year.

But I think it's fair to say that the bulk of the state enforcement activity here has come from my office, the Washington state attorney general's office. We are also looking at the use of no-poach provisions in franchise agreements.

Our formal investigation in this space started in the early part of 2018, where we started initially looking at fast food and quick serve restaurants. To be clear, we don't think there is anything legally distinguishable that would make fast food or quick serve companies more liable under antitrust law.

The thinking was for employees in these industries that may be making minimum wage and may be making below a minimum wage, that they were uniquely vulnerable and victimized by anticompetitive provisions in the franchise agreements that would have the effect of suppressing or stagnating their wages, which is why when we decided to start somewhere, we decided to start there.

We secured a number of settlements through the form of assurance of discontinuances, which are just settlement agreements that are signed by a judge, in the summer of 2018. To date, as of Friday, we have secured 85 AODs against franchisors ranging from fast food companies to tax preparation services to car maintenance to salons and barbers.

Our investigation is continuing. We have a number of CIDs out. I'm sure I have a few signed AODs on my desk that are ready to file. That is the state of affairs.

In terms of the provisions we've been looking at, to just kind of build upon what Dean was talking about earlier, no-poach provisions take a variety of different flavors, so to speak. We have seen no-poach provisions that restrict hiring. We have seen no-poach provisions that restrict the recruitment efforts, basically soliciting or inducing employment movement, and we have seen no-poach provisions that restrict only franchisees from hiring from other franchisees.

We've seen some that restrict sort of a franchisee from hiring from the franchisor, either franchisor headquarters or company-owned stores. And then, we've seen no-poach provisions that just apply equally to every participant within the franchise system, regardless of whom they may be.

We consider all of those no-poach provisions — the connective tissue that connects all of them is basically a restriction that limits the ability of hiring or recruiting decision-making by one of the entities within a franchise system vis-à-vis an employee of another entity within that system.

MS. LUBELL: Thank you. So, you know, we've heard about government enforcement in this area. But private litigation is particularly interesting when it comes to labor competition cases.

And so, Rachel, I'm going to turn back to you, if you could talk to us a little bit about — just an overview of — private no-poach cases that have been filed in the last few years and maybe describe some of the labor competition issues that they raise.

MS. BRASS: Yeah, so we've seen labor competition cases in a pretty wide sector of industries following the DOJ's investigation. There were lawsuits in the high-tech space and in the animation space. There've been a number of healthcare-related litigations, one involving nurses in San Antonio, one involving Duke and UNC.

There've been, as I think was suggested, more than a dozen lawsuits filed against franchise systems or franchisors, cases brought by NFL cheerleaders against the NFL, and others.

No particular industry or sector is immune from these lawsuits. There's also follow-on litigation against Knorr-Bremse and some of the other railroad-related cases.

And they allege a broad range of misconduct and they have been resolved or been dismissed at various stages of the litigation. Some are ongoing. Some have been settled. Common things that you see are questions about the applicable standard of review, whether or not that should be the per se standard, the rule of reason standard, or the quick look standard.

I would say there is no necessarily specific or clear trend in that regard. The decisions continue to be fairly all over the map and somewhat fact-specific. A large number of them have been on the motions to dismiss, which I want to emphasize makes them allegation-specific, not fact-specific. And so, you see that as well.

There have been — in the railroad case, for example, a motion to dismiss the allegations on behalf of putative absent class members was filed and granted which found that there was such a lack of predominance among the potential members of the absent classes that, while the case could proceed on behalf of the named plaintiffs, it couldn't proceed on behalf of absent persons.

Other decisions have dismissed the claims on grounds such as standing where, for example, a named plaintiff doesn't identify having ever applied for or sought a position where they were restricted from movement in any way by the alleged no-poach provision.

And that's been a particular impairment with respect to provisions in franchise agreements, for example, which had a feature that I don’t think I've heard anyone talk about this morning, which is that while there's a provision restricting mobility, it's not a provision that restricts mobility full stop. It's a provision that restricts mobility absent and employer release.

An issue that I think we'll see percolating through the litigation, as well, is what is the effect and extent at which releases were granted. They're alleged in some, but not all of the cases involving these restrictions.

And then, at the outer end, you've seen classes certified and cases settled where, in some cases, like the high-tech case, no decision was ever ultimately made on whether the per se or rule of reason applied.

But a class was certified, Judge Koh finding that class-wide proof could prove liability under either theory and those cases were resolved, as were the animation cases. And most recently, settlements in the Duke and UNC cases.

I would say we're still at a fairly nascent place in terms of what the evolution of the case law looks like, with a number of splits and interpretation percolating through the system on motions to dismiss.

How telling those will be when the courts ultimately in the cases that aren't dismissed engage with the facts on the ground as opposed to the allegations, I think that’s too early to say.

MS. LUBELL: Thank you, Rachel, Rahul, and Marshall for that really helpful background. Doha?

MS. MEKKI: This morning we heard a lot about the fact that the antitrust laws apply to labor markets with equal force as output markets for tangible goods and services.

Randy, I'm going to turn to you and ask a really important question, which is: what does the consumer welfare standard require in terms of harm with respect to labor markets.?

MR. STUTZ: Sure. So, can everybody hear me okay? First of all, thank you to the Antitrust Division for hosting this program, and to Doha and Karina for putting together this excellent panel.

AAI's been following all these developments in labor markets and case law going back a few years now and have called on the agencies to host a program like this, so we're very pleased to see this taking shape, and it's been fantastic so far.

The consumer welfare standard, I think the assistant attorney general really said it best this

morning. It is not — it doesn't mean what it literally says, that we only care about the welfare of end-purchaser consumers like you and me.

The consumer welfare standard protects competition throughout the supply chain. There are plenty of examples to back up this claim. You can look at the *Illinois Brick* and *Hanover Shoe* indirect purchaser role. There's an example where we often protect businesses in the middle of the supply chain at the expense of consumers, end consumers.

And then certainly you can look to Supreme Court cases like *Weyerhaeuser* and *Mandeville Island Farms*, where causes of action for upstream harm in input markets have been sustained without any effort to trace through anticompetitive effects in downstream output markets.

And then, of course, we have the agencies and their practices. We can look at the horizontal merger guidelines, which are very explicit. Example 24 discusses a buyer power merger that inefficiently reduces supply and causes a wealth transfer and clearly states that it's illegal, even if the merger will not lead to any increase in the price charged by the merged firm for its output.

One question that often arises is how effects in upstream markets translate downstream. Oftentimes enforcement in input markets is fully consistent with effects in downstream markets because supply restrictions tend to reduce output in supply markets and that can have anticompetitive effects in output markets.

But the important point is that in antitrust law, we don't require that showing. We don't look further. We look for harm to the beneficiaries of competition and there are beneficiaries all over the supply chain, including upstream.

MS. MEKKI: Most antitrust lawyers have heard some version of the following phrase, which is that the antitrust laws reserve their harshest condemnation for restraints on inter-brand competition.

Samuel, can you tell us the difference between intra-brand competition and inter-brand and why we're suspicious of restraints on inter-brand competition?

MR. WEGLEIN: Yeah, sure. Thanks, Karina. And thanks again to the Division for inviting me here. I will say I mentioned this to a colleague, that the outline that Karina and Doha put together was longer than the field exam I took in labor economics in 1996. But it's been fascinating to think about these issues. It's a real pleasure to be here.

Just very briefly, inter-brand competition, I'll use an example outside of the sorts of industries that we'll really be talking about just to motivate it. Inter-brand would be Whole Foods competing with Trader Joe's, okay?

And there, we expect vigorous competition along multiple dimensions. It can be price. It can be non-price. It can be quality of the produce. It can be service. It can be all of these things. And we expect that. Any attempt to subvert that, any lessening of that competition is something that we would deem problematic.

Intra-brand competition in that context would be the competition, if you will, amongst Whole Foods stores, okay? And you will see obvious ramifications here and there will I think be a diversity of views as to how relevant this analogue is in the franchise context.

But within the context of Whole Foods, we do not expect there to be vigorous competition along all of those dimensions. And in fact, we expect just the opposite. Store managers, for example, are not empowered to reduce the price of milk in their Whole Foods so that they can compete more effectively with the Whole Foods in the neighboring town. There may be some competition along some dimensions like service, right?

We don't ignore entirely the prospect or the possibility that each store manager wants her or his store to outperform the others, but it won't be along all of the dimensions that we expect a

Whole Foods and a Trader Joe's to compete. Broadly, that's the distinction.

MS. MEKKI: Horizontal agreements can be naked or ancillary. What's the difference? Randy?

MR. STUTZ: The naked/ancillary distinction in antitrust law goes back to the 1890s and Judge Taft's opinion in the *Addyston Pipe* case put it very simply: a naked restraint is a restraint that is unadorned, not intertwined with anything else, not part of a broader efficiency-enhancing economic integration. Oftentimes a naked restraint is an agreement to do the thing that is illegal: an agreement to fix prices or to divide markets. But restraints can also be ancillary, which is to say they can be part of something broader and something pro-competitive. And the key inquiry there is whether the restraint is sufficiently interconnected to the broader efficiency-enhancing integration.

And the upshot of this distinction is that when a restraint is deemed sufficiently ancillary, it can change the applicable liability standard with which we consider the restraint.

In particular, an otherwise per se illegal violation like price-fixing can be reviewed under the rule of reason. That's the primary upshot of the ancillary restraints distinction.

It becomes less relevant — a lot of the cases we're going to talk about today involve the franchise context and vertical restraints. Most vertical restraints are already reviewed under the rule of reason. So oftentimes the ancillarity question just doesn't arise or isn't especially important.

But when you have a per se claim or potentially a quick look claim or an inherently suspect, a structured rule of reason claim, the ancillary/naked distinction becomes important.

MS. MEKKI: And are there any recent cases, and particularly no-poach cases, that have explored ancillarity?

MR. STUTZ: It comes up a fair amount. Like I said, oftentimes, particularly when there are joint ventures and other group purchasing organizations, joint selling arrangements, these are the kinds of cases where ancillary restraints questions get litigated.

The hornbook sort of test is whether the challenged restraint is part of a larger economic integration in the sense that it holds the promise of pro-competitive benefits and is reasonably necessary to protect the legitimate fruits of the main transaction.

It hasn't directly come up in a lot of the recent no-poaching cases that we've been talking about. The arguments have been raised — the *Little Caesar's* case, *Ogden v. Little Caesar's* involved a no-poaching agreement where the court did rely on the rule of reason, but on the basis that the plaintiffs didn't plead sufficient facts to allege a per se or quick look violation. It wasn't via the ancillary restraints doctrine that the court got there.

MS. BRASS: I think the *Deslandes v. McDonald's* case, of the recent no-poach franchise cases, comes the closest. And there, as part of the court's analysis in determining that the per se rule would not apply, the court looked both at the fundamental inter-brand versus intra-brand nature of the restraint, the fact that the majority of the agreements under the restraint are franchisor to franchisee and that then also that it's an ancillary restraint to the overall franchise agreement.

The court didn't particularly delineate any one of those factors as driving the ultimate decision, but looked to all of them to find that ultimately per se treatment was not appropriate.

I would say that, you know, one of the places that it's addressed actually in a fair amount of detail is in the Department of Justice's inter-statement as well as their statement on their website about their view of how the ancillary restraints doctrine intersects with franchise systems.

In the cases it filed in the Western District of Washington, three of the pending private

litigations, the Antitrust Division suggested that, at least on the facts of those cases, what was alleged was an ancillary restraint, went a bit further on their broader public statement and suggested that more often than not, although again it will be a fact-by-fact assessment, often these restraints will be ancillary in nature.

MR. STUTZ: An important thing to keep in mind too is just because a restraint is part of some broader integration doesn't necessarily mean it's ancillary.

Part of the issue in the Washington State cases that Rachel was referring to was this question of whether the no-poaching agreements were likely ancillary or likely subject to the full-blown rule of reason as opposed to possibly a per se or a quick look standard.

And really the only way to determine that is to actually perform the ancillary restraint analysis and see if there's a functional connection between the challenged restraint — so in this case, the no-poach clause — and the broader franchise agreement.

And so, you know, the *NCAA v. Board of Regents* case, going back to the '80s, recognizes clearly that a restraint can be part of an integration, but still be naked. It's not ancillary simply because it's appended to a broader agreement.

MS. MEKKI: We've talked a bit about different restraints and we've sort of mentioned in passing the rule of reason, the per se rule and the quick look.

Can we just briefly, for the good of the audience, talk about those rules and why they might matter for plaintiffs and defendants in antitrust cases? Randy?

MR. STUTZ: Sure. It might have been good to start out with that. I apologize. Of course, the per se rule is the strictest antitrust liability standard. It's reserved for naked horizontal agreements that always or almost always tend to restrict competition. And the upshot of applying the per se rule is that a plaintiff is not obligated to prove market power or anticompetitive effects.

In a Section One case, it simply has to prove agreement. If it's a private plaintiff, it has to prove antitrust injury and damages. But market power and anticompetitive effects are irrebuttably presumed.

At the other end of the spectrum is a full-blown rule of reason case. These are cases where a plenary market examination is required. To understand the nature, purpose and effect of a restraint, plaintiffs are required to define a relevant market, prove market power in the market, and prove that the agreement is anticompetitive.

The full rule of reason operates under a burden-shifting framework. The plaintiff has the initial burden to prove power effects and harm and, if it does so, the burden shifts to the defendant which can offer offsetting efficiency justifications. And if the defendant succeeds in doing that, the burden shifts back to the plaintiff to prove a less restrictive alternative or that the agreement is on balance anticompetitive.

In the middle, historically, is the quick look rule. It's not a single rule really and the law around quick look has evolved quite a bit over the years.

But the original premise of quick look was that there are some agreements which are — their anticompetitive effects are obvious. We don't need to inquire into the anticompetitive effects.

But there's some attending feature to the restraint, some novelty which might allow a court or create a desire in a court to peek at any possible efficiency justifications.

They would perform a quick look. It would take a quick look at any efficiencies justifications. If they were legitimate, the case would revert to a full-blown rule of reason case. If they were not, it would revert to the per se rule.

Since then, the court has made clear that we don't have just three strict categories. The rule of

reason can be abbreviated in any number of ways. The applicable line from Justice Stevens in the *California Dental* case is we need an enquiry meet for the case.

One solution has been what's sometimes called a structured rule of reason or an inherently suspect framework, pioneered by the FTC and approved by Judge Ginsburg in the *Polygram* holding, which creates — similar to the per se rule, it creates a presumption about market power and effects.

But it's a rebuttable presumption, so plaintiffs don't have to prove market power, don't have to prove anticompetitive effects. Defendants are offered an opportunity to provide efficiency justifications.

MS. MEKKI: I want to shift now to talking about franchises in particular. They are fascinating business models and undoubtedly some of the most interesting no-poach cases of late relate to restraints in the franchise world.

Darrell, I want to turn to you. At a high level, can you describe what a franchise business model is, some common ownership structures and sort of give us a sense of the business?

MR. JOHNSON: Doha, I'd be happy to, and good afternoon. I have the luxury of being here as a researcher and FRANdata, who sits in the central nervous system of the franchising, we're the objective third party that deals with the business model and looks at it and understands it and explains it. And it's confusing.

As recently as the last hour, somebody asked me about the Starbucks franchise and Starbucks is actually not a franchise. We have a lot of misunderstandings about what is and what isn't.

What we'll do here is we'll focus entirely on the business format franchise model and I'll give you a quick understanding of it and then show you where there's some misconceptions that go along that apply directly to I think what we're talking about here.

First of all, business format, there are three tests under the FTC franchise rule that constitutes a franchise for FTC rule purposes and precipitates a whole series of regulatory responsibilities on the franchisor.

And those three rules are that it's the use of a trademark. And in that, let me give you a quick example. Most of you here have your personal physician and your personal physician, I'm guessing you don't know offhand who he or she actually is a part of. It's just your personal physician. That's an individual. The brand is the individual.

In the case of either urgent care or worried about where one of your parents is going — whether they're going to have aging at home and you want somebody to be in there with them that maybe has some medical experience, you care about the brand.

You don't care about the individual that goes in there as much as does this brand have a good reputation to be able to deliver the service that you expect. That's where franchising lives, is in that brand distinction. And that's where the trademark requirement is the driving force behind it.

The other two rules, one is that there's consideration between two entities, between the franchisee, in the case of the licensed user of that brand, and the franchisor who has the third responsibility, which is significant control over the method of operation of that franchise because they have brand risk associated with it. And therein lies a lot of the rub that you in this room represent on one side or the other.

Franchising is found anywhere in the U.S. where there's rapid growth and that brand component has value. There're over 220 sectors. There're 3,800 active franchise brands in the U.S. today.

And now, let me give you a sense of where there's a distinction and somewhat of the misunderstanding of how some of this is actually used. A lot of the anti-poaching issue was

precipitated by the Princeton study. FRANdata provided the research information with which that study was done.

One of the principles, in fact I think the central tenet of that, is that anti-poaching clauses exist to reduce employee turnover. I will tell you that in the roughly some twenty-some years of begin involved directly in the research business with franchising, I've never heard a franchisor say that.

By in large, the reason they have had anti-poaching clauses in their agreements is to enforce proper training at the franchisee level under the significant control of the method of operation of that franchise business.

Now, I'm not here to argue that that's right or wrong or that it's the majority of the time or a less amount of time.

But I will tell you that most of the time that provision is to protect the method of operation wherein a franchisee who chooses not to do any training and just poaches the employees of another franchisee, it's to try and force better training of employees across all of the franchise system.

So that is just an example I think of where we see a lot of the distinctions and the misunderstanding of franchising.

One other thing I'll note is just the sheer complexity of once you get inside the business model, the franchisor is responsible for 12 functional areas of franchising in order to execute the business model.

They look downward from the franchisor. You have franchisees. Well, franchisees are legal entities. They're formed — they're all incorporated entities. So we think of franchisees as people. They're actually incorporated entities.

The owners of those franchisees are the people who are normally — are oftentimes assumed to be the franchisees. But the corporate structure that they have, almost all of them are either corporate entities, rarely partnerships.

But now you get into the complexity of it. There could be a single-unit franchisee with one legal entity. That legal entity may own two units or 22 or 222 units. It may own it in one brand or it may own it across three brands.

Each time the owner of that business wants to add a new unit, they may incorporate a new entity. You have all of these complex structures that are existing underneath how one franchise system operates. I'll stop there.

MS. MEKKI: Thank you. I want to go back to something you just mentioned about to whose benefit is a no-poach clause within a franchise agreement.

Can you tell us a little bit more about, I mean, the origins of no-poach clauses in franchise agreements and if we had to think about the clauses as benefitting someone, who is the someone?

MR. JOHNSON: Yeah. Well, let me give you some statistics. In the Princeton study, there were — the request by Princeton University was to look at all franchise systems with more than 500 franchised units. There were 156 brands that were identified that were above 500 units in operation.

Of those 156, 58 percent of them had some type of anti-poaching language in their franchise agreements. Those anti-poaching language elements ranged from a very passive kind of inert statement to a very strong one.

Some of the language with some of the brands were both at the franchisor-to-franchisee level and some of them were from franchisee to franchisee and some of them were from franchisee to affiliate of the franchisor.

In franchising, typically most franchisors don’t own a lot of company units themselves.

Oftentimes in franchising, and when I say franchising, I'm not talking about all of the big guys. I'm talking about the 3,800 minus the 156 that had more than 500 units.

The vast majority of them operate with few company units because one of the primary reasons to franchise is to use other people's money. How they get started is to push down the responsibility for the capital formation to the franchisee.

And because of that, there's typically no conflict at all between the franchisor and the franchisee, at least from a competitive standpoint. There are always exceptions. If you've seen one franchise system function, you've seen one. They all have a little nuanced difference to them.

And I will say, as a publicly traded company, Regis Corporation in the haircare industry, they have company brands, brands that are only company units. They have brands that are only franchised units. And I think they have a little bit of each. You have a lot of mix of all of those different things going on.

Typically those agreements, some of which go back 20-30 years in the early formation of it and it was — early on was largely driven between franchisor and franchisee — today it's largely between franchisee and franchisee for the purpose of things like training.

MR. RAO: I'd like to build a little bit off of what Darrell was talking about. In our investigation, we've looked at hundreds of franchise systems. And for the purposes of this public discussion, I'm going to back out everything that I can't talk about because it's in an early phase of the investigation.

Of the ones that I can generally speak about, we've looked at upwards of 130 or over 150 franchise systems. It is not an identical set to what was in the Princeton paper, in part because there were some companies on the Princeton list that do not have a presence in Washington and there are a lot of entities that are below what the threshold was for the Princeton list.

From that macro view, we have seen that about 65 percent of those franchise systems had some form of no-poach provision, which means 35 percent didn't.

In talking to the counsel and discussing our investigation and our enforcement efforts, we've heard basically a repeat of a couple of similar refrains with respect to how these no-poach provisions got into the franchise agreement and what their purpose is.

The first thing that we heard off the bat within the first few sentences of almost every call is we've never enforced these provisions. We've never enforced them and we actually have no idea how they got into the franchise agreement.

The second refrain, which it sounds a little bit incredible but I actually find it plausible, is we did not even know this provision was in our franchise agreement. This is boilerplate language. We just adopted it. The first we heard about this was when you sent us a civil investigative demand.

— I have no reason to disbelieve any of what has been told to me, is that for a lot of the franchise systems today that have these no-poach provisions, they're essentially vestigial organs.

It's literally like an appendix. Like it's there. You don't know how it got there. You don't know what it does and you're happy to get rid of it if it causes a problem. And that's essentially what we have been seeing.

So, about 65 percent. That percent has been relatively consistent throughout the various phases of the investigation, whether we're looking at a smaller number or if we're looking just at fast food or if we're looking at the current amount that we have right now across multiple industries.

MR. JOHNSON: I could confirm that in many, many cases. We're talking about a regulatory

document that has evolved through the practice of law firms who have specialized in franchising over decades. And by in large, it's always been additive. We found something new that we can do, they add it. They don't subtract. And over time, they've evolved.

We have an inventory library of regulatory documents, largest in the world, probably 65,000 documents. I can assure you that some of those clauses are back 25 years ago and no one today knew why they were there and, yet, new franchisors that get started go to those law firms and they just take the boilerplate and drop it in.

And there are a lot of terms like that, that they're there if in case you may need it someday. And that's what surprises a lot of franchise executives when they are confronted with a question like this.

MS. BRASS: Doha, I think Darrell makes an interesting point that's something else I think we'll see wind its way through the pending civil cases, which is that this is a regulated industry. All of these agreements are filed every year with FTC, with each of the states in which the companies do business.

Certain states like Washington make clear that when you file it, the filing and approval of it says nothing about the state's ability to later enforce laws against it. Not all states say that.

But I think that differentiates this from — and may have a bearing on the position that DOJ took. And I'm not speaking for you at all in any way. But this is not a provision that was sneaking around in the dark, like so much of what we think of as unlawful conspiracies.

There was nothing secret about this. If anything, it is the most open and brazen conspiracy that has ever happened in that these 56,000 documents Darrell has described, every single one of them was filed with the federal government and with the state AGs.

And what implications those will have as the cases wind their way through a litigation, I think we'll have to see. Depends on the state. Depends on the agreement. Depends on the law that's being asserted.

But it is something I think that very much differentiates these cases from maybe something like the railroad case where other than that it was shared with outside solicitors it was not something that was sort of open, notorious, available to be scrutinized on the public record.

MS. MEKKI: There's a lot to unpack there that I won't respond to in this setting.

(Laughter.)

But I will only say that we have often heard, I did not know this conspiracy was illegal. And we have many sections that enforce the law in regulated industries. But I take the point that it will be interesting to see how the courts grapple with those facts.

MR. RAO: I mean, and the one thing I would like to just add to that from the other enforcer at the table is I don't necessarily disagree with the objective statement that these were not secret agreements. They were informed franchise agreements that are on file and regulated with the state and shared openly with anybody who wants to look at a franchise agreement.

I think what's interesting about where we are now in antitrust law, which is what's actually really exciting about this workshop, is that our understanding of labor economics has been significantly evolving over the recent many years, and in part because of the Princeton paper and how that brought to bear the anticompetitive effect of these open and notorious agreements is kind of what has sparked the enforcement effort.

It's not that they were secret, or it's not that they were open and we were okay with it, it's that they were open and we just as enforcers may have just been focusing too much on output markets and not enough on the input markets.

MR. STUTZ: And maybe — sorry, just one more thing to add on this.

(Laughter.)

MS. MEKKI: I didn't think the franchise background question would spark this much discussion.

MR. RAO: It's only going to get better, Doha.

MR. STUTZ: From an antitrust perspective, of course the intent is not relevant in terms — well, the economic intent, if you will, is an important thing to get to.

And just to go back to your very question, which was sort of at whose behest are these agreements being imposed it's important to think about whether however they found their way into these contracts, are they serving the interest that Darrell mentioned in terms of promoting investment and training or is it a way for a franchisor to give franchisees a means to capture more of the surplus created by their workers.

The former would be an efficiency rationale. The latter would not. That's just the elimination of competition. It's just making people more wealthy by eliminating competition. It's important to think about.

The analogy that's sometimes used is for resale price maintenance. The Supreme Court in *Leegin* differentiated between RPM agreements that are initiated by the manufacturer versus agreements that are initiated at the behest of the dealer. And there's really not much good justification for the latter. A dealer really benefits from RPM by just keeping prices high and preventing competition from discounters.

If anyone's interested, now would be a good time to go back and read the amicus brief by Mike Scherer and Bill Comanor, two AAI advisory board members, which the *Leegin* court cited and discusses that point in some depth. I think it's relevant here.

MS. MEKKI: Samuel, could you tell us a little bit about your view of how we should think of competition for workers within a franchise system?

MR. WEGLEIN: Sure. Yeah, let me give a little bit of context so that we don't put the cart before the horse. And let's think about franchising as a means of distribution, okay?

You have a spectrum or a distribution of ways in which firms can distribute the products that they manufacture, right? This will be simplified and there can be lots of permutations, but I think it's helpful just to set it up this way.

At one extreme, you can have a company that designs and manufactures, distributes, sells its product, right? It's a vertically integrated firm. And from the consumer's perspective, from the customer-facing perspective, one of the benefits of that vertical integration is the firm has the ability to create a uniform product and a uniform experience regardless of where you are.

Think about Apple. I walk into an Apple Store. I know exactly what it is I'm going to get in terms of product, pricing, service, all of that, experience.

Then you have the other extreme. At the other extreme, you have firms that will produce a product, manufacture a product and then distribute it to distributors or directly to retailers who will sell it largely under their own terms. And this alludes to RPM and other things that we'll maybe come back to in a few moments. And here, the experience can be far more heterogeneous.

For example, I'm in the market for Adidas running shoes. I could go down the street. There's a store around the corner called Marathon Sports. And when I go into Marathon Sports, even before I take off my shoes, they'll be sizing me up in terms of am I an over-pronator, an under-pronator, all these things.

They'll give me all sorts of shoes. I can go outside and run up and down the block. Amazing customer service, and I will pay for that. I will pay a lot for those Adidas.

Then you have in the middle you have Modell's. Okay, I go into Modell's and there may be some amount of interaction with a salesperson, largely to see if that color or that size is available in the back. I haven't been able to find it in the jumble of running shoes that is Modell's. And so, there will be some amount of user experience and sales and service, but limited.

And then, I might go to T.J. Maxx where there's literally none. Whatever is on the rack. And this is not a slam on T.J. Maxx, right? This is you get what you pay for. You pay less at T.J. Maxx than you do at Modell's or at Marathon Sports.

Franchising sits somewhere in the middle between those two extremes. It's a hybrid of sorts. I'll use as an example, not to pick on it, not because I think there are any no-poach agreements or anything like that, but I'll pick on Dunkin' Donuts because I'm from New England.

And Dunkin' Donuts is perhaps closer to the vertically integrated model than it is to the independent distributor. I walk into a Dunkin' Donuts and I know what to expect in terms of the variety of foods that are offered, how the coffee will taste. It's a very uniform experience.

And this is due, at least in part, and Darrell might be able to speak to this — well, certainly could speak to this better than I can, that the terms of the franchise agreement can be quite specific in terms of the types of supplies that are used, inputs and so on.

And in a sense, just to invoke very briefly Oliver Williamson, the idea is you have — I knew that would get a reaction — and the idea is to write as complete a contract as possible. You're not vertically integrated. But the idea is to get as close to that perfect, that complete contract as possible.

And this brings us back to this notion of inter-brand/intra-brand competition. There is not the expectation, the owner of the brand, of the Dunkin' Donuts brand, is not expecting the franchises to compete with one another on all of the dimensions.

I can't walk into a Dunkin' Donuts near my house and hope to buy the local franchisee's grandmother's chili. That's not a thing. I'm expecting a particular experience. And if I don’t get that experience, that can have impact on the brand.

And so, the franchisor is looking intentionally, and we recognize this isn't just a labor thing. We have exclusive territories often. We have requirements in terms of the supplies. The idea is to promote the brand and not to harm the brand.

Another thing you won't see, for example, at a Dunkin' Donuts, you won't see a Dunkin' Donuts offering a promotion that's meant to specifically promote that store. You don’t have a coupon. That won't be given out that's at this location only you can get some sort of special deal. You may have it regionally, but you won't have it at a specific location.

And maybe that's a useful litmus test, not definitive, but that might be a nice little litmus test where you have specific in-store promotions that do in fact put one franchise against another. Auto dealerships, and maybe Darrell will say, nope, that's not really a franchise. Is it a franchise?

MR. JOHNSON: No, it's a product distribution.

MR. WEGLEIN: Darn, okay. But in any event, auto dealerships, they have many common features as franchisees. And they do promote. They do compete vigorously on price with one another. And sales managers have pots of money from the manufacturer that they can use at their own discretion to compete for your business.

The question ultimately is does this harm the consumer, the fact that Dunkin' Donuts is restricted, or the franchisee is restricted in certain ways.

And the answer is not necessarily. Some consumers, if we lived in a world, the counterfactual without any vertical restraint, so the franchisee could do whatever it wanted to do. It just

licensed the brand, but then could offer its own products, its own coffee and so on.

Some consumers may be better off. They may just value the ability to buy donuts at the lowest price possible, regardless of their quality. They may be better off. But other consumers will be worse off. They will not get the coffee they expected. They won't get the experience that they expected.

And in the long run, consider what might happen to Dunkin' Donuts or what Dunkin' Donuts might choose to do. Darrell talked about franchises using franchising as a means of expansion, of funding expansion and sharing risk. And that's undoubtedly true.

And if Dunkin' Donuts can't expand without losing control of its brand, it might choose not to franchise. And that could be a loss of surplus.

Today, Bob could open a donut shop called Bob's Donut Shop. But he doesn't do that. Bob wants to license Dunkin' Donuts. And why does Bob want to license a Dunkin' Donuts instead of opening Bob's Donuts?

It's because he knows that that's what the consumer is looking for. That ultimate loss of ability to license the Dunkin' Donuts name could harm consumer welfare.

DR. STEINBAUM: Can I make just one comment?

MS. MEKKI: Sure.

DR. STEINBAUM: Yeah, so thank you. I think that raises a lot of important questions that exactly motivate why this panel is taking place.

I mean, for one thing, I think there's a lot of interesting research to the effect that because we have permitted the types of vertical restrains that permit the expansion of these franchising networks that totally eliminate any discretion that the franchisees have within the network, I think that reflects the market power that the franchisor has recognized and the brand that they're licensing, as you've just referred to.

The upshot is that that then the one margin that is available to them is to squeeze workers and worker pay and hence the arrival of the no-poaching agreements and the other restrictions that we're discussing in the context of antitrust enforcement now.

I think to wrap that kind of discussion up, you said, you know, that if we didn't have the ability to use vertical restraints in the franchising context, that would result in a reduction in consumer welfare.

Well, the whole point of antitrust enforcement in the labor market is that, well, we don’t allow potential benefits to consumers to offset the harm to competition that happens in labor markets.

If we care about harm to competition in labor markets, then it would be an excuse that everyone would use, that, “Oh, well we need this in order to benefit consumers.”

I don’t think that that's what the antitrust laws support and I don’t think that that's what the consumer welfare standard is about. And I hope that a lot of the discussion from the assistant attorney general and others today would, you know, count against that sort of claim.

MR. JOHNSON: I'd like to give you one more fact associated with what you just said. Today 56 percent of all franchised units in the U.S. are owned by multi-unit operators.

Most of the multi-unit operations — Dunkin' is a good example of this — 10, 15, three, five, eight units, they are usually contiguous units because a franchisee will typically want to expand their territory because their understanding of that local market is strongest. And rather than having a unit in this town and a unit in the next town over or, in this case, in the District and in Arlington and in Bethesda, they would want to have contiguous territories.

Dunkin', as many brands that have encouraged multi-unit sales of units, have followed that pattern. It's an efficiency pattern. The point though for purposes of labor is they're owned by the

same entity. They're owned by the same operator. And it may even be two or three legal entities embedded in this. It's the same operator and the same general ownership structure at the franchisee level.

And I think that's one of the key things when the Princeton study came out, and there was some reference to it at the end of further analysis that could be done. That was one of the key things that was not looked at, at all. And yet, today the majority of franchising is operating in the multi-unit environment.

MS. MEKKI: We'll come back to what franchises, or which franchises might find value and what those values might be for no-poach agreements, but I want to make sure that we cover the antitrust categorization of the restraint.

Rahul kindly articulated a few different like permutations of no-poach restraints in franchise agreements. And we had talked about franchisee-to-franchisee restraints, the kind of vertical restraints from franchisor to franchisee and then there's the franchisee-to-affiliate categories.

Rahul, can you walk us through how we should think about those restraints, I mean, assuming we're in a world where we have to categorize them as vertical or horizontal? What are they?

MR. RAO: I can tell you how I view them, and I'm sure there would be some debate about this at the panel. From my perspective, I think one of the sources of confusion with respect to the nature of the question is, with respect to the output market, the relationship between a franchisor and a franchisee.

The franchisor is in the business of selling franchises. The franchisee is in the business of selling sandwiches or burgers or whatever it may be. You look at it from a consumer standpoint, it looks vertical, right?

But when you're thinking about it from an input market, from a labor standpoint, the fact of the matter is these provisions restrict the ability of one of two market players from hiring or recruiting the same unit of labor.

Both market participants inherently want that same unit of labor. They are in direct competition in a horizontal labor market for an employee. It doesn't matter what their output market is. It doesn't matter what their business is.

In the labor market context, they are horizontally competing for the same talent. The no-poach provision by itself evidences the fact that they are in competition. It makes no sense if they weren't competing for the same employee why they would have that provision to begin with.

From a personal perspective, as well as why we are enforcing it the way we are, we have a very difficult time seeing how a no-poach provision is anything but a horizontal restraint in the labor market.

MS. MEKKI: Does anyone want to follow up?

DR. STEINBAUM: Yeah. Well, first of all, I would just say I agree with that. I think that we have to analyze the competition in the labor markets reflected by the no-poaching agreement.

I would also say that the idea that it would change the competition analysis, whether it was horizontal or vertical, seems somewhat misconceived to me.

If we care about competition in labor markets just as much as output markets, the kind of different antitrust scrutiny for vertical restraints arises from the economic analysis that says that vertical restraints have potential efficiency benefits in output markets.

It says nothing about the fact that they may be pro-competitive in input markets. And in fact, for the reasons that Rahul just said, we would expect that they would not be. Even if we granted that the market structure was vertical franchisor-to-franchisee, there's absolutely no reason to

suspect that that would mean that any agreement between them not to hire from one another in labor markets would have some sort of efficiency benefit, certainly not in labor markets and if it's an output market, why does that vitiate the reduction in competition in the labor market.

MR. WEGLEIN: I mean, that's a really good insight, Marshall. And the fact that the no-poach agreements are not agreements between the franchisees — right, if it arose amongst franchisees, then certainly it would be a horizontal agreement.

DR. STEINBAUM: Yeah.

MR. WEGLEIN: The fact is it's arising. The mechanism is clearly a vertical one, right? It's an agreement between a franchisor and franchisees. Now, there is reference to competitors, for sure. The same is true, whether implicitly or explicitly, with geographic restrictions.

But again, it's going to come down to what's the motivation. And if the motivation here is about promoting the brand, that is a vertical concern, even if it references other franchisees in the area.

DR. STEINBAUM: Yeah. I mean, I just don't see that there's a difference in the competitive impact arising from the fact that the agreement is between franchisor and franchisee.

I mean, the franchisees are entering into that agreement because they're contracting with a brand where they know that everybody else has contracted in such a way that they're not going to be poaching workers from one another.

I mean I can't speak directly obviously to the legal aspect here. But it seems kind of odd to me that we're having this, to some degree, formalistic debate about whether the agreements are horizontal or vertical premised on, first of all, the economic assumption that the vertical agreements benefit consumers, when we're not talking about the output market, and second of all, when we're not paying attention to the fact that this is affecting an agreement that reduces a competition in labor markets, whether the formalization of the contractual parties is that they are at different segments of the supply chain or not at different segments of the supply chain.

MR. WEGLEIN: Yeah. I agree that the formalistic nature of it. And by the same token, I think if some of the stores are franchisor-owned, to me that's not particularly relevant.

The same sort of muted competition as between franchisees occurs between franchisees and franchisor-owned stores. There's the same sort of adherence to pricing and promotion of the product and geographic markets. I agree with you that the sort of formalistic debate is it horizontal, is it vertical isn't relevant.

I think I at least see a different sort of argument, or maybe I see the consumer welfare standard discussion in a slightly different way than the way you're describing it. I don't have a definitive answer, which, is there a right answer or a wrong answer.

But it feels like we're perhaps conflating two things. The consumer welfare standard, the justification for pursuing a case upstream in a labor market is to say that even if we don't observe a reduction in output downstream, that's not going to deter us from bringing a case.

If there is impact upstream without a commensurate impact, a supply-side impact, the laborers, the workers supply less labor and therefore the producer produces less and so that change moves us along the demand curve, but it's not a change in demand, we move along the demand curve and the price increases because of that output. We don't require that.

That to me is the question about the consumer welfare standard. There is a separate question, I think, and I'm not sure those two necessarily have to be linked, which is suppose that we have both that upstream effect and we don't have a supply-side effect downstream but we have a demand-side effect downstream.

Because you don't have turnover disruptions — we heard a lot about that from Professor

Ashenfelter, notwithstanding Darrell's warnings not to invoke that. But that has a demand-side element to it as well.

The franchisee and the franchisor potentially are looking to avoid disruptions to their operations because that's going to affect service. It's going to affect wait times. It's going to affect the quality. The fries get soggy, things like that. These are demand-side. It's a different effect than the supply side.

I'm not sure that the consumer welfare standard or the articulation that the assistant attorney general gave today necessarily rules out the possibility that those benefits downstream that are on the demand side can't offset or be counted against the harm upstream.

DR. STEINBAUM: Yeah. I mean, I guess what I would just say to that is it sounds to me like you're saying — maybe I misinterpreted this — that the reason why we would care about upstream effects in labor markets is ultimately motivated by a concern about output and economic quality of downstream markets, even if you don't actually have to show effects in downstream markets to establish an antitrust violation.

If that's what you're saying, I just think that that isn't why we would care about competition in labor markets. If competition in labor markets is just as much the concern of the antitrust laws as competition in output markets, then it isn't because we assume that the harm to competition in labor markets would have some sort of output effect.

It's because we care about the welfare of workers just as much as we care about the welfare of consumers.

And if the welfare of workers has been harmed, including through the franchising business structure, where we have essentially legalized vertical restraints that permit franchisors to tell franchisees what to do in almost every context, if that's harming workers, and if it's harming workers by reducing competition for their labor, then that is a violation of the antitrust laws. It doesn't matter what the output effect is.

MS. MEKKI: This is an important point. I want to make sure that we solicit other views. I mean, I think the threshold question is in these no-poach cases, assuming some form of the rule of reason applies, there's presumably an opportunity for the business to offer a pro-competitive justification.

And I think we've heard a little bit from Samuel and Marshall. But, where does that pro-competitive justification lie? Does it have to be in the labor market or can it be in some output market?

MS. BRASS: Well, I think what I hear Samuel saying is that it doesn't have to be one to the exclusion of the other. You may have pro-competitive benefits in the labor market. There may also be pro-competitive benefits in the downstream market. And it's appropriate to be considering both when you're looking at alleged anticompetitive effects.

You're not limited to looking in the downstream, in the up or in the downstream market, which I think would make sense in any vertical relationship. It's how we look at things like resale price maintenance. It's how we look at things like the dual distribution models, which are evaluated under the rule of reason.

And in dual distribution, for example, we do look both upstream and downstream when we're evaluating pro-competitive and anti-competitive effects to decide if something satisfies the rule of reason.

MR. STUTZ: One thing we don't do in antitrust, and I want to make sure I'm understanding Marshall's position accurately, but also we don't do multimarket balancing.

At least we don't do that in merger law and we don't do it under the rule of reason, outside of

the ancillary restraints framework. I think we can all agree on that, or maybe not.

But, that's basically — it's sort of a central premise of antitrust law. It's the choice to do a consumer welfare standard instead of a total welfare standard. We are not willing to accept anti-competitive harm to one group of market participants because it makes a different group of market participants better off.

The efficiencies, if they're going to overwhelm the anticompetitive effects, have to be in the same market. They have to make those injured consumers better off. You can think about *National Society of Professional Engineers*, the ruinous competition defense.

They said if you allow engineers to compete on price, prices will get too low and bridges will collapse. The court said that argument is a frontal assault on the Sherman Act. We don't accept the argument that it's okay to restrain competition because it serves some greater good.

In merger law, this rule is actually spelled out in the merger guidelines. It's footnote 14, the out-of-market benefits rule comes from *Philadelphia National Bank*. It's the idea that we — the language from *PNB* is to the effect that we don't do an ultimate reckoning of social and economic debits and credits for merger law.

And the reason in that context is that exercise is beyond the competency of courts. That decision is left to Congress in terms of choosing whether to make one group subsidize another group's benefits by accepting anticompetitive harm. It's just courts are not competent to weigh those kinds of decisions.

That's why in the merger guidelines, the efficiencies have to offset the harm in the relevant market. I think that's a well-accepted principle.

Where it gets tricky and difficult is when you look at some of the ancillary restraints cases and the cases that maybe don't specifically invoke the ancillary restraints doctrine but that involve joint ventures, cases like *Board of Regents* and *BMI*, for example.

The way I like to think of that principle is it's — the ancillary restraints test should sort of mirror that inextricably intertwined test in the merger guidelines.

It's when you literally can't separate the two restraints, when they are one, when they're so fused together that the challenged restraint is subordinate and collateral in the sense that you can't examine it independently without examining the entirety of the collaboration.

That's almost like the exception that proved the out-of-markets benefits rule. That's sort of the one instance when you have no choice. But if you have a choice, you don't allow benefits in one market to rescue conduct that causes harm in a different market.

MR. WEGLEIN: One thing I just wanted to follow up on what Rachel said, so just to be very clear, I'm certainly not ruling out the possibility that there are these upstream effects. And we've talked about different motivations for no-poach agreements.

There can be a turnover effect and the turnover effect could be more about preserving the brand, that when there's too much turnover, particularly within the system — we talked about ownership within a particular area. There can be real echo effects.

Let's say you have a bunch of Dunkin' Donuts and Dunkin' Donuts, one, loses an employee. And the most natural place to replace that employee is from franchise two.

Franchise two then poaches from franchise three and four and so on. That one separation can have real effect throughout the system, as the poaching juts continues on in an area.

That's a brand. That could be more of a brand issue. And there, I think, the points that Marshall is raising and that Randy is raising about where are those benefits and should those offset, to me those are really interesting open questions.

But you do also have, certainly, motivations. Darrell talked about this. And you have

motivations that really pertain to the freeriding and to the training that the whole purpose of the no-poach is to preserve incentives. We haven't talked so much about how this works.

The point would be if I'm franchise one, I'm in Brooklyn and I do a really good job of training my people, franchise two in Manhattan skimps on the training. And whenever it has a vacancy, it poaches from the Brooklyn franchise and maybe pays a bonus that the Brooklyn franchise can't match because they've used funds to train with high quality investment.

The goal through the no-poach is to prevent that freeriding, to prevent the Manhattan franchise from poaching from the Brooklyn franchise. And that preserves the Brooklyn branch's incentive to continue to provide that training, which it might lose otherwise.

If poaching continued to happen and they kept losing their investment, they might stop providing that high-quality investment. There could be benefit to the worker as well.

By preserving that and by allowing the worker to gain what we call — I think we talked about this in the morning — transferrable human capital. We make distinctions between firm-specific human capital and transferable human capital. Here there's the potential — in some instances, it's not going to be in every instance. But in some instances, if you're working, you're learning how to fix mufflers or replace brakes, if you're getting general managerial skills, these are human capital skills that you can then transfer.

The worker will be able to benefit from that as well. I don't want to rule out the possibility that there are also motivations or benefits upstream and it's not just downstream.

One just thought experiment. I'm going to throw it out there for people to think about. But your comment about ancillarity and joint ventures, this took me down a rabbit hole. I was on the Acela. Nobody could call me. It was fine.

Suppose we thought about franchise agreements as a series of joint ventures. And you have the brand. The brand brings with it knowhow and the brand itself. And the franchisee brings the funds, the financing, and the local market knowledge.

For some antitrust issues and for some ancillary restraints, it's, to me at least, easier to conceive of why we might countenance a restraint in the context of a joint venture.

We've come together to grow this brand in Atlanta. That's out joint venture. We don't have a presence in Atlanta. Let's grow the market in Atlanta. There's going to be lots of interaction between us.

And this maybe speaks more to in the context of no-poach between franchisee and franchisor or headquarters. We want that to succeed. Inevitably there's going to be contact between our employees. And if there's poaching back and forth, this joint venture won't work and we will not be able to dominate the donut market in Atlanta.

In some respects, I find it easier to think about the ancillarity issues when I thought about these as joint ventures. But I don't want to derail. I mean, in some sense, it's helpful because it gets us away from vertical versus horizontal. And so, I found it natural and useful in that respect as well. But we don't need to reorient our entire discussion around joint ventures.

MS. MEKKI: For sure. I want to make sure we have enough time to cover the gig economy. But Samuel, just one more question back to you on franchises. You talked about training and freeriding justifications.

Does that hold up as a rationale in the case of relatively low-skill, high turnover or entry-level workers?

MR. WEGLEIN: Yeah. This is another rabbit hole maybe. But especially when you overlay minimum wage, I think it gets complex and interesting. Here's the thought experiment.

In the absence of a no-poach and in the absence of a minimum wage, suppose that my worker,

without training, the value — or the wage that they would earn is $9 an hour, okay? Now in Massachusetts, the minimum wage I believe is $12 an hour. Don't quote me on that, but I believe that to be the case.

That floor is binding in this instance. I pay my worker $12, even though without a minimum wage, I would pay $9. Now suppose that as a result of a no-poach agreement, I now have the incentive to provide my worker with high-quality training and investment to the point where the worker becomes more productive and, as a result of that greater productivity, the greater training that the worker now has, I would in the absence of a minimum wage, I would pay them $11.

Their wage without the minimum wage, without the binding floor, would be $2 more. But because I'm still in Massachusetts, I still pay that person $12.

The question is here we have a pro-competitive effect. It's upstream. We don't have to get into any of the debate about does benefit downstream, "Does it counterbalance harm upstream?" Here we've got the benefit upstream.

But is it really a benefit? Because the worker in both situations, with training, with no-poach or without no-poach is still getting the floor, the $12 an hour. To me, that's a really interesting question. I'm not quite sure how to resolve that question.

I mean, the other thing to think about, we heard I think competing statistics this morning about the implications of it being do we see an effect on low-skilled workers. And I think this issue will pertain particularly to low-skilled workers. Maybe we don't count that as a pro-competitive effect because of the wage floor.

By the same token, there may not be an anticompetitive effect, right? Where you have geographies that are fairly local. My alternatives as a worker don't really take me to the next franchise. I wouldn't travel five miles in any event. Maybe the no-poach doesn't really have an effect or there are many, many options.

That's not always going to be the case. Dunkin' Donuts is a poor example. I'm told that there's a Dunkin' Donuts every mile-and-a-half in New England. That argument might not work for Dunkin' Donuts. But it might be true in other circumstances.

On the one hand, it's really complicated upstream and is there a pro-competitive effect for low-skilled, entry-level workers. There may not be a downstream — an anticompetitive effect going on there.

MR. JOHNSON: If I may, let me give you not upstream or downstream, because I represent the business perspective here. But let me give you across the street perspective.

When we talk about low wage, we talk about generally lower skilled or under-skilled employees. The franchise business model is largely, as it relates to those type of workers, we always think of QSR. So, let's think about QSR for a moment.

I am now providing, and the franchise business model does this really well. The training requirements, in order to meet the brand standards, training is a really important part of the discipline to create the consumer expectation of consistency and uniformity, the two hallmarks of what the franchise business model represents to the consumer.

In order to get there, you'd have to have consistency and uniformity. To do that, you have to have employees that deliver consistency and uniformity every day. In order to get that, you have to provide training.

And the training that lower skilled, lower waged employees get, generally, in franchising are around foundation skills. And there's starting to be a body of analysis around this that really is becoming meaningful.

What are foundation skills? How do you work in a team environment? Almost every

franchise, at least on the retail level, has some level of team.

Training with consumer interaction, customer service, training around technology, at least as it relates to POS and things of that sort, responsibility, things that are basically foundation skills by which lower skilled employees build their careers.

Now, when it comes to anti-poaching, we can think of it in the context of franchisee A and franchisee B within the same system. But there's across the street that's a far more practical aspect of it. Franchisees of one franchise system — think of it, say, McDonald's and Burger King — franchisees will actually go into their competitors' location, observe employees, and poach them frequently. That goes on all the time.

All the anti-poaching that we're talking about here is related to one system. But the actual poaching that goes on by in large in franchise systems is across brands. And there's nothing that any of this affects.

The practical aspect of this for many in building foundation skills is allowing those employees to actually find higher wages and higher earnings. As I said, I'm not here to defend the business model.

But I will say that that's the practical implication at the employee level, by in large, for most employees in franchise training.

MS. MEKKI: Oh, sorry. Go ahead, Marshall.

DR. STEINBAUM: Yeah, I mean, briefly to reply to that, I think we're making too much of the distinction between inter-brand and intra-brand competition when we talk about the labor market. I mean, we have permissions for restrictions on intra-brand competition in the case of say territorial exclusivity in the output market.

And the idea is that by permitting the suppression of intra-brand competition, it will enhance inter-brand competition. But there's no analogue to that in the labor market that I'm aware of.

And we shouldn't use the idea, the excuse that there's the potential to move to outside the system for why we should allow the suppression of competition through no-poaching agreements within a franchising system, especially when there are many cases in which the employees themselves would say the best prospect for an outside job offer is going to come from another franchisee, absent a no-poaching agreement, because this is the system that I've been trained on and that I'm best equipped to work for.

To take away that possibility and say, "Oh, well they could just go across the street to a different franchise," I think that's practically not relevant to the harm to competition that's actually taking place in the labor market.

MR. STUTZ: Just two quick things to add. You know, one, I think it's important to ask, you know, to what extent the no-poaching agreement is actually inducing increased training. Every business has to do entry-level training for employees. That's an unavoidable cost.

And then when you're dealing with workers who are occupying very low-skilled positions, I speak from some experience, having worked at this kind of a restaurant in high school, it just — for me, seeing the argument that preventing an entry-level fast food worker from moving to another franchise encourages investment in a type of training that that job requires just shouldn't really pass the straight face test, let alone the rule of reason. That's an economics question certainly.

But just to come back to Samuel's hypothetical of the minimum wage, where there's no maybe measurable damages or no price effect, another point we haven't talked much about is harm to non-price competition, which the antitrust laws also protect and which is often quite relevant in the context of these no-poaching cases.

Oftentimes the reason a franchise, say a fast food franchise worker wants to go a mile away to a different franchise may have less to do with a pay increase and more to do with being harassed at work, being in an uncomfortable work environment, and having a different choice that that worker values for non-wage reasons.

MS. LUBELL: Thank you all. This has been a great discussion about franchise and obviously there are a variety of views. And it's a complex business setting, so it's no surprise. We're running very short on time.

But we would be remiss not to discuss one other complex business setting when it comes to assessing antitrust harm and that's digital platforms and gig economy workers.

Marshall, I'm going to put you in the hot seat for a few minutes. You've published some fascinating work about the relationship between the growth in the gig economy and the labor laws. And so, I was hoping that you could briefly describe the relevant history and some of the recent empirical research in this area.

DR. STEINBAUM: Sure. It's great to have a panel that's talking about franchising in labor markets and also the gig economy because, in my view, those two things have a lot to do with one another in terms of the evolution of the law governing both of them.

The very first thing I ever wrote about antitrust was about a private action against, at that time, Travis Kalanick, the CEO of Uber. Now the case is *Meyer v. Uber Technologies*. It's essentially a direct offshoot of the fact that, at least at that point, Uber drivers had tried and failed to prove misclassification as independent contractors.

They said that they were in fact employees, given how much control they were under from the gig platform in 2015, late 2015 when that case was filed. Those cases had been unsuccessful.

This case, this antitrust case against Kalanick and Uber essentially says, "Well, if you're not — if the drivers are not employees, then why does Uber have the power to fix prices across all of these ostensibly bilateral transactions where the drivers are independent businesses." That's Uber's claim in defense to employment misclassification.

Well, that immediately triggers the concern that they are violating the antitrust laws and in particular violating a per se ban on horizontal price-fixing if this app that fixes prices across a bunch of bilateral transactions is a horizontal price-fixing arrangement.

That case had a long history of litigation. It got sent to arbitration eventually. And now it's about to be arbitrated finally. Next month, I believe, there's going to be a hearing about it.

In all of the time I've been writing and publishing about antitrust from early 2016 to now, this case is now finally going to be heard on the merits, at least in arbitration. And that's gratifying to me.

I think that raises this question of, "Well, if the business model, the gig economy, the labor platform that's premised on the fact that the workers on that platform are not employed by the platform, then that brings into effect all of the concerns that we might have about antitrust.

There's price-fixing. I think there's a good case that the driver pay policies are more generally even outside the ride-sharing context, that pay policies on labor platforms amount to vertical restraints that direct workers to supply labor in particular geographic markets or at particular times.

These are ways of controlling the work that workers do, ostensibly outside the sphere of labor law where if that degree of control were exercised, then the workers would be in return empowered with many rights as to hours of work, minimum wage, the ability to collectively bargain.

What the gig economic labor platforms bring about is a situation in which the workers who do

not enjoy the rights of employees under labor law are also, at least to date, not protected by antitrust law vis-à-vis the anticompetitive actions of the platform that at least directs what they do on a day-to-day basis at work if it doesn't legally employ them.

There's the case *Meyer v. Uber Technologies*, and I think there's potential for other cases that involve essentially scrutiny of the policies of the gig economy platforms as to their allocation of markets, for example.

I mean, just the very fact of the labor platform says, “This driver has to serve this customer and the drivers cannot compete over serving that customer.” That could be viewed as a vertical restraint potentially subject to antitrust laws.

The fact that the policies penalize multihoming, even though the platforms claim that they permit multi-homing on the part of workers, the fact that in practice, if you don’t supply a hundred percent of your labor, at least within a given shift, to a certain platform, you will not be eligible for the bonuses and, therefore, it'd make that shift not worthwhile.

That is another restraint on competition that makes the supposition of multi-homing really not applicable in practice. And therefore, these labor markets have a lot less competition going on in them than the platforms claim is the case.

I think that the issues that Ioana raised this morning with respect to the firm-specific labor supply elasticity can absolutely be brought to bear on the matter of the gig economy labor platforms.

In fact, some very good work has been to date estimating supply elasticities to the ride-sharing market as a whole, as well as to the individual companies who provide ride-sharing services.

This idea that the platforms have the ability to manipulate driver pay without much loss of labor supply on the platform gives them a great deal of market power that raises all of the concerns about anticompetitive behavior that we're here today to discuss.

MS. LUBELL: I want to just go back because you were using the term multi-homing and I want to make sure that everybody in the audience understands what that means.

So if you could describe multi-homing and the platform pay policies, and how that provides an incentive.

DR. STEINBAUM: Yeah. Multi-homing means that a single service provider on a platform — or I should say a single service provider could at any given time supply their labor via one platform for another.

If you use the ride-sharing market, you might see that a car has a sticker for Uber and a sticker for Lyft in the car. And ostensibly that means that that car is multi-homing or could be multi-homing because that driver might be driving for Uber or for Lyft.

And in theory what's supposed to happen is they're like receiving the possibility of taking up fares from one or the other and choosing the one that best serves them. The reality of it is quite different. I don’t think there's that much multi-homing that goes on.

I can tell you I for one used to be a bike messenger and there was no multi-homing there even though I was not a statutory employee. You know, I basically had to do what the dispatcher said and take the fares that were on offer, not despite the fact that I did not have access to the benefit of employment status.

And I think this idea that — undoubtedly multi-homing is of value, or at least the potential for multi-homing is a value to the drivers. But I think in practice, in the status quo, it is not as available an option as the public has been led to believe.

MS. LUBELL: A lot of what you talked about stems from this distinction between the

classification of workers as independent contractors versus employees.

How should we think about sharing economy workers? Do they fit well within the existing employee/independent contractor dichotomy? What is the appropriate way to think about them?

DR. STEINBAUM: Yeah. the existing independent contractor/employee dichotomy is something that has not been static at all. I don’t want to give the impression that there's this sort of well-established categories and you're in one or you're in the other. And if you're not in one or the other, then something's wrong with the system.

We have been eroding labor law in the sense that we have allowed many different work arrangements to be categorized as independent contracting that would previously have been categorized as statutory employment. And this is enabled by technologies that allow for supervision from afar.

But it's also been enabled by the erosion of legal standards. And at the very least, whatever you think about that evolution of labor law, I would say it certainly implies that antitrust has more of a role to play in the labor market than it once did because if we're saying that all of this whole category of worker doesn't benefit from the protections of labor law, like minimum wage,, in some sense you could construe labor law as even more — sort of regulating competition in the market even more so than antitrust law.

Antitrust is sort of a minimal set of regulations about preserving competition in the labor market. If more and more workers are not protected by labor law, which recognizes the imbalance of power between workers and employees, then you're sort of throwing workers into the realm of antitrust, where they, at least to date, are also not effectively being protected.

And I think that that represents a policy failure at the very least, you know, even recognizing the erosion of the traditional employment relationship.

MS. LUBELL: California recently passed a law that requires app-based companies to convert in-state workers to full-time employees with benefits and wage protections.

Following up on what you just said, how would you predict that this bill would change labor competition analysis for workers?

DR. STEINBAUM: Yeah. Well, I mean, so the companies have claimed that in response they will have to withdraw the ability of the workers to multi-home and force them to be exclusive to one platform or another.

I don’t buy that on their part. I mean, there's no reason why they would have to withdraw the ability to multi-home. I think there are certainly labor arrangements that exist in the economy that are analogous to multi-homing that are fully consistent with statutory employment status on the part of workers and that could be arranged.

On the other hand, I would say it's pretty clear that the reason why the platforms have availed themselves of these sort of technology-based controls over worker behavior as opposed to just saying outright, “Well, you have to only drive for Uber, you have to only drive for Lyft” is because they feared exactly the thing that has now come to pass, which is that they would then be forced to reclassify workers as — or sorry, independent contractors as employees, or at least the law aims at bringing it about. I guess it hasn't actually made that happen as of yet.

The companies could say, well, you know, now that this thing has been passed, we do require exclusivity. In some sense, the legal risk of doing that has now been removed because the bad outcome has already occurred.

But there's no reason why it needs to. And there could be a context, I would say, arising say from a collective bargaining agreement under employment status that multi-homing must be preserved in some form or fashion.

MS. BRASS: For those interested in this subject, there's been one trial to date on the employee/independent contractor question in the gig economy. It's one case that's actually gone all the way to judgment.

That's the case involving Grubhub. It was tried in front of Magistrate Judge Corley. It was a bench opinion. Unlike a jury trial, you can actually see a very extensive set of findings of fact.

Not to discount Marshall's personal experience as a bike messenger and what it meant for multi-homing, for example, Judge Corley does have extensive findings on how that was working at least in one geographic market in the independent contractor versus employee context, to the extent, the law clearly in California is changing, not merely because of AB5 but because of the Dynamex decision.

You know, it's clearly a very evolving environment in terms of what's an employee versus what's an independent contractor.

But for those who are thinking about this in terms of what's going to happen in the other 49 states, it's a nice counterpoint just to see an actually foliated, developed factual record on how some of these thigs are working in practice.

MS. MEKKI: I cannot believe it, but I think our time is up for this panel, and not just because the next panel was supposed to start 10 minutes ago.

(Laughter.)

This has been a fascinating discussion. I will say personally I am grateful to all of you for arriving today, for being as enthusiastic for the subject, as I anticipated, and for having this really fantastic discussion.

To echo something that Makan said this morning, it is an essential public good and all of us are grateful for your time.

(Applause.)

Panel 3: Labor Unions and Collective Bargaining

- *Jonathan Berry, Principal Deputy Assistant Secretary for Policy, U.S. Department of Labor*
- *W. Stephen Cannon, Constantine Cannon LLP*
- *Matthew Ginsburg, Associate General Counsel, AFL-CIO*
- *Jeffrey Kessler, Winston & Strawn LLP*
- *Derek Ludwin, Covington & Burling LLP*
- *Sanjukta Paul, Assistant Professor of Law, Wayne State University*
- *Moderator: William Rinner, Chief of Staff and Senior Counsel to the Assistant Attorney General*

MR. RINNER: Many thanks to Doha and the Competition Policy and Advocacy Section for I think really assembling a wish list of top lawyers particularly in the fields of antitrust and collective bargaining.

I'll go through the intros really quick. We have a 5:30 stop time and I want to hear as much from them as possible. You can read their bios, but I'll go down the line. Starting with Jonathan Berry, who's the Principal Deputy Assistant Secretary for Policy at the U.S. Department of Labor. Then going down the line, we have Derek Ludwin, who is a partner at Covington & Burling.

Then next is Sanjukta Paul, who is a law professor at Wayne State University. And then, I see Steve Cannon, who is the chairman of Constantine Cannon and the managing partner of Constantine Cannon's Washington, D.C. office.

And then, next to Steve is Jeff Kessler. Jeff is the co-executive chairman and co-chair for the antitrust, competition, and sports law practices at Winston & Strawn. And then finally, we have Matthew Ginsburg, who is associate general counsel for the AFL-CIO.

Let’s just jump right in. The focus of the panel is going to be on the labor exemption from the antitrust laws and, more generally, we're going to cover the past, the present, and the future of the intersection between these two areas of law, antitrust and collective bargaining.

As we'll discuss, the statutory and non-statutory labor exemptions have a long history and have proven integral in protecting the rights of workers to organize and collectively bargain.

When competitors come together and agree on the prices that they will charge to a purchaser of their inputs, antitrust lawyers usually see that as an antitrust problem and they're agnostic to the underlying reasons for such horizontal agreements.

It's unsurprising then that after the Sherman Act was passed, collective bargaining and unionization efforts were on a collision course with the antitrust laws. But, as you will hear, Congress passed a series of laws that are now known as the labor exemption from the antitrust laws. These statutes immunize labor organizations that are lawfully carrying out their legitimate objectives.

The labor exemption — statutory exemption enables workers to organize to eliminate competition among themselves and to pursue their legitimate labor interests, so long as they do not combine with a non-labor group. That's the words of the Supreme Court.

The statutory labor exemption, however, does not address agreements made between unions and employers. And so, recognizing that this would subject collective bargaining agreements between unions and employers to antitrust scrutiny, the Supreme Court inferred a non-statutory exemption to accompany the explicit statutory carve-outs.

The non-statutory labor exemption has two main underlying rationales: one, the need to provide for labor peace; and then, two, the desire to allow labor policy, rather than the antitrust laws, to control the realm of collective bargaining.

At the same time, one thing that units many antitrust lawyers, and we'll talk about this more, is an aversion to exemptions or immunities from antitrust scrutiny. In fact, in 2007, the bipartisan Antitrust Modernization Commission, on which Steve Cannon sat, issued a report on the state of antitrust law, with recommendations for future development.

In its discussion of exemptions and immunities, the report states, "Statutory immunities from the antitrust law should be disfavored. They should be granted rarely and only where, and for so long as a clear case has been made that the question would subject the actors to antitrust liability and is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general."

On the one hand, an aversion to antitrust immunity doctrines, even when there's an expressed statutory immunity, not to say anything about the non-statutory immunity. But on the other hand, we have this statutory federal policy to protect collective bargaining.

Some of the questions today will explore this tension. But, more broadly, we'll cover the purposes of the statutory and non-statutory labor exemptions and how the exemption is still being litigated today. And then, we'll talk about what might be next in this area.

To start, we're going to forego opening statements. But I'm going to have a kickoff question to each of our panelists that'll help us sort of look at some of the big picture issues in this space. And then, we'll get into some of the more applied topics, digital, sports, and so on.

I'll start with Sanjukta. Could start us off by providing some of the key background history underlying antitrust law's relationship to workers, including what we now call the labor exemption to antitrust law?

DR. PAUL: Absolutely. Thank you. I'm going to try to shake up our background assumptions about this topic a little bit and actually I'm going to do that by talking about what I would call the pre-history of labor exemptions, something we don’t talk about very much.

Workers and workers' organizations, in particular the Knights of Labor, which was the AFL-CIO before there was an AFL-CIO in the 1880s, were at the core of the social movement that helped to get the Sherman Act passed in the place.

Thank you. Sorry. And together with farmers organizations, historians agree that they were really at the core of this anti-monopoly movement. We know this as well because legislators repeatedly referred to this fact in the legislative record, which I spent a chunk of my summer reading from beginning to end. It's true.

And needless to say, neither of these groups of people dreamed that coordination between themselves, whether it was in the form of joint bargaining or joint price-setting as to their rates, would come within the ambit of the statute.

Now, we've heard sort of the conventional framework for why we today think this is the case. I'm going to try to unsettle our assumptions about that just a little bit.

Let me start with, first, the facts. Quite simply, the legislative record shows that legislators did not intend for the Sherman Act to bring workers' coordination or coordination between farmers and small dealers within its grasp. It's not really a close question. I'm not the first person to say this. Back in the early 20th century, this was quite a hot topic and early commentators made this point.

We also know that it was not legislators' intent because they said so over and over on the record. And they discussed it because they were worried that the courts would interpret it this

way, right? They talk about how can we draft it to avoid this possibility. And that is exactly what the courts did.

As I read the record in fact, the final redrafting of what we now know as the Sherman Act was, in fact, done in large part in an attempt to avoid precisely this eventuality. It removed some language about raising cost.

And they thought that took care of the problem by tracking the common law language of restraint of trade. As you all know, the restraint of trade doctrine at common law did not actually prohibit price-fixing per se. And this was not an issue in the same way at common law.

Now, to really understand this though, we have to understand what legislators were trying to do. And it was quite simple really. They were worried about the power of the trusts. That's why it's called antitrust law. The trusts were a new type of business form that had not existed until the 1880s. Trusts were like today's large corporations in all respects save one.

There was an additional formal layer to their corporate governance in the form of these trust certificates that were issued to shareholders in individual constituent firms in exchange for voting power of their shares that was held by a small centralized group of trustees that — kind of like the board of directors today, that now controlled all the constituent firms as one.

Trusts existed because state corporate law at the time made outright merger largely impossible. And the important thing to understand about trusts is that they were a mechanism to deal with what I would admit was sometimes destabilizing competition in the emerging national markets through a mechanism that was different from prior forms of market coordination because it concentrated power in much fewer hands than was previously the case when we had more regional and local markets.

As Senator Sherman said, "John D. Rockefeller might have been a fine man, but the danger was that he held more power over economic coordination than one man should."

The somewhat challenging thing for us today to understand is that the people and legislators were focused on the trusts insofar as they were like today's large firms, not insofar as they were like coordination between firms or individuals, tiny firms, Uber drivers, whoever.

And this is the precise opposite of the priorities that today's antitrust law sets, labor exemption or no labor exemption. But the act, while it perhaps could have been drafted more clearly, absolutely was aimed at the concentrated power of the trust, which really is represented by large corporations today.

And again, the dispersed nature of worker and farmer coordination was not considered an antitrust problem. What about those early cases that preceded the New Deal and preceded also the Clayton Act's labor proviso?

The courts did not see this the way that I see it and they largely ignored legislative intent on both counts. I won't go through the whole development, but I want to highlight two Supreme Court cases. One is the one that all labor lawyers know as the Danbury Hatters' case, *Loewe v. Lawlor*, and this actually built on a couple of federal district court decisions.

And in that case, the Supreme Court summarily dismissed legislative intent with frankly a rather misleading statement about attempts to pass a labor exemption having failed. That's not the case. The legislators rewrote the statute, thinking that no labor exemption was now necessary, right?

The other thing I want to highlight about *Loewe v. Lawlor* and the other cases of that period that preceded the Clayton Act and preceded the New Deal is what their rationale was for breaking up labor strikes and boycotts. It was not that they were anticompetitive or akin to price-fixing.

And on the contrary, many of these cases actually said that collective bargaining over wages and working conditions would actually be fine, that that — they either implied or said that that itself would not be a problem. Rather, they held that employers had property or property-like rights that were threatened by many types of common strike activities. And furthermore, the federal courts read those specific employer rights into the federal antitrust law.

At the same time, around this same time, we had a trio of cases on the merger side, *E.C. Knight*, *Northern Securities* and finally, *Standard Oil*. And I won't go through all of them. But in *Standard Oil* is really where we got the modern distinction between unilateral and multilateral conduct. That is not something that legislators contemplated. It did not exist in the law before.

And prior to *Standard Oil*, for example in *Northern Securities*, the court actually moved towards treating horizontal mergers akin to price-fixing between competitors. And that is in line with the legislative intent that I'm highlighting that was concerned with concentrated power and with the problem being concentrating coordination rights in too few hands.

And again, this was a major step in the process that eventually made coordination between firms and individuals the, quote, "supreme evil of antitrust," which it was not originally, rather than focusing on concentrated corporate power.

Now, very briefly, I think that my colleague is going to talk about the statutory and non-statutory labor exemption. But what we now know as the labor exemption to antitrust was articulated, I would say, in a pair of Supreme Court cases in the early 1940s, *Hutcheson* and *Apex Hosiery*.

And these really knit together the labor proviso that can be found in section six of the Clayton Act together, which had been rendered more or less a dead letter by the Lochner-era federal courts, knit that together with the Norris-LaGuardia Act, which as of New Deal vintage, and to some extent also knit together judicial interpretations of the Sherman Act and the Wagner Act as well, which is the NLRA, or the basis of the NLRA.

These cases said that taking labor costs out of competition was not a violation of the Sherman Act. Indeed, it's important to note that these cases said that that's true as a matter of the Sherman Act, that that is not what the Sherman Act implied, not just sort of as it was later modified by whatever the labor exemption is.

And this is indeed, I would submit, consistent with a careful reading of the Lochner-era labor antitrust cases as well insofar as those cases focused on the means by which workers sought to achieve union shops or to better their wages and working conditions, often involving secondary action, or other activities that the courts considered to be interference of employers' property rights, as I mentioned, rather than being concerned with the end of collective bargaining, which we just assume today is an antitrust violation.

I just want to also briefly say that we wouldn't accept the reasoning that the Lochner-era courts used today that focused on the means because — well, I don’t have time to go into it. But they really focused on the social status of workers and whether they were sort of fit to engage in the kind of coordination that businesspeople were, which is quite alien, I think, to the way that we would think about this.

And however, we do use a rationale that we cannot find in these cases about collective bargaining itself constituting antitrust violations. I think I will leave it there.

MR. RINNER: Great. Thanks, Sanjukta. I'll go over to Jon to give us a bit more table-setting, specifically from the labor perspective. How did the background employment law rules influence antitrust law consideration?

MR. BERRY: Thanks, Bill. I'll start by making the conventional distinction between labor

law and employment law. Labor law speaks to the process for collectively negotiating the employment relationship. The rest of the panel is going to talk about how labor law intersects with antitrust law.

I just want to flag one feature, which is namely that in a unionized workplace, the National Labor Relations Act requires unions and employers to bargain over certain core terms of the employment relationship such as wages, hours, time off, benefits and workplace safety.

Employment law, by contrast, goes to the substance of those core terms and sets some substantive floors on those. Here's just a quick general overview for those who may not know.

With these topics, wages and hours, the Fair Labor Standards Act sets a minimum wage and requires overtime after 40 hours a week. I'm speaking in generalities. There are tons of exemptions and lawyers make a lot of money off of those.

Time off, another one, Family and Medical Leave Act guarantees up to 12 weeks unpaid leave for illness and for family care. Congress is of course currently considering whether to add some kind of paid leave benefit mandate as well.

Benefits, the Affordable Care Act requires many employers to offer subsidized health insurance. And ERISA, the Employee retirement Income Security Act, puts a host of obligations on employers who offer retirement or health benefits.

Safety, the Occupational Safety and Health Act puts a general duty on employers to protect employees from workplace hazards and to comply with a variety of safety standards on specific topics like chemical exposure, fall protection, and dangerous machines.

For workers who are covered, and that coverage issue is very important — we'll come back to it later — for workers who are covered, employment laws set a fairly comprehensive floor for how those workers will be treated.

All else equal, again, big caveat, this floor reduces the relative desirability to workers of collective action. If the main concern at your workplace is safety, maybe the OSHA Act does enough to reduce or address hazards that you don't think a union is worth the lift; likewise, with the FLSA perhaps, if your main concern is overtime.

To the extent that antitrust law concerns itself with the question of workers' practical economic incentives, it should take into account, I think, how employment law speaks to at least some of those incentives. And that's all I wanted to say.

MR. RINNER: All right. Thanks, Jon. I'll go over to Derek. Sanjukta gave us a very useful and informative discussion of some of the background principles and the origin story of what we call the labor exemption today.

I guess fast-forwarding to today, what do we understand as the purpose of the labor exemption and do you have a different perspective from Sanjukta that you might add?

MR. LUDWIN: Sure. I'm not sure I have a different perspective. I think I have some additional modern-day gloss that I will add.

MR. RINNER: Sure.

MR. LUDWIN: As you heard, labor law looks at the process of bargaining and it protects the process of bargaining and there are many cases that talk about how national labor policy favors free and private collective bargaining. And it does so between two sides: labor and management.

And the purpose of the exemptions together is to protect that process. Taking them in turn, the purpose of what is known as the statutory exemption is pretty simple. It protects from antitrust scrutiny, quote, "unilateral conduct," sort of flowing from *Standard Oil*, unilateral conduct by a union acting on behalf of its members.

Congress did not want unions to be considered cartels and tried, and it took more than one try,

but eventually got enough legislation in to make that happen.

And it didn't want — because unions are not cartels, it did not federal courts enjoining them from doing all of the things that labor law says that they can do. Again, this is the unilateral union actions. And the Congress didn't put in an express exemption.

What it did is it put in a prohibition on injunctions. But the, quote, "statutory exemption" which flows from that prohibition on injunction has as its basic purpose protecting one-half, or really one-third, of this bargaining process.

The non-statutory labor exemption protects the other two-thirds, the other two parts of this bargaining process. And really what it does, its purpose is to give practical content to the statutory exemption because it's all very well for the union to have an exemption to go out and unionize and maybe to strike and maybe to demand collectively terms and conditions of employment.

But that doesn't really get anyone anything if the union can't then agree with management on a contract that gives effect to where they've landed on these terms and conditions.

The non-statutory labor exemption, it is read, it's implied to cover concerted conduct and it does so in two respects. First, as I've said, it covers that, the agreement, the concerted action between the union and management to give effect to the fruits of the bargaining process.

But the other thing it does is it recognizes that management isn't always unilateral on its side. The law favors, national labor policy favors multi-employer bargaining units.

And if you are going to have a group of employers working together on the other side of a union working together, you know, with its members, you can't give effect if the agreement among those employers about how to respond to a demand by a union for an industry-wide term or condition, if that's going to be subject to antitrust scrutiny.

The purpose of the statutory and the non-statutory exemptions working together are to protect this broader, sort of soup to nuts collective bargaining process and the agreements that arise as part of that process.

But an important part of that is to preserve the balance that Congress intended in this process. Labor law, and Jon can speak in much more detail than I can about it, but labor law and the collective bargaining process is predicated on this balance between things that unions can do, strikes, and things that management can do, lockouts.

And what these exemptions acting together do is protect both and maintain that balance that exists and is supposed to exist in the collective bargaining process.

MR. RINNER: Thanks, Derek. I'll turn to Steve next. We've heard a lot about what the labor exemptions protect, the activities with the collective bargaining stage in terms of union organizing activity. What doesn't it protect? What are some of the outer boundaries of the labor exemption as we understand it today?

MR. CANNON: Well, it is interesting that it took, what, 40 years from 1890 from the Sherman Act to at least 1932, to Norris-LaGuardia to clarify what, I'm convinced now, was clear. You've convinced me of that. But, so which actually was pretty speedy for the Congress, I guess. 40, 42 years is not that — is not that slow.

But, I mean, this, the whole idea of what the exemption covers, both the statutory and non-statutory, it has somewhat of a parallel like in the state action doctrine, which antitrust folks in the room know is this question of conduct of state entities, et cetera, not being subject to antitrust liability because it's the act of the state as sovereign and not — and so therefore anticompetitive activities you cannot reach a state on.

That actually, as folks know, is actually court-made law. It's not statute-made law, which

makes it even more complicated.

But here, there has been a pretty good rollout, if you will, of cases over the last 20, 30, 40, 60 years about what it really does mean. And, you know, when you get back to *Hutcheson*, which really started this entire thing about, gee, you've got to make sure that the union is acting in its self-interest and it is not acting with — this is a double negative, it's not acting with a non-labor organization, if you can follow those double negatives.

And that's what the courts have tried to flesh out. There are so many of these cases around that it's pretty easy to have any number of examples. One, of all things, back 30, 40 years ago involving an international longshoreman, you would not be surprised to hear that if the union decided, in protest, not to unload ships because of the Soviet invasion of Afghanistan, that's not covered. What a shock.

However, there's another case involving the National Basketball Players Association where decertification of an agency for players was found to actually be in their self-interest because it could have an impact on terms and conditions of employments that the players would have.

There are all sorts of other cases and another landmark case that we haven't talked about is *H.A. Artists v. Actors' Equity*. The Supreme Court decided in 1981 that essentially reaffirmed what everybody calls now the economic interrelationship test and held that agents that represented equity members who had agreed to abide by the terms and conditions for franchising those agents in fact did qualify as a labor group.

When you start parsing through these cases over the years, sometimes you can just tell people knowing what the broad principles are. There's a little bit of guessing going on whether or not the particular activity that you are wanting to do would cover it.

And then, you get to the non-statutory exemption and it's essentially a three-part test. Again, easy to say, not terribly easy to interpret on occasion, although I think there are plenty of cases around the circumstances where there's no question about it that the non-statutory exemption applies.

One is intimately related to the mandatory subject of collective bargaining, such as wages, hours, terms of working conditions. It does not have the potential to restrain trade outside the elimination of competition in wages and working conditions. And then finally, generally arises out of the collective bargaining setting.

And kind of the landmark case here or the key case is known as the *Connell* case in the Supreme Court which essentially said if a union, a plumbers' union, is going to a general contractor and trying to get that general contractor to agree that that general contractor will not use a non-unionized plumbing subcontractor, then that is not covered by the exemption.

On the employer side, there are other examples of where the exemption simply will not apply. An interesting one from the Ninth Circuit, any number of years ago, involving a grocers' union action where the court ruled that a group of groceries, or grocers, could not come together and make an agreement that if one of the grocers was a subject of a strike, that the other grocers would all come together and basically have a revenue-sharing agreement.

Gee, that sounds pretty obvious that you couldn't do that. But you'd be surprised. People have — that case is — obviously that happened.

There are all sorts of other agreements that I won't go into. Time is pretty limited. But there are just any number of cases like that about — and the question is always where do you draw that line between something that is affecting the labor market and something that is affecting essentially the commercial market. Thanks, Bill.

MR. RINNER: Thanks, Steve. It does sound like there's a lot of mischief out there still —

MR. CANNON: There is. Yeah, there is.

MR. RINNER: — notwithstanding these clear limits. So why don't we go to Jeff, speaking of mischief — I'm only kidding.

The labor exemption has attracted a lot of attention in the sports context on some cases I'm sure you've been involved in. Could you walk us through how courts have recently applied the exemption in this area?

MR. KESSLER: Yes. In sports, it's been really remarkable because it's mostly been about the non-statutory exemption. There's very few sports cases actually involving the statutory labor exemption, about the union. But there a quite a bit — do this? Okay, sorry.

There are quite a number of cases involving the non-statutory exemption. And most of the cases have been the employers in a multi-employer bargaining unit, basically the teams in the league, invoking the exemption against the union.

If you go back through the history, as we heard, of where the labor exemption came from, we used to like to say that like Samuel Gompers would be turning in his grave because it became a weapon for employers to say even though what we want to impose, let's say, at the labor law — so at impasse, you could impose your last best offer in bargaining.

Or you can continue the status quo of a prior restriction. That could be imposed by the employers and they would assert the non-statutory labor exemption, saying it protects the collective bargaining process and therefore we are protected.

This was battled out by various sports unions against the teams and the employers in a whole series of cases as to when you'd have coverage and when you wouldn't have coverage in the 1970s through the 1980s.

And it came to culmination in a Supreme Court case called *Brown v. Pro Football*. And in *Brown v. Pro Football*, the Supreme Court, much to my personal chagrin, because I did not agree with the result, ruled that as long as there is a labor relationship between the group of multi-employer bargainers and the union, even if the collective bargaining agreement expired, even if you got to a point of impasse in the bargaining, then the non-statutory exemption would continue.

What did this lead to? It led to the plethora of strikes and lockouts that you've seen in professional sports since *Brown v. Pro Football* because the consequence of this is that the only choice for the sports player unions to be able to assert antitrust rights against their employer unions essentially has been to end their union. They disclaim it, which you can do under labor law.

You can actually get a majority of workers to say I disclaim you as a union. If you're a certified union, sometimes there's a decertification election. But you have this perverse situation where workers are fighting to get rid of their union and you have the employers — and this should tell you something as lawyers.

The employers say, no, you've got to stay a union. We want you to be unionized because we need our non-statutory labor exemption. I remember very well, Matt, the first time the NFLPA, which was a member of the AFL-CIO had to go explain to the AFL-CIO why it was good for the workers for them to stop being a union. This was back in 1989.

And you can imagine that the general counsel at the AFL-CIO spent a few minutes thinking about that. but eventually came to the conclusion, and the AFL-CIO supported us, think about it like we became like right to work advocates, that the union members didn't want to be in a union so that they could invoke the antitrust laws against the employer restraints.

Most recently, that has played out in the context of lockouts because the preferred strategy by

employers in these leagues in recent years has been not to impose their last best offer or continue the status quo but to conduct a lockout of the workers.

And we had the last major case in this was the *Brady* litigation, which was in 2011 in the district court of Minnesota. And the first argument there was so the union disclaimed, just before the end of the collective bargaining agreement, and filed an antitrust case before Judge Nelson.

It ended up in the district court of Minnesota seeking a preliminary injunction against a lockout because, absent a non-statutory labor exemption, a lockout would be a group boycott of all the employees, probably a per se illegal group boycott against the workers in that context, absent an exemption.

So, a preliminary injunction was sought. And the fight by the NFL was, “Well no, you really can't stop being a union.” And they went to the NLRB and they said don't let them stop being a union. They're refusing to bargain with us in good faith.

The NLRB ended up never deciding that. They argued to the court should stay its ruling until the NLRB acted. The court rejected that and then the court found the exemption had ended with disclaimer because it was no longer and purpose for the exemption once there was no longer a collective bargaining relationship and enjoined the lockout.

Then enter the Norris-LaGuardia Act. On appeal, the big issue was not the non-statutory labor exemption. It was the Norris-LaGuardia Act. Now, the Norris-LaGuardia Act was another pro-labor union statute that was passed to essentially prevent state courts, mostly were the culprits but federal courts as well, from enjoining strikes.

That was really what the Norris-LaGuardia Act was intended to do. It doesn't say anything, by the way, about lockouts. However, it's been interpreted to also protect again sort of the idea that there's a non-statutory application of the Norris-LaGuardia Act to protect lockouts.

So, the issue was, “Well, if the labor exemption to the antitrust law is ended, should the Norris-LaGuardia Act still protect the employer's lockout?” And what the Eighth Circuit decided in a 2-1 decision is they said yes and no. They said that it protects employer lockouts for workers who are under contract.

But it may not protect employer lockouts for free agents or new players who were coming into the league as rookies. But it reversed the injunction that was in effect at that time.

Now, so the one interesting question about all this, because it makes sort, of, your head explode in terms of what you would think should be liberal/conservative issues on this, if you think about the Supreme Court.

How would a textualist think about a non-statutory labor exemption that's used by employees against unions when you have a specific statute, Section Six of the Clayton Act that creates an exemption and no other text in any congressional law that creates a non-statutory labor exemption? I'm just asking.

MR. BERRY: Did you want me to answer that now or later?

MR. RINNER: Oh no, you'll get your chance. We're going to circle back to sports because that was great. But I do want to give Matt a chance to jump in. And it's going to shift gears a little bit to actually where the last panel ended, on the digital question.

How should we think about how the labor exemption has been applied or should apply in digital markets?

MR. GINSBURG: Great. Thanks, Bill. And actually, I hadn't planned on it, but it's a nice segue from because you don’t think of your average NFLPA member and your average Uber driver as having a lot in common.

But in many ways, they both really depend on this intersection between the labor exemption

is, in a way, the intersection between antitrust law and labor law in terms of their rights. And I'm just going to frame the issue because I know we're going to get into it more.

But, if you take Uber and Lyft and the other app-based companies at their word, all of the people that they've retained to do the work are independent contractors. You can guess where I stand on that question. But let's just take them at their word for a moment.

The question then is whether if they organize, if they organized a boycott, if they organized to bargain, you know, do they violate — or do they fall within the labor exemption or are they violating the antitrust laws.

And just as a first cut, it's not entirely clear from the case law what the answer is because we know — we know from *Columbia River Packers* about selling fish and we know from the Grease Peddlers case about selling yellow grease, whatever that was back then, that the sale of commodities by small businesspeople is the sort of thing that's outside of the labor exemption.

When you get together to set the price of grease, whether or not you do it through a union form or not, that's outside. But when you have people, as I think is generally true with many, if not most of those app-based companies, who are basically selling their labor and very little else and have almost no capital investment in the work they do and are in the sort of common law agency sense very much controlled by the app or the coordinator or the company, however you want to characterize the control, that looks quite a bit different from, you know, *Columbia River Packers* or the Grease Peddlers.

Just to frame the question, and we can get more into it, the question is, you know, to what extent is the labor exemption coextensive with what the NLRB says is an employee versus an independent contractor, perhaps what some other agency says, whether the Department of Labor says you're an employee or an independent contractor, whether a state department of labor or state unemployment office says you're an employee or an independent contractor or is there something more fundamental about the purposes of the antitrust laws that maybe would not intend to get at people who are basically just selling their labor and have very little capital investment in their business.

And, the other sort of touchstone in this area of course is *Superior Court Trial Lawyers*, which was not a labor exemption case but a case where you had defense attorneys here in the district, public defenders in the District who conducted a group boycott to get the rates raised for reimbursement for taking on public defense cases.

The Supreme Court of course found that that was unlawful under the antitrust law. But it was not litigated as a labor exemption case. So, is there something different about people who perhaps fall right over the line into independent contractor status, but really the services they're selling are unskilled services?

They're driving their own personal vehicle which they use to take their kids to school and all the other things as well versus perhaps a professional who's an attorney or an accountant who gets together. These are the questions. I don't think we have answers, and I know we're going to have a bit of a debate and discussion about that.

MR. RINNER: All right. Thanks, Matt.

MS. PAUL: Can I add one thing too?

MR. RINNER: Yeah. I was going to go to you next, but please go on.

MS. PAUL: Oh, sorry. Well, I was just going to say that I think one thing I just want to add to what Matt said is that *Columbia River Packers Association* and the Grease Peddlers case, neither of those involved sort of primary joint bargaining with the immediate buyer of the commodity.

And so, I would submit that it was not really teed up until *Superior Court Trial Lawyers Association* and then obviously that can be distinguished in certain ways. Also, I think that was wrongly decided and there was a dissent, but —

MR. RINNER: All right. Good. Well, I'll stick with you, Sanjukta, and taking you from the legislative history of the Sherman Act all the way to the present day on these digital questions.

We could talk of a new gig economy and how digital markets are really causing many to question whether the existing antitrust standards are still fit for the job. Others take the view that we have the tools. It's just a question of how we apply them and how we apply them in an intelligent way.

Maybe you have some of the answers to the questions that Matt posed. And I'll start with one of them. Should the antitrust labor exemption turn on the employee versus the independent contractor classification?

MS. PAUL: Yeah. I think Matt started to talk about that. I mean, I think I would say it's settled that the labor exemption, you know, as a matter of existing law, that it's broader than just employee status.

But I think there's questions about how much broader and I do think that the gig economy tees up that question in various ways. I would just add a couple of things. One is that the mandatory arbitration clauses that Uber includes in its contracts with drivers have frustrated, I think, the judicial resolution of the independent contractor versus employee issue.

I also would just — this was started to be talked about at the end of the last panel — the platform's own extensive coordination of the ride services market I think raises novel antitrust issues as to them. I think we should discuss that as well if we're discussing the coordination of the drivers.

And also, I think this was mentioned in the last panel, but that the kind of market coordination that the platforms are engaging in also constitutes control over drivers in a way that militates toward I think the employee status of the drivers.

But I think that — I think just really briefly to Matt, because we're not going to decide it all right now, I think that the labor exemption is clearly broader than just employee status. I think we don’t know exactly how much broader.

I do think that the early cases like *Columbia River Packers Association* and the Grease Peddlers definitely involved secondary action. In that period, we really didn't have any cases saying that just straight up collective bargaining is a violation of the Sherman Act, absent any type of exemption.

In fact, I think that most people would have assumed that that is not the case. And even, for example, Thurman Arnold, who prosecuted — did not want a broad labor exemption at the time, I think took a more pragmatic attitude toward coordination among labor unions and sought to prosecute it where it was economically or socially harmful in some specific way, not in this sort of generic manner that it's a distortion of markets for workers to engage in coordination.

So, I mean, I think we really need to get away from that concept. I think that's a very, very new concept actually, relatively new in antitrust law.

I think, if I may add one thing, I think that the interesting thing about the platforms is that they tee up that question in a new way because they stretch the boundaries of what a firm is. We assume that firms in antitrust law are able to engage in price-setting internally, right?

If you go back to what I was saying originally about the legislative intent, the original trusts at which the law was aimed were functionally large corporations. They were not — I mean, they weren't sort of cartels, right?

What I call in my work the firm exemption to antitrust law, which we should be talking about if we're talking about the labor exemption to antitrust law, is, first of all, should be on the table when we're discussing the labor exemption.

The Wagner Act, in its text, talks about this and says that one of the purposes of labor law and of the labor exemption is to create true freedom of association for workers to parallel the freedom of association that capital already enjoys through the firm.

I think that this has to be part of our conversation because in the form of a firm itself, you already have association. It's not one person. It's not, right? There's already economic coordination happening.

Bringing this back to Uber, I think that Uber and the other labor platforms really are useful, in a way, insofar as they stretch sort of our conception of what a firm can do and what its boundaries are.

They sort of claim something like single entity status, or at least they want the benefit, you know, whether it's a joint venture or something, they want, you know, essentially the benefits of entity status for antitrust purposes and they want to disclaim that status for labor law purposes. So, they want the benefits and not the responsibilities or the risks, right? It's not just labor law either.

But without even getting into that normative question though, we can see how it is different from prior sorts of firms that were firms that owned plants that were supposed to have efficiencies, that reduced cost in some way.

We just assume that those efficiencies, first of all, productive efficiencies can be imputed to the services economy. I think that's not obvious at all. And that is, at a deep level, what leads us as a default matter to condemn coordination among Uber drivers but to sort of have a mindset — I don’t think that this is all — that it's sort of blatant hypocrisy. I think we're all — we sort of are trained to think this way.

But to see Uber as a firm that is entitled to deference, even when now it is technically going beyond what conventionally were the boundaries of what I would call the firm exemption to antitrust law because it is coordinating the prices of services that it is telling us that it doesn't sell and that are sold by supposedly independent businesspeople, right? And they're engaging in lots of coordination of that market beyond just the prices as well.

Without even — I mean, I obviously have my views on this. But even apart from my views or what we might disagree upon, I think we should be able to agree that this unsettles some of the deeper assumptions of antitrust law.

And I just want to get this in there, that we are talking about the labor exemption on this panel. The fact is there are unstated exemptions to antitrust law that are written in. If we go back to first principles, property is actually an exemption, right? Federal antitrust law defers to state property law all the time, which is interesting actually because of federal supremacy.

And it was internalized into federal antitrust law fairly early, as I said, in that trio of early cases, *Knight, Northern Securities* was an outlier and then *Standard Oil*.

But the reason why there are always exemptions is not necessarily a bad thing. It's because economic coordination is inevitable. There is no such thing as pure competition. The firm itself is a limit upon competition.

Let us have an honest debate about what types of limits on competition we are willing to cognize or accept or not as a matter of first principles and why exactly is it that an Uber driver's association is a distortion of market outcomes whereas Uber's price coordination is efficient. We really need to approach this with fresh eyes.

MR. RINNER: I assume everyone on the panel agrees with all of that? Would anyone like to chime in or should we — all right, well so —

MR. LUDWIN: I will, for the —

MR. RINNER: Okay.

MR. LUDWIN: Expressing only my own views, to be clear. But I think it goes back to a premise that's baked into that whole calculus, which is that Uber controls prices and — because the other way to look at it is that Uber is a technology platform that really makes markets, almost like an auction, where you have drivers who can choose to accept a ride or not accept a ride, who can be on the Uber platform, the Lyft platform on neither, who are incentivized by Uber's algorithms during rush hour to still work by getting paid more for the same ride.

And on the other side of that platform are probably almost all, if not all of us who, go downstairs, open our Uber or Lyft app, take a look at what it's going to cost me to go home now and decide either I accept that or, you know what, I'll take the Metro today.

The notion of control is so important I think to the construct and, I mean, it's a premise that we have to question because if Uber is not a firm in the sense of controlling price, but it is really a market-maker, then it's not the analogue, for labor law purposes, it's not the management side of a group of drivers who are independent, again, who are not signed by a contract to have to do anything with this particular employer.

So, an association of those drivers collectively agreeing to, you know, not participate on the Uber platform — and I'm making this up — for without x or y term doesn't necessarily flow. Two, Uber, on the other side, is the bargaining.

Now, it could be and there could be, as you said, an argument for an exemption on the drivers. I haven't thought through that hard enough, and I agree with you that the non-statutory labor exemption extends more broadly than just to people who are currently in the union. But I do think the control point matters.

MS. PAUL: Can I very, very briefly respond to that? I think the main thing that I would say on this control point though is that I think this misses the point, to be honest, because if we don’t say about cartels that there's a lack — that the cartel is mandatory, that they've got gangsters out there enforcing.

That is not a requirement of section 1 liability, right? Entirely voluntary agreements to set prices are illegal under section one, as it's currently interpreted.

I don’t think we should be setting — I don’t know why we set this higher standard where we say that Uber has to be actually controlling them and that the question is whether Uber drivers have the freedom to decline and not participate in this market.

The point is that there is still effectively this, for a moment, an analogue to a cartel but that's controlled from the top down by Uber, right? And I think that the only way — I haven't frankly thought through this sufficiently and I think your rejoinder is interesting and I'll think about it more.

The way to make sense of your comment, to me, is that this is like *Chicago Board of Trade* and that Uber is like the New York Stock Exchange or like the Chicago Board of Trade or something and it's a market-maker in that sense.

I don’t think that's a viable argument in the end. But I think that's the direction you have to go to make it work. I don’t think that on the cartel point that there is this difference, that the control point I think is not the way to distinguish the two forms of coordination.

MR. RINNER: I want to bring in our labor expert, and I think one thing is clear, is that so much turns on this employee versus independent contractor distinction.

Jon, could you — so leaving antitrust aside, how does labor law treat this distinction between an employer — independent contractor on the one hand versus an employee on the other?

And then, for gig economy workers, I mean, as we're talking about, does this binary distinction really make sense? Is it the best policy? Is there any middle ground that might afford workers some rights that traditionally independent contractors did not enjoy?

MR. BERRY: Thanks, Bill. And I promise I'll bring it back to antitrust at the end. In both labor law and employment law, this employee/contractor distinction is pretty foundational.

Employees have all those rights that I walked through earlier, overtime entitlement, safety protections, organizing rights, the works. Independent contractors do not, being generally treated as independent business owners, capable of taking care of themselves.

And so, unfortunately, while the stakes are high when it comes to which side of the line a worker falls on, that line isn't necessarily the clearest.

Under the Fair Labor Standards Act, for example, we tend to look at the degree to which workers are economically dependent on a business. Economic dependence is a pretty thorny concept, meaning that sometimes you have business models spring up, like some of the ones we're discussing today, where those models don't fall cleanly on one side or the other. And again, the stakes are high.

To your second question, Bill, I think that a — so a binary distinction for gig workers means either no protections while they get — while they get to keep working under a current business model or a whole host of rights and entitlements at the risk that the business model changes radically or just disappears.

If I'm a company whose smartphone platform connects handymen with projects and I'm suddenly the employer of all those handymen, as maybe is just happening now in California, the full suite of federal workplace safety rules now applies to me, this despite the fact that I may know very little about these handymen individually and the fact that I provide no onsite supervision to their work whatsoever.

Maybe I'm forced to provide — furnish live supervisors, if not one-to-one, then maybe on some kind of random rotating basis. Maybe I can absorb that cost, maybe I can't. And if I can't, then I shut down and a whole lot of handymen are now going to miss out on the work opportunities I was connecting them with.

Given the sharp binary here, yeah, I do think that the question of an appropriate middle group is something worth exploring. There are legislative proposals for some sort of intermediate independent worker status that would confer some, but not all of the rights and benefits that typically come with employee statutes.

The challenge there I think is really drawing the right line. And I don't know whether anything close to a societal consensus has emerged about how to draw it. While it has some precursors, the gig economy that we're talking about has really only started to take its current shape in the last decade.

Contrast that with the employee/contractor distinction, which mostly only started carrying federal workplace rights and obligations as of the New Deal, after Anglo-American law had had a century to really digest and unpack the meaning of the Industrial Revolution.

Instead, bringing it full circle, I'd like to suggest that an expanded antitrust exemption is something that's worth exploring further. Instead of getting into the substance of which workers ought to have what rights at what cost, an expanded exemption would presumably remove a cloud on a process, namely some kind of a collective action outside of the NLRA that those workers could use to at least attempt to negotiate terms and conditions of work that may make

sense in the context of a particular service like ride-sharing without killing the whole model. There's a lot to think through there. I'm glad we're having this conversation.

MR. RINNER: Thanks. I promised in our time we would get back to sports. And I want to start with I think the question we left off with Jeff, and I think I'll put it to Derek, because I think you had a reaction.

Is the non-statutory labor exemption just simply too old for employers to, you know, go after the players and hurt them in this context? What do you think?

MR. LUDWIN: No. But I'll expand. To provide context to my answer, which is no, you know, go back — go back to the beginning of the relationship. The NFL Players Association, players decided to get together to enter into a collective bargaining relationship with the employers, collective employers, the teams in a given league.

As part of that, they went and they demanded collective terms, league-wide terms that would apply to all of the teams. This is the classic collective bargaining process at work that Jon talked about.

And we know from labor law, section 8(b)(3), that a union may withdraw from collective bargaining with a multi-employer bargaining unit only before bargaining on a new contract has begun.

If you all think about the airport, there's a big sign above the TSA screening that says once you start this process, you can't turn around and go back. And there's lots of good reasons for that. And labor law has lots of good reasons for saying we want these parties to bargain.

We're going to make them bargain. We're going to make them bargain in good faith, which means once you take on the protections and the weapons of the collective bargaining process, which, for Jeff's clients involve strikes and collective demands, you can't just suddenly turn it off and say, “You know what, that's not working very well. I didn't like the counteroffer, we're done.”

What Jeff refers to as the weapon of the non-statutory labor exemption actually presupposes the weapon of the antitrust laws. What the Supreme Court said in *Brown*, and I'll read it, because it's pretty apt, "Congress, through these exemptions, hoped to prevent judicial use of antitrust law to resolve labor disputes." It's that simple.

This whole decertification effort is an effort to weaponize antitrust law in the middle of a collective bargaining process. Now, I say in the middle of. Jeff and I can disagree of when that collective bargaining process ends.

The Supreme Court agreed with us on that, that it survives past impasse. Jeff and I would both agree that no one has decided how much longer past, and we can come back to that if Bill wants us to later. But the basic point is the weaponization here is not of the statute, of the statutory exemption. It's of antitrust law to begin with.

MS. PAUL: An alternative way to look at that is that it's the weaponization of labor law by employers to prevent competition in one of the few instances where workers have sufficient bargaining power to make it work for them.

MR. KESSLER: So, Derek's history doesn't go back far enough.

(Laughter.)

And it doesn't go up to the present enough either, so.

MR. LUDWIN: We're going back to *Madison v. Marbury*.

MR. KESSLER: Starting way back, starting way back, in sports, the teams got together and imposed joint terms before there was any labor union in any professional sport.

So, it was not a question of players first came together and forming labor, saying we want you

all to bargain together. It was a response to the fact that the competing employers set terms and conditions of employment collectively, which, by the way, was an antitrust violation before any of these unions were formed. That's the actual history of how it came about.

But going forward, what *Brown* makes absolutely clear is that the labor exemption does have an end point. It says that unequivocally. You're right. It doesn't identify exactly when that is, except it says it probably — well, it says two things.

One, I believe it says that if you decertify, disclaim, that's the end point because the relationship ends. It suggests even that if you had an impasse that was so long that bargaining became meaningless, you might even end the exemption even before that. But wherever that point is, it's there somewhere.

And this flows from another part of the NLRA, which is Section Seven, that says that just like workers have a right to collectively bargain, they have a right not to collectively bargain. And so, what happens in these cases is that they decide that bargaining is actually not in their interest, for whatever reason, and I can give you all the reasons why in sports unions have concluded that for one reason is striking is extraordinarily difficult when your average career is three years long and the employer's average lifetime is multigenerational passing on of the team.

It sort of distorts the ability to use strike as a meaningful weapon against employers. And if you can't strike, but they can lock out, then labor law doesn't seem like such a good remedy for you, while antitrust law would be a great permanent remedy for the workers.

And what's inevitably happened is when unions have disclaimed in sports, again, a total reversal of any other employment context. It's the employers who insist the unions get reformed as a condition of settling with the workers.

Going back to the original disclaimer back in 1989 through 1992, when the antitrust action was settled, which was the *Reggie White* case, there's a provision in that antitrust class action that says if the union's not being formed, I think it was in 60 days or 30 days or whatever it was, it was a provision put in at the request of the NFL teams, then the NFL had the right to void the class action settlement and go back to litigating.

They were demanding that the union be reformed. And the union was reformed because they liked the settlement and they didn't want to give it up and it's there.

But again, to me, this is sort of like a perversion of whatever the labor exemption meant, whatever the non-statutory labor exemption meant, it wasn't supposed to be, and I agree with my colleague here exactly. It's a weaponization by employers of the antitrust non-statutory labor exemption to use against labor in that context.

And just to give you one other twist on this to tie sports to the gig economy and independent contractors, there are athletes who fit into this kind of amorphous bucket as well, like tennis players, for example.

And so, what tennis players have done historically because they're treated as independent contractors. They couldn't formally unionize at all, is that we've ended up in these situations in both men's and women's tennis where the players broke away because they couldn't collectively bargain or strike in some way that they thought was possible to form their own competing leagues.

And that's how they sort of — so they went from labor to management or to capital and in effect sort of carried it to its logical conclusion. That didn't work all that well.

And what then happened in both men's and women's tennis was eventual legal battles and settlements where today both the ATP, the men's tour, and the WTA, the women's tour, has players and tournament owners, which would really be the management and labor, have equal

votes.

And they developed this bizarre system where they have a neutrally hired president who is the tie-breaker in the vote. And I think both labor and management would agree it's become a very unsatisfactory system. In other words, the tournaments don't like it and the players don't like it. In other words, they would be more comfortable in a traditional labor/management relationship.

But this whole amorphous statute of, they're not employees, they compete in tournaments, prevented that from coming in.

I don't know what's going to happen in either of those organizations. I just can tell you you have a situation where neither side likes the current arrangements in terms of that.

MR. RINNER: I want to shift gears a little bit, and I know we're low on time. But there's a few of you who haven't had a chance for a little while to weigh in. I'll start with Matt.

A lot of the discussion has sort of focused on I guess what we might say call nontraditional arrangements between employers and employees, the gig economy, sports, for example.

I have a question about how the labor exemption might apply to public sector unions, which is in some ways a slightly less traditional model than the for-profit corporation and the employee relationship and specifically how the non-statutory labor exemption applies.

For example, in the First Amendment context, last year the Supreme Court held that the agency shop provision of a collective bargaining agreement that required non-union members to pay union dues violated those non-members' first Amendment rights.

The court emphasized in that case the differences between public and private sector bargaining. In the private sector, unions negotiate with for-profit companies whereas public sector unions negotiate against the government, which is ultimately funded by the taxpayer. And in that case, that made that public sector bargaining activity a matter of public concern.

I guess my question is whether these differences between public and private sector unions could spill over into how courts or the Supreme Court might consider the labor exemption, whether the statutory or non-statutory labor exemption.

MR. GINSBURG: I mean, I don't actually think so. I know the issue's been raised here and there. But it hasn't really gained any traction and because, I mean, again I think that if you look back into the broad terms used in the Clayton Act and in the Norris-LaGuardia Act, I mean, the thrust of it is the broad right of employees to get together to negotiate their terms.

And in effect, if it's a charter school that's a private school providing a public service, there's no question it's squarely within the labor exemption. And if you cross the street to the public school and engage in the same collective bargaining, the same activity's at play.

I don't see a particular issue there. And in addition, the fact that you have the state on the other side and all of the collective bargaining in states that permit such collective bargaining have passed very detailed statutory and regulatory regimes for that collective bargaining, show a very clear purpose of the sort that's broadly analogous to the state action exemption that would permit that sort of bargaining outside of the realm of the antitrust laws.

I haven't seen it become an issue in any litigation and I don't really see it becoming an issue.

MR. RINNER: We're almost out of time. Steve, we had a series of questions about the writers' guild case that you and Jeff were both involved in. I'm not sure we have enough time to get into the details of that case.

What I will ask is in some ways the case does raise the question of what are the limits on what employers can do when bargaining with a union that's protected by labor law. Do they depend on the bargaining power of the counterparty?

MR. CANNON: Yeah. Well, let me say first that the cases obviously — thank you, Jeffrey.

It's several months' old, but now it is brand new again. The judge has consolidated the three agency cases against the guild, which is our client. We represent the guild in this matter.

We're going to get a new complaint from Jeff and his co-agencies pretty shortly. It's a little bit in the early stage. But yeah, that is an issue in the case and I must say I think that from the guild's standpoint, this really is not a cutting-edge case.

From what the guild has done is wrapped in decades of precedent from the Supreme Court and other cases in terms of their ability to control the franchising of the agents that will then represent some of the guild members. I don’t think that's really an issue.

I think Jeff and I probably disagree with that. But look, you've got a minute or so. You want to —

MR. KESSLER: Yeah, there's no time to really do it. I'd just say it's an interesting case because the parties don’t really disagree that unions have the right to franchise, if you want to call it, or certify agents in these industries where they do that.

That's not the subject of the disagreement. The subject of the disagreement has to do with, as you said, sort of the limits of this.

One of our issues in this case will be adjudicated is that, in this case, the Writers' Guild combined with, for example, managers and lawyers to engage in a coordinated, in our view, concerted action against the agents and the managers and lawyers and non-labor parties. And that takes it, at least in our view, out of the statutory exemption.

And, in terms of the conduct, it them becomes whether or not it's a proper invocation of the non-statutory exemption, when we're not even talking now employers versus labor in terms of this. We're talking about the use of other actors, in our view, going after commercial activity.

But there isn't time really to debate that now or discuss it. I think it poses extremely interesting questions about where the exemption would end or not end in this type of a case.

MR. CANNON: That would take us through dinner, I think.

MR. KESSLER: At least, at least.

MR. RINNER: Well, the court will have plenty of time.

MR. CANNON: Yeah.

MR. RINNER: And certainly, both sides are well-represented. We are out of time, and I just want to thank all of the panelists for coming out. This has really been enjoyable. I wish we could go on forever, but time is what it is. Thank you.

(Applause.)

Closing Remarks

- *Ronald Drennan, Acting Economics Director of Enforcement, Antitrust Division*

DR. DRENNAN: I just wanted to thank everyone who contributed to making this a great workshop: Makan, Doha, our presenters, our panelists, our moderators, a lot of people who came from far away to be here and also to the number of dedicated staff, including many right outside these doors, who've been helping us all day in preparation.

As you can tell, this is an area of great interest to the Antitrust Division and to the larger antitrust community. The goal today was to advance dialogue by stimulating further engagement between antitrust practitioners and experts in the field of labor and others with an interest in this area. I think we've done that.

I think the organizers did a great job of bringing together people with different views on some key issues and it was enjoyable to see that play out. And also judging by the off-panel, between-panel, and lunchtime discussions, they just keep on going. So, thank you.

I know today's presentations and discussions have given us at the Division a lot to think about as we look forward to continued dialogue and I want to talk about really quick three points.

One is we look forward to the continuation of this discussion with the FTC's portion of this two-part series. Please be on the lookout for that, and we'd love you all to participate in that as well.

We hope those in academia and the larger research community will continue to remain motivated to keep adding to the research that is helping to inform us in this area. We had a presentation of some of that research today. We'd love that to be a growing body. You're addressing relevant questions.

And we also look forward, third and finally, to just further discussion from all of you as well. The Division invites comments from the public on all of the topics covered today. Interested parties may submit public comments online now through the next month, through October 23rd.

If you go to the Division's webpage for this workshop, you can scroll down to the section titled "Public Comment Submissions" and there's instructions on how to submit. It's as simple as sending an email. So please consider putting pen to paper or fingers to keyboard and send us your thoughts on this. We really look forward to them.

Once again, don’t want to keep you. Thank you to everyone for participating and joining us in this important discussion.

(Applause.)