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Office of Commissioner
Alvaro M. Bedoya

"Commanding the Price of Labor": Confronting the Human Cost of Labor Monopsony

Remarks of Commissioner Alvaro M. Bedoya
Federal Trade Commission

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Thank you Spencer, for your kind introduction and for inviting me to be here. Thank you to the Loyola School of Law, and to all of the faculty and students who helped organize this Colloquium. This is the third lecture in a series on labor and antitrust, and I'm thrilled to publish it with you. I want to thank my team, who helped me research and develop these remarks: Catherine Sanchez, Max Miller, Sunila Steephen, and Dalia Wrocherinsky; I owe a special debt to Catherine who was my intellectual partner in this process. And I want to thank all of the people in and out of the Commission who helped us think through these issues.

Before I begin, I'll just say that I'm speaking for myself as a commissioner; I'm not speaking for our staff, the chair, or any of my fellow commissioners. I'll add a disclaimer that I will not be discussing either the Kroger/Albertsons or the Tapestry/Capri transactions today.

1. Annie Lavery and the Can Labelers.

I'd like to start by talking about something that happened to a group of women who lived right here in Chicago 124 years ago. They worked as can labelers for Libby, McNeill & Libby, a meatpacker that specialized in corned beef. And they were led by three Irish-American women named Annie Lavery, Annie Condon, and Hannah O'Day.[1]

The women likely worked at the Libby company's processing facilities at the Union Stock Yards.[2] Most men at the stockyards earned $0.15 to $0.18 an hour, a wage scale that was

[1] *Hatpin Case Closes*, CHI. INTER OCEAN, Mar. 24, 1900, at 4; *Girls Bring Damage Suits on Charges of Blacklisting*, CHI. TRIB., June 24, 1900, at 10; *Libby, McNeill & Libby*, ENCYCLOPEDIA OF CHICAGO, http://www.encyclopedia.chicagohistory.org/pages/2751.html (last visited Apr. 20, 2024).
[2] *See Request for Preliminary Determination of Eligibility, Libby, McNeill & Libby Canning Plant*, DEPAUL UNIVERSITY, https://las.depaul.edu/centers-and-institutes/chaddick-institute-for-metropolitan-development/research-and-publications/Documents/Libby%20McNeill%20%20Libby%20Canning%20Plant%20-%20PDIL%20Package%205-7-12.pdf (last visited Apr. 21, 2024) (processing facility at Union Stock Yards).

considered, at the time, to be unlivable.[3] Women in the stockyards weren't even paid an hourly wage. They were paid piece rate, and worked six days a week at jobs like painting and labeling cans, or sewing up the ends of bags.[4]

But there was a silver lining – because if you got *good* at piece-rate work, you could improve your lot. That's exactly what the can labelers at Libby & Co. did; they became expert at their jobs. But something changed. As they got faster, as they became more productive, the company started to pay them *less*; it started to cut their rates.[5] This was a trend across the industry. In 1892, a woman working piece-rate might reasonably expect to make up to $8.25 a week – that would eventually fall to $5.50 by 1902.[6]

The women at the Libby plant didn't wait that long. On February 5, 1900, they walked off the job and called a strike. They demanded an end to the pay cuts.[7] And they were no pushovers. A month later, when the company brought in strikebreakers, Annie Lavery led a group of six of them down to the plant to yell "opprobrious epithets" at the strikebreakers, and to, and I quote, "rais[e] a mob of small boys who pelted them with snowballs."[8]

But eventually, the group needed to find work. So they applied to Armour & Co. and Nelson Morris & Co. and the Fairbank Canning company – but at every one they were turned away.[9] Technically, the women had been blacklisted.[10] In reality, they had been knocking on the doors of what was effectively *just one company*. You see, Libby, McNeill & Libby was controlled by the great meatpacker Swift & Co.; and Swift *and every company they'd applied to* operated as *one* vast and secretive combination known as the Beef Trust.[11]

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[3] John R. Commons, *Labor Conditions in Meat Packing and the Recent Strike*, 19 Q. J. OF ECON. 1, 4 (1904) (surveying pay scales of cattle butchers and helpers in 1904). "They could not live on it. No one could," said Michael Donnelly, national president of the Amalgamated Meat Cutters and Butcher Workmen of North America, of the $0.15 wage. *To the Bitter End,* APPEAL TO REASON, Aug. 6, 1904, at 2.

[4] Commons, *supra* note 3, at 20 (discussing mode of employment of female employees at the meatpackers).

[5] *Id.*

[6] *Id.*

[7] *Girls Bring Damage Suits on Charges of Blacklisting*, supra note 1, at 10.

[8] The women were quickly arrested for "unlawful assemblage." Two hundred people attended their trial two weeks later; the women denied everything. The jury voted "not guilty," and celebrations followed. *See Hatpin Case Closes*, *supra* note 1, at 4. Coverage on page 4 of the March 17th edition of *Chicago Inter Ocean* describes the circumstances surrounding their arrest.

[9] *Girls Bring Damage on Suits of Charges of Blacklisting, supra* note 1, at 10; *Blacklisting is Declared Legal*, CHI. INTER OCEAN, May 17, 1901, at 5 (case of Annie Condon); *Blacklist Valid in Law*, CHI. TRIB., June 11, 1901, at 13 (case of Hannah O'Day).

[10] Years later, a whistleblower would verify that the Beef Trust had an overt policy of blacklisting troublesome employees. *See Beef Trust Men Enjoined,* SUN (N.Y), June 5, 1904, at 4 (describing an affidavit of former Swift & Co. manager Daniel W. Meredith, attesting that this agreement provided "[t]hat any employee of any said packing houses who was discharged or relieved from duty was unable to secure employment with any other packing house until permission was first given by the packing house with which he was first employed").

[11] *See Libby, McNeill & Libby*, *supra* note 1 (Swift control of Libby). The FTC's extensive investigation of the meatpackers makes clear that while the three largest packers – Armour, Swift & Morris – did not formally merge into a single company until 1902, they effectively operated as a single entity as of the early 1890s, holding weekly meetings to precisely set prices, divide territory, and even audit and penalize members who did not abide by their agreements. *See* FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT-PACKING INDUSTRY, SUMMARY AND PART I, at 46-48 (1919). The formally merged entity even met at the exact same day and

And so, the strike failed. The newspapers wrote that "[a]s these [were] the only concerns in the city doing the class of work at which the girls had become experts after years of training, they were obliged to secure other work at $4 a week, where they had previously been earning as high as $15."[12] Hannah O'Day and Annie Condon sued the companies – and lost.[13] The fastest woman in their group, the one who could make as much as $20 in a single week, she would soon die of "consumption and overwork."[14]

Five years later, Teddy Roosevelt sent a delegation to inspect the working conditions at the meatpacking plants. In a report to Congress, they would make special mention of finding groups of, quote

> "[g]irls and women… in rooms registering a temperature of 38[°]F, without any ventilation whatever… The floors were wet and soggy, and in some cases covered in water, so that the girls had to stand in boxes of sawdust as protection for their feet. In a few cases even drippings from the refrigerator rooms above trickled through the ceiling upon the heads of the workers… In many cases girls of 16, 17, and 18 years stand ten hours a day at work…"[15]

Roughly around that time, Swift & Co. made the equivalent in today's dollars of $125.8 million in gross profit – just on their beef business.[16]

A lot of people equate "antitrust" with "anti-*monopoly*," with seller power. But from the very beginning, in 1890, the congressmen who passed the Sherman Act also had *monopsony*, or buyer power, in their sights. We know that because of what they said about the Beef Trust, which

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time – Tuesdays at 2pm – as the preceding combination. *Id.* at 48. The Fairbank Canning Company appears to have been a subsidiary of the Morris company, receiving large investments from Morris and operating certain of its plants. *Id.* at 239-240.

[12] *Blacklisting is Declared Legal*, supra note 9, at 5.

[13] *See Girls Bring Damage Suits on Charges of Blacklisting*, *supra* note 1, at 10; *Blacklisting is Declared Legal*, *supra* note 9, at 5 (case of Annie Condon); *Blacklist Valid in Law*, *supra* note 9, at 13 (case of Hannah O'Day).

[14] Commons, *supra* note 3, at 20.

[15] 40 CONG REC. 7800-8001 (June 4, 1906) (message from the President of the United States Theodore Roosevelt). The commission was sent in the aftermath of a massive strike in the summer 1904, in which 50,000 workers in Chicago and five other states walked off their jobs to demand a minimum wage for the lowest paid workers at the meatpackers. *See Packing House Employes Would Force Conditions Through Strike*, APPEAL TO REASON, Aug. 2, 1904, at 2. Their strike failed, too, but attracted the attention of a young writer named Upton Sinclair, who traveled to Chicago and found a population of workers "hanging always on the verge of starvation." *See* UPTON SINCLAIR, THE JUNGLE 129 (1906). President Roosevelt's commission verified what Sinclair had written. In their report to Congress, they described the conditions as "unnecessary and unpardonable," and the packing plants as "vaults in which the air rarely changes." "[T]he workers toil without relief in a humid atmosphere heavy with the odors of rotten wood, decayed meats, stinking offal, and entrails." Bathrooms were few, far, and lacked sinks; some workers relieved themselves on the cutting room floor. Tuberculosis was rampant; workers would often cough onto the surfaces in which meat was processed. 40 CONG REC. 7800-802 (report of James Bronson Reynolds and Commissioner Charles P. Neil, special committee appointed to investigate the conditions in the stock yards of Chicago).

[16] Francis Walker, *The "Beef Trust" and the United States Government,* 16 ECON. J. 491, 501 ($3,850,000 in total profits for its beef business).

fixed the purchase prices of livestock at artificially low rates.[17] But Congress wasn't just worried about monopsonies on *cattle*. They were also worried about combinations of companies who could control the price at which they bought *labor*. Senator John Sherman made this clear on the floor of the Senate when he said that, quote:

> "The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests… It dictates the terms to transportation companies, *it commands the price of labor without fear of strikes, for in its field it allows no competitors*. Such a combination is more dangerous than any heretofore invented…" [18]

John Sherman said that on March 21, 1890. Yet it was only in 2021 that a federal antitrust enforcer first stopped a merger because of its impact on competition in the labor market.[19] And it was only *last* year that the Department of Justice and the Federal Trade Commission issued Merger Guidelines expressly addressing how mergers can hurt competition for *labor*.[20] In many ways, our agencies have finally stepped up to the starting line of a race that was called 134 years ago.

Our agencies have a lot of priorities; we're in a lot of races. What's so important about *this* one? Why is it so important that we stop "combinations" that "command the price of labor without fear of strikes"? And what tools do we have, right now, to do just that? This is what I'd like to talk with you about today.

2. Raquel Jimenez, Ennelida Lopez, and 47 Acquisitions.

Let's start with that first question: What's at stake here? Why is it so important that antitrust law stop mergers that might substantially reduce competition for labor?

In the first instance, the answer is money – a lot of money. A growing body of research confirms what most of us would intuit: The fewer employers in a community, the lower the

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[17] *See* GREGORY J. WERDEN, THE FOUNDATIONS OF ANTITRUST 197 (2020) ("The most often heard complaint in the Sherman Act debates was that the Beef Trust depressed the prices paid to farmers for their cattle."). The Beef Trust was "monster" that "robs the farmer on the one hand and the consumer on the other," they said in the House. 21 CONG. REC. 4098 (May 1, 1890) (remarks of Rep. Ezra B. Taylor of Ohio). "Farmers who are producing beef have to sell it… at starvation prices," they said in the Senate. 21 CONG REC. 12606 (March 25, 1890) (remarks of Sen. William M. Stewart of Nevada).

[18] 21 CONG. REC. 2457 (March 21, 1890) (remarks of Sen. John Sherman of Ohio) (emphasis added).

[19] U.S. v. Bertelsmann SE, No. 1:21-cv-02886, 2021 WL 5105483, at *79-80 (D.D.C. Nov. 2, 2021)

[20] *See generally* DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

wages.[21] The research also shows that mergers, specifically, can help companies keep wages low.[22]

Two years ago, the Treasury Department estimated that, as a result of current employer market concentration, as well as how time consuming it is to find, interview for, and accept a job, Americans likely lose out on the equivalent of *eight weeks of pay every year*. In other words, in a perfectly competitive labor market – in a world where we can easily switch jobs to one of any number of firms, most of us would be about two to four paychecks *richer*.[23]

Now, there's no such thing as a perfectly competitive market. But *even if the effect was just half that size*, that could be a month's rent; that could be the downpayment for a car that doesn't break down on the way to work; or the deductible for a long-delayed surgery – *that* is what people lose, in part, because there are too few companies competing for their labor.

But, of course, it's about so much more than a paycheck. It's also about safety. When we issued the draft Merger Guidelines, I relayed the account of an administrative assistant at a major university hospital system who testified before Congress a few years ago.[24]

Her name was Nila Payton. In her testimony, she alleged that when COVID hit, her employer had waved away her requests for PPE. So, she decided it was time for a new job. She ran a search for administrative jobs offered by other employers. Eight-hundred jobs came up. Then she eliminated part-time posts and those that paid the same or less than her current job. Then she filtered out the night shifts – she had two boys and she couldn't leave them at home alone overnight. Then she filtered out the jobs that required a car; she didn't have one. After all of that, there were only two jobs left. And so she stayed in that job.

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[21] *See, e.g.*, Efraim Benmelech et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages*, 57 J. OF HUM. RES. S200, S203 (Supplement) (2022); José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, 57 J. OF HUM. RES. S167-S199 (Supplement) (2022).

[22] *See* Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397, 397 (2021); Benmelech et al., *supra* note 21, at S200 ("instrumenting concentration with merger activity shows that increased concentration decreases wages"). *See generally* IOANA MARINESCU & JAKE ROSENFELD, *WORKER POWER AND ECONOMIC MOBILITY: A LANDSCAPE REPORT* 7 (2022), https://www.workrisenetwork.org/sites/default/files/2022-08/correctedworker-power-economic-mobility-landscape-report.pdf (surveying the literature on the impact of market concentration and mergers on wages).

[23] The report's review of academic studies "places the decrease in wages at roughly 20 percent relative to the level in a fully competitive market." This is a middle estimate from an estimated range of $0.15 to $0.25 cents of lost wages on every dollar. The "eight weeks of pay" figure applies the *lower bound* of that estimate ($0.15, or 15%) to 52 weeks of pay. *See* U.S. DEP'T OF TREASURY, THE STATE OF LABOR MARKET COMPETITION, at ii (2022) ("20 percent"); *id.* at 24-25 ("15 -25 cents on the dollar"). *See generally* ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS (2021) (concluding it was "plausible" that in many labor markets, workers receive many thousands of dollars less than the competitive rate).

[24] Fed. Trade Comm'n, Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter Regarding the Proposed Merger Guidelines Issued by the Federal Trade Commission & U.S. Department of Justice (Jul. 19, 2023), at 1 https://www.ftc.gov/system/files/ftc_gov/pdf/p234000_merger_guidelines_statement_bedoya_final.pdf.

It didn't used to be this way, she told Congress. There used to be countless hospitals in the region. One by one, they had almost all merged. Now, she said: "There is almost nowhere else to work if you are a healthcare worker."[25]

What's at stake here really clicked for me much more recently, though, when, after reading about the can labelers, I decided to look into the working conditions at *modern* meat processing plants. I figured that, if Swift & Co. had been the biggest meatpacker in the Beef Trust, maybe I should look at conditions at the biggest meat processor of 2024.[26]

So I started to read exposes about conditions at that company, which specializes in processing chicken.[27] I was particularly struck by a 2021 investigation by a journalist at *The Guardian* alongside an investigator from the Union of Concerned Scientists. It focused on the company's employees in Arkansas.[28]

The Guardian article profiled two of their processing line workers: Raquel Jimenez and Ennelida Lopez.[29] Raquel Jimenez was born in central Mexico and came to the U.S. almost forty years ago. Most of that time was spent working for this one processor.

At the time of her interview in 2021, Ms. Jimenez was working six days a week; she used to get two hours credit for the mandatory overtime shifts she worked on Saturday – but not anymore. She used to get two 30-minute breaks – not anymore. Now it was one 20-minute break during which she had to take off her safety equipment, microwave her meal, eat, use the bathroom, get dressed again, and get back on the line. "We barely have time to eat," she told *The Guardian*.

Ms. Jimenez used to be able to spend Christmas with her family in central Mexico – but the company had stopped guaranteeing time off.

Ennelida Lopez, the second worker interviewed, was from Guatemala. At the time of her interview, she had been working for the company for five years, butchering chickens on the

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[25] Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker Before the Subcomm. on Antitrust, Com., and Admin. Law of the H. Comm. on the Judiciary, 117th Cong. 38–42 (2021) (statement of Nila Payton).

[26] *See* FED. TRADE COMM'N, *supra* note 11, at 89; Karen Perry Stillerman, *4 Ways Tyson Foods Made 2020 Worse*, UNION OF CONCERNED SCIENTISTS (Dec. 21, 2020), https://blog.ucsusa.org/karen-perry-stillerman/4-ways-tyson-foods-made-2020-worse/.

[27] *See generally* OXFAM, LIVES ON THE LINE (2015), https://s3.amazonaws.com/oxfam-us/www/static/media/files/Lives_on_the_Line_Full_Report_Final.pdf; Michael Grabell, *Exploitation and Abuse at the Chicken Plant*, NEW YORKER (May 1, 2017), https://www.newyorker.com/magazine/2017/05/08/exploitation-and-abuse-at-the-chicken-plant; Eric Schlosser, *The Essentials: How We're Killing the People Who Feed Us,* ATLANTIC (May 12, 2020), https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpeacking-coronavirus/611437/.

[28] Nina Lakhani, *"They rake in profits – everyone else suffers": US workers lose out as big chicken gets bigger,* GUARDIAN (Aug. 11, 2021, 6:00 AM), https://www.theguardian.com/environment/2021/aug/11/tyson-chicken-indsutry-arkansas-poultry-monopoly; Rebecca Boehm, *Tyson Spells Trouble for Arkansas*, UNION OF CONCERNED SCIENTISTS (Aug. 11, 2021), https://www.ucsusa.org/resources/tyson-spells-trouble.

[29] *See* Lakhani, *supra* note 28 for the discussion of Ms. Jimenez and Ms. Lopez's working conditions.

assembly line. She described processing chickens at high speed in a cockroach-infested environment with water leaking from the roof overhead.

How fast were they working, exactly?

Well, according to a separate report by Oxfam, the top assembly line speeds at poultry plants across the country have doubled since the early 1980s.[30] Workers now process a chicken almost every two seconds. That's 1,800 chickens an hour, over 14,000 chickens a day. Workers may make the same motion on an assembly line up to 20,000 times a day; and as their knives get duller, they have to push harder. A few years ago, the NIH studied 191 poultry workers at a separate company's plant in my home state of Maryland; three of every four workers had indications of nerve damage.[31] Many people lose the use of their hands or arms entirely.[32]

That's not the only risk to workers. People like Ms. Lopez and Ms. Jimenez work elbow-to-elbow with other workers wielding sharp knives, on a slick floor, in a refrigerated environment below 40° Fahrenheit.[33]

Then COVID hit. In late 2020, Ms. Jimenez's body started to ache. She was exhausted. She alleged that her supervisor told her to keep working, as she didn't have a fever. She didn't want to be penalized; so she kept working. She was soon diagnosed with COVID, and infected her whole family.

Ms. Lopez also got sick. She infected her husband, who was recovering from surgery. He died three days later. She also alleged that this was the company's fault. "If the company had taken better care, I might not have gotten Covid and my husband would still be alive," she told *The Guardian*.[34]

Across all of this time, the company they worked for was performing spectacularly. Its profits had increased almost every year for a decade.[35] Yet even though Ms. Jimenez and Ms.

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[30] *See* OXFAM, *supra* note 27, at 11-12.

[31] *See id.* at 24; Jessica Ramsey & Kristin Musolin, *High Prevalence of Carpal Tunnel Syndrome among Poultry Workers,* CTRS. OF DISEASE CONTROL AND PREVENTION NIOSH SCI. BLOG (Apr. 6, 2015), https://blogs.cdc.gov/niosh-science-blog/2015/04/06/poultry-workers-cts/.

[32] *See e.g.,* OXFAM, *supra* note 27, at 24 (profiling a worker, Karina Zorita, who is "unable to straighten her fingers or grab a spoon or a glass," nor can she hug her daughter with a full embrace); Peter St. Onge, et al., *An Epidemic of Pain,* CHARLOTTE OBSERVER, Feb. 10, 2008, at 15A.

[33] *See* OXFAM, *supra* note 27, at 12 (repetitive motions); *id.* at 7 (dulling of knives); *id.* at 16 (refrigeration). By almost any measure, poultry processing is among the most dangerous private sector jobs in the country. *The Guardian*'s analysis of 2019 Bureau of Labor Statistics data found that poultry processing was the most dangerous private sector job in the country. Lakhani, *supra* note 28 ("nonfatal injury and illness rates in the poultry-processing industry were higher than in all other private industries"). In 2015, the Occupational Health and Safety Administration has reportedly indicated that workplace illnesses and injuries at poultry processing plants were "at more than five times the average for all US industries." OXFAM, *supra* note 27, at 22.

[34] *See* Lakhani, *supra* note 28.

[35] *See Tyson Foods Gross Profit 2010-2023,* MACROTRENDS, https://www.macrotrends.net/stocks/charts/TSN/tyson-foods/gross-profit#:~:text=Tyson%20Foods%20gross%20profit%20for%20the%20twelve%20months%20ending%20December,a%202.18%25%20increase%20from%202021 (last visited Apr. 25, 2024).

Lopez were working faster and longer; even though they were putting their health and family at risk – they saw none of that upside. Instead, their benefits were cut and their pay stagnated.[36]

Why didn't Ms. Lopez and Ms. Jimenez just leave their jobs? Workers at a poultry plant can develop significant skill over years of experience;[37] there's every reason to think that Ms. Jimenez and Ms. Lopez *should* be able to exit to another job.

And yet, they were terrified of getting fired. "I'm fed up but it's hard to complain," said Ms. Lopez. "They could fire me at any moment," she said. "We just want to be treated with dignity and fairly, but most people are too scared to complain in case they get fired," said Ms. Jimenez.

Here's a reason they may have been scared: Because at the time of the investigation, in 11 of the 14 counties in Arkansas, *there was only one single poultry processor* – and usually, it was the one company the women were already working for.[38] *It didn't used to be this way*.[39] But from 1990 to 2021, the company Ms. Lopez and Ms. Jimenez worked for bought 47 of its suppliers and direct competitors.[40]

"Labor monopsony" may be a dry term. But what it *does* is brutal. It's what lets a company say *we will not protect you from COVID; we don't care if you're butchering so fast that your hands stop working; we'll make you work in 38 degrees with water dripping on your head – and as you work faster, we'll pay you lower.*

That is what's at stake here. That is why we need to stop "combinations" that can "command the price of labor without fear of strikes."

3. The government should not stand in the way of labor organizing.

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[36] *The Guardian* reported that Ms. Jimenez earned "$9-something" an hour when she was hired and $13.85 per hour at the time of reporting (2021). The article also indicated that she had spent "most" of her then-35 years in the U.S. working for the plant, suggesting a minimum tenure of 18 years. Adjusting for inflation, a wage of $9.25/hour in 2003 is equivalent to $13.32 in 2021; a wage of $9.50 would be equivalent to $13.65. *See generally* Lakhani, *supra* note 28. Across the industry, the real value of wages of workers like Ms. Lopez and Ms. Jimenez was 40% lower in 2015 than it had been in the early 1980s. *See* OXFAM, *supra* note 27, at 11-12.

[37] *See* Class Action Complaint at 26, para. 111, Jien v. Perdue Farms, Inc., No. 1:19-cv-02521-ELH (D. Md. Aug. 8, 2019) ("Some chicken processing plant positions were paid more wages by Defendant Processors than other positions, largely due to the greater skill required by those positions. For example, 'deboners' are typically paid more than many other non-supervisory workers on the processing line. Effectively deboning a chicken requires some experience and training, and Defendant Processors earn more money when a chicken is deboned effectively…"); *see also* Lakhani, *supra* note 28 (identifying $15 hour pay for "toughest, least popular jobs such as deboning").

[38] *See* Boehm, *supra* note 28 (11 of 14 counties); *see also id.* (67% of poultry production in Arkansas attributable to Ms. Lopez and Ms. Jimenez's employers).

[39] For an expert account of the consolidation of the chicken industry, *see* CHRISTOPHER LEONARD, THE MEAT RACKET (2014).

[40] Boehm, *supra* note 28. A 2014 analysis by Christopher Leonard found that in in two-thirds of the counties in which the processor operated, wages grew more slowly than they did in the neighboring counties. *See* LEONARD, *supra* note 39, at 315 ("[These] counties, in other words, were worse off in terms of income growth than their neighbors, even as [the company's] profits increased.").

So, what can we as antitrust enforcers do about this?

First, we should do no harm. The government and the law should not stand in the way of labor organizing. Because while the can labelers' strike failed, other strikes didn't. In fact, in the two decades after World War II, organized labor overcame countless barriers to unionize 95% of meatpacking workers outside of the South. By 1968, wages of meatpacking workers were over 25% higher than those of comparable workers in non-durable manufacturing.[41]

The congressmen who passed the Sherman Act and the Clayton Act and the Norris-LaGuardia Act went out of their way to write exemptions to make sure that antitrust could not be used to stop union drives.[42] Law enforcers need to read those exemptions as broadly as Congress intended them. And so at the most basic level, antitrust law should not be used to stop the "individual unorganized worker" from organizing – regardless of whether the slip they get at tax season says "W-2" or "1099."

But the people who passed our antitrust laws didn't just want to protect labor organizing; they wanted to *promote* it.[43] So I think our government needs to do more than just honor the labor exemption. Consider the Norris-LaGuardia Act of 1932, in which Congress declared the following to be "public policy in labor matters":

> Whereas under prevailing economic conditions, …*the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor*, and thereby to obtain acceptable terms and conditions of employment, [therefore]… it is *necessary* that he have *full freedom* of association [and] self-organization […] to negotiate the terms and conditions of his employment…[44]

I agree with Professor Hafiz that the importance of this statement cannot be understated.[45] This is the United States Congress declaring, not in a committee debate or a floor debate or a committee report, but *in statute* – that when "the individual unorganized worker" tries to negotiate with a company – he will likely lose. And so it is imperative that he have "full freedom" to organize.

It's hard to look at American labor law and say that it lives up to that. Here's one example: It's illegal to fix wages – for everyone. So: How can it be that four individuals could

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[41] *See* Daniel Calamuci, *Return to the Jungle: The Rise and Fall of Meatpacking Work*, 17 NEW LAB. F. 66, 70 (2008).
[42] *See generally* Alvaro M. Bedoya & Bryce Tuttle, "*Aiming at Dollars, Not Men": Recovering the Congressional Intent Behind the Labor Exemption to Antitrust Law*, 85 ANT. L. J. 805 (2024).
[43] *See, e.g.,* 21 CONG. REC. 2728 (March 27, 1890) (remarks of Sen. George F. Hoar) ("I hold, therefore, that as legislators we may constitutionally, properly, and wisely allow laborers to make associations… When we are permitting and even encouraging that, we are permitting and encouraging what is not only lawful, wise, and profitable, but absolutely essential to the existence of the commonwealth itself.") Senator Hoar is often credited as a co-author of the Sherman Act. *See, e.g.*, *George Hoar: A Featured Biography*, U.S. SENATE: FORMER SENATORS, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_Hoar.htm (last visited Apr. 25, 2024).
[44] *See* 29 U.S.C. § 102 (Mar. 23, 1932, ch. 90 § 2, 47 Stat. 70).
[45] *See generally* Hiba Hafiz, *Towards a Progressive Labor Antitrust*, 125 COLUM. L. REV. (forthcoming 2025).

incorporate and set wages to their hearts' desire – and do it in about 48 hours – while it would take four people who work for that company *years* to form a union to just start *bargaining* for a better wage? The law makes it easy to combine capital. Why is it so hard to combine labor?

It should be dramatically easier to form a union in this country.[46] And I *know* that the people who passed our antitrust laws would agree with that.

4. Antitrust enforcers need to act. The law is there to do that.

Beyond doing no harm, antitrust enforcers need to act.

It's our job to block "combinations" that "command the price of labor without fear of strikes." This isn't just a matter of legislative history; it's been almost a hundred years since the Supreme Court held that antitrust law could be used *affirmatively* to protect competition in labor markets.[47] Yet, for almost the entire history of antitrust, enforcers have not brought those kinds of challenges.

There are a lot of reasons for that, but I think that part of it comes from an unfamiliarity with how a body of law built up around product markets could be applied to labor markets. So let's talk, at a high level, at how some of those principles might map onto the two cases I've focused on – the can labelers in 1900 and the poultry plant workers in 2024.[48]

Annie Lavery and her colleagues went from earning up to $15 or $20 a week to $4 a week because there was effectively only one employer at which they could do the "class of work at which [they] had become experts" – and that was the Beef Trust.

Antitrust law recognizes that the level of concentration in a market can help us tell how a merger might affect competition. What's more, the law actually *presumes illegal* a merger that significantly increases concentration in a highly concentrated market. And the threshold for that is much lower than that of the Beef Trust – it's 30%.[49] So that's one possible ground upon which enforcers might intervene.[50]

Now, some people hear about market concentration and they hear about the Herfindahl-Hirschman Index, and they feel out of their depth; they say "I'm not an economist, I don't know

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[46] *See, e.g.,* SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY (2020), https://clje.law.harvard.edu/app/uploads/2020/01/Clean-Slate-for-Worker-Power.pdf.

[47] Anderson v. Shipowners Ass'n of the Pac. Coast, 272 U.S. 359, 365 (1926) (allowing a group of sailors to sue shipowners for wage-fixing).

[48] Of course, the examples provided here do not represent all potential legal theories available in caselaw or the Merger Guidelines; nor are these theories mutually exclusive.

[49] *See generally* DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 20, at 5-6 (2023) (Guideline 1).

[50] The Department of Justice's successful challenge to Penguin Random House's proposed acquisition of Simon and Schuster in 2021 broke the seal on merger enforcement premised on competitive harm to workers, and paved the way for similar challenges. There, the DOJ presented a primarily "structural case" arguing that the publishing rights to anticipated top-selling books was a properly defined relevant market and that the combined share of two merging companies would lead to undue concentration in that market. The court agreed with the DOJ. It found that the merger would substantially lessen competition in the market for publishing rights to top-selling books and stopped the merger. *See* U.S. v. Bertelsmann SE, No. 1:21-cv-02886, 2021 WL 5105483, at *79-80 (D.D.C. Nov. 2, 2021).

how to define a market." But that kind of economic evidence is just one ground to challenge a merger.

Let's say there had been competition between the packing companies to hire the fastest can labelers; that there were recruiters out there competing to hire the best labelers, offering higher wages, better hours, that kind of thing.[51] You could also see a world where the strikers played those competing companies off of each other, to negotiate for themselves an even higher piece-rate, or maybe even an hourly rate like the men they worked alongside in the stockyards.[52]

You don't need a Ph.D. in economics to understand that if those firms merge, it may substantially lessen competition in that labor market. The law allows us to use *direct evidence* of that kind of head-to-head competition to stop a merger.[53]

Lastly, the caselaw is clear that mergers can violate the law when they entrench or extend a dominant position.[54] This may sound complicated; it's not. A dominant employer that already has a lot of power over workers can further entrench that power by buying another company that competes to employ the same workers. It can also extend its power to other labor markets by acquiring employers in those markets.

And how do we know if a firm has a lot of market power over its workers?

Well, when Annie Lavery and Annie Condon and Hannah O'Day work faster and faster only to see their pay cut – and have no other place to take their skills – that is evidence of their employer's market power.

When Ms. Lopez and Ms. Jimenez work longer hours, at a faster pace, only to see their wages stagnate and benefits cut – when they stay in those jobs even after their employer allegedly exposes them to a dangerous work environment – that is evidence of market power.

And when workplace injuries increase, or companies start breaking labor laws, and their workers have nowhere else to go – *that* is evidence of market power as well.[55] When a company

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[51] A contemporary economic analysis reveals that the "swiftest" labeler at the Libby plant made more than twice than what most upper-end employees made in one week. *See* Commons, *supra* note 3, at 20 (revealing that the fastest labeler made up to $20 in a week, whereas the upper-end labelers typically earned between $5.50 and $8.25).

[52] Chair Khan recently recognized "how competition between employers can give unions greater leverage when bargaining over a new contract, allowing unions to play employers off of one another to secure better terms. […] Mergers that eliminate competition among employers, meanwhile, can remove a key point of leverage for those unions." Chair Lina M. Khan, Fed. Trade Comm'n, Remarks at the Harvard Center for Labor and a Just Economy (Feb. 21, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/remarks-khan-harvard-center.pdf.

[53] *See generally* DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20, at 6-8 (Guideline 2).

[54] The Merger Guidelines note that "the effect of such mergers 'may be substantially to lessen competition' or 'may be . . . to tend to create a monopoly' in violation of Section 7 of the Clayton Act." *See id.* at 18-21 (Guideline 6). Although caselaw has not historically focused on the "tend to create a monopoly" prong of Section 7, it also provides a tool through which enforcers can seek to protect competition for labor. *See generally* Robert H. Lande, John M. Newman & Rebecca Kelly Slaughter, *The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act § 7*, 103 TEX. L. REV. (forthcoming 2024).

[55] For a review of indicia of labor market power, *see* Hiba Hafiz & Ioana Marinescu, *Labor Market Regulation and Worker Power*, 90 U. CHI. L. REV. 469, 495 (2023).

exhibits that kind of power, the law opens the door for us to scrutinize its acquisitions closely, and stop them if necessary.[56]

So, it's true: Antitrust can be complicated. It's mostly been tested in product markets, and not labor markets; and it can involve highly technical economic evidence.

But the antitrust law is there, today, to protect workers against "combinations" that "command the price of labor without fear of strikes." The law *lets us* take account of how organized labor can level the playing field for the "individual unorganized worker." And while some of the evidence for these cases is technical, some of it is just *there* – you can see it with your own eyes. You just have to look for it. And so that's exactly what we're going to do.

Thank you for your time.

[56] *See* DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 20, at 27 ("The features of labor markets may in some cases put firms in dominant positions. To assess this dominance in labor markets (see Guideline 6), the Agencies often examine the merging firms' power to cut or freeze wages, slow wage growth, exercise increased leverage in negotiations with workers, or generally degrade benefits and working conditions without prompting workers to quit.")