Case No. 17-1113

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RODOLFO LLACUA;
ESLIPER HUAMAN;
LEOVEGILDO VILCHEZ GUERRA;
LIBER VILCHEZ GUERRA;
RAFEAL DE LA CRUZ,

Plaintiffs-Petitioners,

v.

WESTERN RANGE ASSOCIATION;
MOUNTAIN PLAINS AGRICULTURAL SERVICE;
MARTIN AUZA SHEEP CORPORATION;
NOTTINGHAM LAND AND LIFESTOCK, LLLP;
TWO BAR SHEEP CORPORATION, LLC;
CUNNINGHAM SHEEP COMPANY;
DENNIS RICHINS, D/B/A Dennis Richins Livestock,

Defendants-Respondents.

On Appeal from the United States District Court for the District of Colorado
The Honorable Robert E. Blackburn
District Court Civil Action No. 15-cv-01889-REB-CBS

BRIEF OF PROFESSORS HERBERT HOVENKAMP, ESQ. AND ERIC A. POSNER, ESQ. AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-PETITIONERS' PETITION FOR REHEARING

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ORAL ARGUMENT IS REQUESTED

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CERTIFICATION PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

No party's counsel authored any part of this brief; no party or party's counsel contributed any money to fund preparing or submitting the brief; and no person other than amici curiae, its members, or its counsel contributed any money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

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INTEREST OF AMICI CURIAE

Amici Curiae are antitrust scholars who have an interest in the sound development of antitrust law.

Herbert Hovenkamp is the James G. Dinan University Professor at the University of Pennsylvania Law School and the Wharton School. Long recognized as a leading antitrust scholar, Professor Hovenkamp has published scores of books, articles, and other writings in the field, including the seminal Philip E. Areeda and Herbert Hovenkamp antitrust treatise, Antitrust Law, which the U.S. Supreme Court has cited on numerous occasions.

Eric A. Posner is the Kirkland and Ellis Distinguished Service Professor at the University of Chicago Law School. He has written numerous academic articles on the relationship of antitrust law and labor markets. He is also of counsel at MoloLamken LLP.

Amici's authority to file this brief is by leave of this Court.

I. ARGUMENT

A. The Complaint Describes an Employer Cartel That Violates the Sherman Act

The complaint alleges that ranchers hired foreign workers as shepherds through two agencies. While the law permits the ranchers to post job openings through the agencies, the ranchers do not use the agencies only to post job

openings. They also delegate to the agencies the task of determining the wages. The agencies offer the minimum legal wage to every job applicant.

To see why the complaint alleges a violation of the Sherman Act, consider how wages would be set in a competitive market. The ranchers would individually determine how much they can pay shepherds. The wage offered by a particular rancher would depend on various factors. For example, ranchers located in inhospitable climates might need to offer higher wages to attract workers. Experienced shepherds would be able to demand higher wages than inexperienced shepherds. Because the ranchers compete with each other for shepherds, they would bid up wages. Each rancher would ultimately pay what economists call the employee's "marginal revenue product," or, loosely, the monetary value that the shepherds contribute to a specific employer through their work. Thus, while the job description is the same, shepherds employed in different ranches throughout the United States would earn different wages.

Because competitive labor markets lead to relatively high wages, employers may be tempted to enter a wage-fixing agreement. The ranchers, for example, would make higher profits if they agreed among themselves to pay a wage to shepherds that was less than the wage that prevailed in competitive conditions. While the ranchers described in the complaint did not enter an explicit wage-fixing agreement, they delegated to the agencies the task of setting wages. The effect is

the same. The agencies are operated by the ranchers and thus have an incentive to fix wages at a level below the competitive wage.

How can we infer that the agencies fixed wages on behalf of the ranchers? If the ranchers had used the agencies for recruiting while respecting the rules of the free market, then each rancher would have told the agencies the wages that he or she would be willing to pay for different types of shepherds—just as, for example, businesses who use headhunters for recruiting employees will tell the headhunters the salaries they are willing to pay. But in this case, the agencies decided what wages to offer on behalf of the ranchers. According to the complaint, this resulted in supracompetive wages.

The panel states that:

> [T]here are no facts alleged in the [Complaint] from which it can be inferred ranches needed to offer more to attract a sufficient number of qualified workers. The federal government sets the lowest wage that may be offered to H-2A shepherds. Assuming a sufficient supply of qualified labor is available at this wage, no rancher would be logically inclined to offer more.

Op. 33.

This argument misunderstands basic economics. There is no such thing as a "sufficient supply of qualified labor." Employers are assumed to hire the number of workers that maximize profits. While a firm that employs very few workers may be able to stay in operation, it will hire above the minimum scale when additional workers bring in revenues greater than labor costs even though it must

increase wages to attract new workers. If a firm fails to do so, this creates the inference that it is engaging in anticompetitive behavior to keep wages artificially low. That inference is further strengthened if the firm collaborates with its competitors.

To see the incongruity of the panel's argument, imagine the mirror-image case, where a group of sellers of wool hire an association to fix prices charged to buyers. Suppose the association offers, on behalf of the ranchers, a price for a unit of wool at $5. The panel would seem to suggest that the complaint should be dismissed if it does not show that the sellers "needed to offer" a lower price "to attract a sufficient number of" buyers. But sellers do not want a "sufficient number" of buyers. They want as many buyers as possible paying the highest possible price. The agreement to fix the price tells us that the sellers are not competing. If the competitive price happens to be $5, the sellers gain nothing by redundantly agreeing with each other to set the price at $5. If the competitive price exceeds $5, then a cartel price of $5 would drive everyone out of business. Thus, the only reason to set the price at $5 is that the competitive price is lower. Similarly, the only reason for the ranchers to use their associations to set the wage at the minimum wage is that competition would force them to pay a higher wage.

Antitrust policy opposes labor-market cartels as well as product-market cartels. Most cases involve "product-side" cartelization, also known as monopoly,

in which firms fix prices, obtain illegal monopolies through mergers, and engage in other anticompetitive behavior that harms consumers. Product-side cartelization results in higher prices and lower output. A less familiar form of cartelization involves "buy-side" cartelization, also known as monopsony, in which firms fix prices that they pay to suppliers of inputs. Monopsony results in lower prices and (also) lower output. When the suppliers of inputs are workers, lower prices mean lower wages and lower output means unemployment as well as less production.[1]

Contrary to common intuition, consumers do not benefit from the employers' lower labor costs. Because employers reduce wages by reducing employment, and thus reduce production, they produce fewer goods. The effect on prices depends on the product market. If the product market is imperfectly competitive, the reduction in supply will result in higher prices for consumers. If the product market is highly competitive, the reduction of supply by the employers in the cartel will be offset by increased production by firms outside the cartel. But prices will not fall below the status quo—they will stay the same. Savings on labor costs accrue to the shareholders of the employers, not to consumers.

As far back as Adam Smith, economists have understood that firms have strong incentives to cartelize labor markets. As Smith put it,

[1] *See* ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS (2003).

> We rarely hear, it has been said, of the combinations [cartels] of masters [employers], though frequently of those of workmen [namely, unions]. But whoever imagines, upon this account, that masters rarely combine, is as ignorant of the world 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 labour above their actual rate.[2]

Smith went on to comment that these actions by employers to suppress wages are usually invisible:

> [Combinations to reduce wages] are always conducted with the utmost silence and secrecy till the moment of execution; and when the workmen yield, as they sometimes do without resistance, though severely felt by them, they are never heard of by other people.[3]

This invisibility continued for centuries—until very recently.

B. Labor Market Cartelization Is a Serious Problem

Until recently, hardly anyone talked about the problem of labor market cartelization. All that has changed in the last ten years. In 2010, Apple, Google, and other Silicon Valley companies settled with the Justice Department, which accused them of violating the Sherman Act by agreeing not to poach each other's employees.[4] Later they settled a class action for more than $400 million in

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[2] Adam Smith, The Wealth of Nations, bk. 1, ch. 8 (1776), available online at https://www.gutenberg.org/files/3300/3300-h/3300-h.htm.

[3] *Id.*

[4] Robin van der Meulen & Brian Morrison, *An Update on Anti-Poach Enforcement and Class Actions*, LAW360 (July 11, 2018), https://www.law360.com/articles/1062322/an-update-onanti-poach-enforcement-and-class-actions.

damages.[5] In 2014, the Jimmy John's sandwich chain was accused of imposing covenants not to compete on low-wage, low-skill sandwich makers, which effectively barred them from working for competing restaurants across huge swathes of the United States.[6] And then in 2017, an academic paper revealed that more than half of major franchises, including McDonald's and Burger King, used no-poaching clauses in their franchise contracts.[7]

This wave of litigation was accompanied by new academic research that revealed, for the first time, that labor markets throughout the United States are highly concentrated. These papers use different data sets and methods, but all come to the same result.[8]

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[5] Colin Lecher, *Apple, Google, and Other Tech Giants Will Pay $415 Million in Poaching Scandal Settlement*, THE VERGE (Sept. 3, 2015), http://www.theverge.com/2015/9/3/9256097/apple-google-415-million-poaching-settlement.

[6] *See* Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFPOST (Oct. 13, 2014, 4:03 PM), http://www.huffpost.com/entry/jimmy-johns-non-compete_n_5978180.

[7] Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* 3–4 (Princeton U. Dep't Econ. Indus. Rel. Sec. Working Paper No. 614, 2017) (finding that 58% of major franchise chains use restrictive covenants in franchise contracts).

[8] *See* José A. Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data* (Nat'l Bureau of Econ. Research, Working Paper No. 24395, 2018);Efraim Benmelech et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 3–4 (Nat'l Bureau of Econ. Research, Working Paper No. 24307, 2018); Brad Hershbein et al., *Concentration in U.S. Local Labor Markets: Evidence from Vacancy and Employment Data* (working paper, 2019), http://economicdynamics.org/meetpapers/2019/paper_1336.pdf ; Kevin Rinz,

A useful measure of market concentration is the HHI index, which is used by the Justice Department and the Federal Trade Commission to evaluate mergers. The HHI index ranges from 0 (perfect competition, meaning an indefinitely large number of firms) to 10,000 (a single firm). An HHI of 2,500 or over is considered "highly concentrated" by the DOJ and FTC, and mergers that generate an HHI of 2,500 are usually forbidden.[9] One study found that *60%* of labor markets in the United States exceed the 2,500 threshold, covering tens of millions of workers.[10] Indeed the HHI of the average labor market is 4,374, far higher than the HHI of the average product market, which is only 411.

The map below provides a visual illustration of these results. The country is divided into commuting zones, which roughly represent the geographic scope of each labor market. The colors represent the HHI of the average labor market in a commuting zone. Red means an HHI greater than 5,000; orange means an HHI between 2,500 and 5,000; and yellow means an HHI between 1,500 and 2,500.

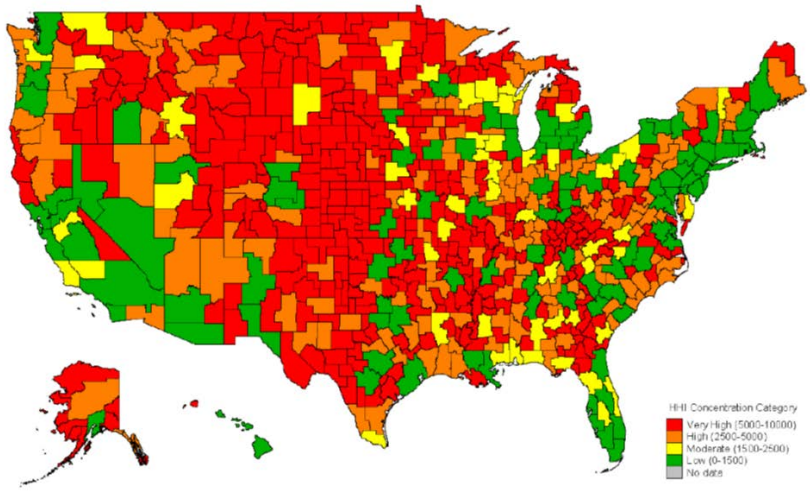
Labor Market Concentration, Earning Inequality, and Earning Mobility (CARRA Working Paper No. 2018-10, 2018); Yue Qiu & Aaron Sojourner, Labor-Market Concentration and Labor Compensation (IZA Discussion Paper No. 12089, 2019); David W. Berger et al., *Labor Market Power* (Nat'l Bureau of Econ. Research, Working Paper No. 25719, 2019).

[9] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §5.3 (2010).

[10] Azar et al., *supra* note 8, at 2.

Visual inspection reveals the scope of labor market concentration throughout the country.

Figure 1: Labor Market Concentration in the United States



Source: José A. Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data* (Nat'l Bureau of Econ. Research, Working Paper No. 24395, 2018)

Numerous other findings show that labor markets are highly concentrated, including:

- Minimum wage laws usually do not reduce employment in many labor markets. If those labor markets were competitive, minimum wage laws would reduce employment.[11]

[11] José Azar et al., *Minimum Wage Employment Effects and Labor Market Concentration* (Nat'l Bureau of Econ. Research, Working Paper No. 26101, 2019).

- Mergers of employers frequently result in lower wages for the employees of those employers.[12] If the affected labor markets were competitive, wages should have increased or stayed the same.
- Laws that ban employee covenants not to compete result in higher wages. If labor markets were competitive, such laws would reduce wages.[13]

The overwhelming evidence of labor market concentration has led economists to hypothesize that labor market concentration may be responsible for the widely publicized hardships experienced by lower-wage workers in recent years. One study estimates that labor market concentration and other sources of monopsony have suppressed employment by 13%, and labor's share of output by 22%.[14]

In response to this evidence, the U.S. government has recognized that labor market concentration has become a serious issue of public policy. In 2016, reports issued by the White House and the Treasury Department raised the alarm.[15]

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[12] *See* Benmelech et al., *supra* note 8; Elena Prager & Matthew Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals* (Wash. Center for Equitable Growth Working Paper, 2019).
[13] Michael Lipsitz & Evan Starr, Low-Wage Workers and the Enforceability of Non-Compete Agreements (unpubl., Aug. 23, 2019).
[14] Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 538 (2018).
[15] WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES (2016), http://obamawhitehouse.archives.gov/sites/ default/files/non-competes_report_final2.pdf; OFFICE OF ECON. POLICY, U.S. DEP'T OF THE

Subsequently, the Federal Trade Commission and the Department of Justice announced new enforcement priorities to target no-poaching agreements and other labor-related anticompetitive practices.[16] States attorneys general have brought cases targeting franchise no-poaching agreements and abuses of covenants not to compete. Scholars have also encouraged government agencies and courts to take labor market cartelization more seriously than they have in the past.[17]

Private individuals have also increasingly brought cases against employers based on allegations of antitrust violations. These cases are at an early stage, and it is important that courts get the law and the economics right so that workers are given an opportunity to develop the factual basis of their allegations.

TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS (2016), https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf; Antitrust Division, U.S. Dep't of Justice, Division Update Spring 2019 (Mar. 26, 2019), http://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach.

[16] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 4 (2016), https://www.justice.gov/atr/file/903511/download; Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (Oct. 20, 2016), http://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.

[17] *See* Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031 (2019); Naidu, Posner& Weyl, *supra* note 14.

II. CONCULSION

When adjudicating antitrust disputes, federal courts have always been receptive to the latest empirical findings about the structure of markets. Particularly in light of this research, the allegations of wage-fixing were clearly plausible, in fact exactly what one would expect given the latest learning. The Tenth Circuit should reconsider the panel's decision.

Respectfully submitted this 17th day of September 2019.

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This brief complies with the type-volume limitations of Fed. R. App. P. 29(b)(4) because this brief contains **2,534** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Local Rule 32.

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I hereby certify that with respect to the foregoing:

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