[INTERPOSING VOICES]

[MUSIC PLAYING]

BILAL SAYYED: Before we go live on the web stream, I'm just going to read some general--

[AUDIO OUT]

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During the panels, the audience is invited to submit questions via the question cards. FTC staff will be walking through the audience to take those cards. The chairman, the commissioners, FTC staff, cannot accept documents during the hearing or workshop. Such documents will not become part of the official record of any commission proceeding or be considered by the commission. We do invite the public to file written comments until February 10, 2020, through a link on the hearing website.

At the end of the day, please return your FTC visitor's badge, because we reuse them.

OK. I think-- are we ready to go live? OK. So I'll take a few minutes. I'm Bilal Sayyed. I'm the director of the Office of Policy Planning. Welcome to our one-day hearing and workshop on non-compete clauses in the workplace.

We'll look at non-compete clauses through the lens of antitrust and consumer protection law, looking at legal issues through not only antitrust and consumer protection but through the lens of contract law and administrative law, and also the economics of the effects of these clauses.

Before I introduce our first two speakers, I want to thank especially, or point out especially, both Chairman Simons and Commissioner Chopra, who have a significant interest in this topic. And it's their interest that has sort of driven OPP's interest and efforts to put together this workshop on this very topical issue.

As I said a moment ago, we welcome comments on this topic. Comments are due February 10. We have put some questions out for comment. We think about the questions we put out for comment seriously, and we hope the comments try to address them. This is, I think, a hard issue, and so one thing I would ask the commenters to think about is it's not, to my mind, sufficient just to tell us that Section 5 allows us or gives us broad authority to prohibit all sorts of conduct.

The commission lost a number of cases in the appellate courts in the 1980s that suggest that there were limits to our Section 5 competition authority. This is well before the alleged conservative takeover of the judiciary. It's not just sufficient to tell us we get Chevron deference. Agencies lose under Chevron deference frequently in the DC circuit and other circuits, and it's not just sufficient to tell us we get our deference. Our deference appears to be on its last legs at the Supreme Court.

So I'd ask-- well, people can comment however they comment. But I believe this is a very hard issue for us, and we take seriously comments that grapple with these hard issues. The fact that we are doing this workshop should reflect our interest in this policy issue. But it's a very hard issue, we think, so we hope the comments focus on the hard legal and economic issues.

So I hope that doesn't dissuade anyone from commenting, but I hope people take seriously what they'll hear today. We will get the transcript up by Wednesday morning, at least in rough form, and we hope commenters refer to the transcript in their comments.

OK, so with that, I'll offer some quick introductions of our two initial presenters. Our first presenters is Orly Lobel. Professor Lobel is the Warren Distinguished Professor of Law and Director of the program on Employment and Labor Law at the University of San Diego School of Law. I've spent many weekends in the law library there, and I can tell you it seems like a very nice place to teach. My daughter is an undergraduate there, and when I visit, I only get so much time with her.

Anyway, Orly is a graduate of the Harvard Law School and Tel Aviv University. She was recently named one of the most cited public law scholars in the nation. She's written some wonderful books on legal issues-- my personal favorite is, You Don't Own Me-- How Mattel v. MGA Entertainment Exposed Barbie's Dark Side, because I worked on some of that case-- as well as numerous law review articles on a wide variety of interesting topics. We're delighted she's going to open our conference, and she's one of the preeminent legal scholars in this area.

Professor Bill Kovacic will follow. Many of you should need no introduction of Bill. He's been a fixture in competition and consumer protection law for over 40 years. But for those who do need an introduction-- because this is a new issue for us, so we have some new faces-- Bill is a professor at George Washington University Law School, where he's director of the Competition Law Center. He is also non-executive director of the UK's Competition Markets Authority.

He was an FTC commissioner from 2006 to 2011 and served as chairman from 2008 until 2009. He was previously the FTC's general counsel from 2001 to 2004, and he was at the commission much earlier in his career in the 1970s and early 1980s. And he served on the Senate staff of I think Senator Phil Hart. And he was, in fact, my first law school professor for contracts way back in fall of 1983. So with that, I will turn it over to Professor Lobel.

[APPLAUSE]

ORLY LOBEL: Thank you. I think this is the clicker. So, good morning. It's a great pleasure to be here. I want to commend the FTC for organizing this workshop and putting together a terrific program.

When I wrote Talent Wants to be Free in 2013, arguing that the labor market is a market that needs to be competitive and that non-competes are inherently anti-competitive tools that are spreading and pervasive, and we need to think about potential harms and effects, not only on employees and wages but also on entrepreneurship and on innovation, I felt quite lonely-- I don't know what happened right here-- in these arguments.

There were things out there, but just the number of new empirical research and what we know in the past, I would say, 10 years, seven years, has grown tremendously. And so it's very fitting that January 2020 we're having this discussion-- a new decade and new attention to this market.

What I was tasked to do this morning is provide some basics, particularly on the law, and explain why I think the common law has not really given us a lot of certainty on where we are on enforceability of non-competes, and kind of show how non-competes are at the intersection of many bodies of law that have been treating it as kind of an under-the-radar issue. And I think that this is why the Federal Trade Commission really can play a role in thinking about these issues.

So just basics on definitions, we are talking about non-competes, or covenants not to compete, in the post-employment context. So employees that sign contracts that tell them that they need to refrain from accepting employment in a similar line of work for a specific period in a certain geographic area. So we're always kind of in that zone of time, place, position.

And I see this field as being at intersections. And in that sense, because it's in intersections of bodies of law, I think that's where it kind of fell between the cracks or below the radar. So we're talking about contract law and employment law. For centuries, it's been a common law issue, and there's a lot of statutory law, a lot of state statutory law that varies.

It is also an IP question, and we'll see that trade secrets, which is kind of in itself, I think, in some ways the neglected stepchild of intellectual property law, plays a role not only in the definition

sometimes of-- not sometimes, really at the core of what is the enforcement requirements of non-competes, but it also-- intellectual property serves as alternatives to achieve similar goals.

And a lot of times, all of these agreements that have to do with intellectual property, ownership, and with competition, are bundled together in the same agreement. So all of them mean that there's kind of this spectrum that we need to consider when we think about where non-competes fit.

We'll talk about how antitrust law can, should, play a role in non-competes. But as I'll show, there's not been a lot of that up to now. And then the speaker after me will be the more knowledgeable on Section 5, but I'll say something about that in the end.

So focusing on what has been the purview of non-competes up to now, it's really, I think, fit to start with this quote by a state court saying, "What we're talking about in non-compete state law is a sea, vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything if he live so long."

And there's been one advantage, at least, in having so much variation in state law, which is the research. So, really, that's the researcher's dream, to have these natural experiments. And that's what's been emerging in the past decade or so, or a little bit more than that, comparing not only the very few non-enforcing states, the states like California, paradigmatically, that do not enforce non-competes in the context of employment, but also the majority of states that enforce non-competes within reason, or using the standard of reasonability, but to varying degrees.

And so now we know that even those varying degrees, even the more minute differences, even different details on what is required, does make a difference in terms of mobility and all the different questions that we want to ask about the labor market.

And I'll talk about this slide a little later, but you can see, even with the same state you see here-- Florida is on this slide showing that you can have variation with changes and reforms. So throughout the day, we'll have researchers like Evan Starr, who's done so much important work on this, showing these effects with changes in the law. Again, not just moving from one to zero, or kind of off/on enforcing or non-enforcing, but also changing the policy on when do we enforce, how do we enforce.

So with the majority of states, when we think about whether a non-compete will be enforceable, we start with the restatement of contracts. And it's always been that every state, really, will say that they don't enforce unreasonable non-competes.

And what is unreasonable? It's when the restraint is greater than is needed to protect the business and goodwill of the employer, legitimate business interests, or this need, this legitimate business interest, is outweighed by the hardship on the employee and the public's interests, the public policy and the injury to the public.

So how do we figure that out, that balance? Again, we think about the scope, both in terms of the position, the time, the length that the non-compete lasts, the geography that it covers. But it's

always this triangle. So it's the double triangle or angle of the effect on the employer versus the employee and the public in general. So this looks kind of ancient, but it's actually my RA designed this for Talent Wants to be Free. It's just a page from the book.

So legitimate business interest. I mentioned already trade secrets. Those are, I think, the best case for a protectable interest that the employer might claim. But we also see a lot of courts considering customer goodwill, employee or former employee relationship with clients. And then a little bit less, investment in human capital and training. Those are all potentially legitimate businesses interests of employers.

At the same time, again, courts always say, even though it's not clear if that's actually carried out, that what is a clear illegitimate business interest to enforce a non-compete is restraining competition. So that kind of naked restraint of competition as a purpose, which it is a goal that a lot of companies will want in the talent wars, is not justifiable.

The outliers in this story are only four states, and California is the iconic one that's always had this exceptional policy. They are the ones that do not enforce non-competes. They don't do this balancing act. They just don't enforce non-competes at all in the context of employment. They say that any restraint on anyone engaging in a lawful profession, trade, or business-- so notice the word "non-compete" does not appear in the act. It really uses the antitrust language.

It says that any restraint on trade is void. And the California courts have been quite consistent for decades upon decades in not enforcing non-competes, and actually not enforcing-- these are even more recent developments, and I think we're not even talking about these kinds of restraints-- other restraints, such as non-solicitation of customers, non-solicitation of co-workers or former co-workers. So what they consider as maybe more narrow restraints on trade are also to that extent void.

But again, it should be very much on the table that that doesn't mean that no non-competes are enforced in California. California does enforce non-competes when we're talking about the breaking up of a partnership, or the selling of goodwill between business partners. So we're only talking about the context of the labor market and employees being able to pursue their profession and trade.

There's been a lot of movement on state law in the past few years. And it's not surprising because it is, exactly like I described before, a moment, really, with momentum of seeing the research, having a debate, and understanding some of the gains in California and other places that have been more suspect of non-competes. And we'll talk about this more. Actually, Jane, who's on the panel, in our upcoming panel, now is one of the experts on a lot of these reforms.

So a very broad brush here, we have several states that have recently prohibited non-competes for low-wage workers. And some of them actually-- Washington, for example, that's here on the slide-- it's not low-wage workers, it's minimum-wage workers. It's below a threshold, which is quite a high threshold. So any worker that earns less than $100,000 a year, you cannot enforce a non-compete in that state.

And Massachusetts was very much covered. I see Russell Beck, who was material in that reform, in the audience. Massachusetts is a good example where they specifically looked at some of the harms on the region, and comparing the classic comparison of Silicon Valley and Massachusetts' tech hub, and thinking about potential gains of moving, not all the way to California, but restraining the spread of non-competes.

And so they have a new statute that requires 10-day written notice to actually sign a non-compete. The right to consult an attorney before signing. They limit all non-competes in this very new statute to one year and require a garden leave, a payment during that one year to the employee for non-competing. And other states, like Oregon, have passed similar recent laws.

Another very important issue, I think, that we need to discuss and we will discuss is what happens when a state-- and every state, as I just showed, every state requires reasonableness. So even in the states that enforce very broad non-competes, there will be non-competes that are drafted that are too broad even for those high-enforcing states. What happens then?

And there is, again, great variation. It's still the sea vacillating with uncertainty. There are those states that say if an employer has drafted too broad a non-compete, then the entire clause is void. Other states do not red pencil, but blue pencil. They allow the employer to still have an enforceable non-compete within the limits that they deem reasonable.

Reformation states similar, but even more active in saying, oh, you said, this scope of profession. We'll call it a little bit-- it's not nanotechnology in particular, engineering, like, a medical device application-- so they'll rewrite the whole clause. And this is really important because, again, for the FTC, knowing how broad the unenforceable non-competes are, how pervasive this phenomenon is, and what to do with it, is important.

In 2016, when the White House convened a meeting about non-competes, and I was part of the White House working group on thinking about these issues, one of the calls to the state by the president at the completion of this working group was that red pencil is really the way to go, because we don't want to give those incentives to draft too broad non-competes, to draft all these unenforceable clauses. Put them in employment contracts, and then have no cost in having those really broad interim effects.

Again, back to other kinds of variations. There are some states that have long had specific professions carved out of the non-compete enforceable world. So broadcasting in several states, where there's this understanding that you want to allow reporters to move freely. Security guards. Physicians.

I know that we're going to talk about some findings about physicians and the practice of non-competes. So there are several states that do not enforce non-competes specifically for doctors. And also the American Medical Association has opined that non-competes restrict competition, disrupt the continuity of care, and potentially deprive the public of medical services. That is not as strong an opinion or a ethical rule as the one with attorneys, where the ABA has been much more clear that, for attorneys, non-competes should be void and are unethical.

Tech workers. A lot of the research centers around them. A lot of the claims about scarcity of talent centers around the tech industry and computer industry. And Hawaii is an example where it's specifically banned non-competes very recently just for tech workers. And I think we'll also hear about some studies about Hawaii and that effect.

There are bills before Congress. And, again, we see kind of that spectrum of bills that would ban non-competes for low-wage workers, bills that would do the same for more workers, for all non-exempt employees, and a bill that would ban it completely. So it's interesting to see that spectrum. So, yes, we have this great spectrum that changes all the time.

And there are various ways to measure strength of enforceability. It involves so many different questions, like whether a court will enforce a non-compete against a fired employee versus a non-fired, or somebody that quit voluntarily. When does the non-compete-- when is it presented to the employee, before or after acceptance of an offer? Is there a rule of thumb of how long a state will enforce a non-compete on average?

And I want to make three points, again, setting us toward the discussion that we'll have throughout the day, about what we can learn from all of these variations. One insight is that we're not just talking about one effect. And this is why sometimes we have maybe variations, even in the debate of what we know from the empirical studies.

Sometimes we're talking about apples and oranges when we talk about what do non-competes do. Well, they do a lot of different things. And I think, again, for thinking about this context of talking about it at the FTC, it's been very important to me to say it's not just a labor issue. It's a market issue, and it's a competition issue, and a regional economic development issue. And so we have to consider all of the different consequences and costs and benefits. And I'll show a slide immediately after this one about that.

The other point of these variations is we have to consider alternatives of achieving the same goals. And I mentioned already intellectual property and clauses that restrain competition later on, restrain mobility but in different ways. Do they alternate? Are they effective enough without having that ultimate, blunt strongest gun of just complete prohibition of moving to a competitor or starting something new on your own?

And then the third point is the pervasiveness of non-enforceable non-competes that employees everywhere are signing and what to do about that. And so that gap between what the law is and how it plays out in action. Again, I think that's where a regulatory agency should be really concerned and should have a role in enforcing at least what the law says it does.

So the multiple effects. I have 10. I like the number 10. It's nice and round. But you could split it in different ways. I'll just highlight several of these. We're talking about-- the market for talent, it's a market just like the market for products. And it can be richer or more scarce or less productive in all sorts of ways.

I have some experimental behavioral studies that I've done with my collaborator, [INAUDIBLE], at UCSD on just the effects of signing away a career trajectory and how that can depress

motivation of people to be more productive to enrich their own talent. So we're talking about a market, but the product is a human resource that makes its own decisions as well on how it will behave. So it's not just a company that's making a kind of unilateral decision.

Another issue is the variation between states has meant that there is a brain gain/brain drain effect. And I know this in California. For me, I was teaching for six years in Massachusetts and then in Connecticut. And moving to California and teaching employment law and seeing that big difference, it's been really interesting to get to know the legal community.

And I know anecdotally, but it's also shown in the empirical data, that attorneys just call up somebody in an enforcing state, like in Illinois or Michigan, and they say, come here to-- in Southern California, it's biotech. In Los Angeles, it's entertainment. In Silicon Valley, tech. Come here. Your talent will be more valued. You will be able to leave if you're unhappy. There's going to be a competitive tournament more frequently over your talent, and that has an effect in competition between states themselves.

Wages and monopsonies, we'll talk about, I think, quite a bit with the speakers that are coming up. But what I think we'll talk about less-- and it's near and dear to my heart. I have, basically, three articles forthcoming right now that in some ways touch on this particular aspect. I think that the evidence is there that non-competes depress wages. There's less mobility, less valuation of one's value, or what they bring, and competition over one's talent. But it has a disproportionate negative effect on particular identities.

And I have been writing about the very sticky, very stagnating, gender wage gap. And I think that one of the things that we're seeing is that it's kind of the Gary Becker, very basic, 101, how do you eradicate inequality. Well, you have a market. You have a competitive market, a functioning market, that sees underpaid people, whether it's because of gender or race and biases, and there is a tournament specifically over their abilities.

OK, the second point out of the three. The spectrum of tools that we have to protect those protectable interests, those legitimate business interests. It's very important to see that non-competes are very much only a small piece of this greater puzzle, or one tool that is potentially available, or in some places not available.

So in California, we have very active trade secrecy litigation. And as I've shown in my most recent book, in You Don't Own Me, that can be a very strong threat on mobility in itself, even when those claims are frivolous, even when an innovation assignment is too broad, covers things that should not be protectable under the bargain that we've drawn in intellectual property, things that are just conceptual, in the idea stage, things that were completely developed on one's own. NDA's are frequently much broader than what trade secrecy, the statutory trade secrecy definition is.

We now have-- recently the Congress has strengthened trade secrecy by passing the Defend Trade Secret Act, having a civil right of action, federally, and also increasing the penalties of the Economic Espionage Act, the criminal arm of trade secrecy.

So all of those operate very strongly to create a threat for employees to really think not only twice but maybe three times and four times whether they can move to a competitor, or whether they can move from their big establish incumbent company and start something new in the high-frequency trading market and develop a new algorithm without being sued, without being arrested even. So all of this to say, we have a lot going on, and we have to think if non-competes are really necessary.

OK, so finally, the point that I've already made about how there's a lot of evidence that even in non-enforcing states, non-competes are, astoundingly, basically as prevalent as in enforcing states in the contracts themselves, which really means that employers are just using this tool as a threat even when they know that they will not be able to enforce it.

And we know that that has an effect, a behavioral effect. The FTC cares about behavioral effects. When we're thinking about the consumer market, we think about what is the actual practice in the market. What do people understand from what they sign, and how is behavior chilled.

And that's the lead to the end of my talk, and now the moving to the FTC's role. That's where I think that it's just not enough to rely on courts ex post to tell us in the litigation, in the context of defending a claim of a breach of a non-compete contract, whether something is enforceable or not. So there's a lot of roles, and we've started seeing some of these roles being played out.

In California, there's some things that we could emulate using the unfair business practices statutes and kind of a private attorney general model. Antitrust. We have the model of using antitrust when we have the "do not hire" lateral restraints. But we have not employed that so much in the vertical model of restraining trade through non-competes, which is actually much more pervasive.

So the FTC and the enterprise division have done quite a bit in making it clear that "do not hire" among employers is per se illegal. And they've announced that criminal prosecution is the next step. But they haven't done something similar with non-competes, which I would say are, again, both broader in context, or in how much they're used.

But also they're broader in their effect, because they tell employees that they can't go anywhere. They can't go to any employer. They can't found their own company. So a disproportionate loss to entrepreneurship and new entry in a market, which is really something that's of great concern. And they affect all employees. So non-competes, again, has been shown to have these negative externalities, not on only those who sign them, but beyond, on all workers in that region.

So, last slide. I'm not an expert on Section 5 of the FTC Act. But I do think that, setting up the discussion for today, we're talking about the role of the FTC in looking at practices that have a strong potential for stifling competition. And non-competes-- it's in the words themselves. It kind of falls squarely in that standard.

And I think the FTC is really well-positioned to think about practices that are against the public policy, even kind of looking at all of those multiple effects beyond perhaps just what the antitrust

division looks at-- how concentrated versus how much competition there is in a particular market, but looking at all these multiple effects, like the 10, if you want.

So I will end here. And we're going straight into-- I'll be in the next panel too, so thank you.

[APPLAUSE]

WILLIAM KOVACIC: All right. Thanks. Thanks very much to Chairman Simons, to his colleagues on the Commission, to the Office of Policy Planning for the wonderful opportunity to participate in the program today. And great thanks for Orly to offer that great summary of a lot of dense and difficult material on the approach of competition policy to dealing with non-competes.

I'm going to talk about the consumer protection side of the enforcement and rulemaking agenda, and to think about the use of consumer protection concepts directly in the prosecution of cases or in the development of rules.

My main policy conclusion is that the paths that Orly has suggested are the most promising paths, that is that the consumer protection mandates that both the federal government and most of the states work with tend to be so explicitly consumer-facing that they don't address very directly the employer-employee relationship as a focus of attention.

So a major policy conclusion I'm going to offer, and just to identify it first, is that Orly's emphasis on competition as a theory of enforcement, of policymaking, is probably the most promising here. And thus, you've seen the best road map, I think, so far to begin with.

I want to talk about two things about consumer protection. One is the coverage of unfair or deceptive acts and practices and whether or not it would encompass the kinds of concerns that we're addressing today. And then to talk about strategy and process for policymaking, and here I'm going to address concerns that would be related to the use of unfair methods of competition by both the FTC or by the state governments with their replicas of the FTC Act or in the development of rules-- both approaches.

So second half of my presentation focuses on policy implementation, the first on the concept of using consumer protection. And in doing this-- I speak for myself, not the Competition and Markets Authority in the United Kingdom-- but I do draw upon, in one instance, my experience there to suggest what approaches might be taken going ahead.

A basic assumption I'm making here is that there's not going to be new legislation right away, so I'm talking about tools that the FTC and the states could use right now currently at their disposal. I'm not going to take the easy escape hatch by saying you walk up the street here to the big, white dome building and ask them for more stuff. Maybe they'd give it to you, maybe not, although I'm going to cheat on that a bit at the end in saying, if I was going to ask them for more stuff, here's what I'd ask for in order to do this, to address the mandate.

The most fundamental question, I think, that would arise in using the unfairness or deception authority of the FTC or most of the state governments as well is whether it covers this relationship. Most of these statutes, either by their own terms, by policy interpretation, or by jurisprudence, address business-to-consumer relationships.

In a number of the state laws, it's expressly contained in the statute that this deals with relationships between merchants and consumers. In the federal policy guidance and jurisprudence, the consumer protection mandate-- and, again, I'm talking about unfair practices. I'm talking about deceptive practices. Both of those guidelines talk about the consumer interest first and foremost.

So, basic question is, who's covered by this? Unmistakably, relationships involving merchants, sellers, and individual consumers and users clearly covered. The FTC in a number of instances has said that the consumer can be a business enterprise too, covering a number of business-to-business relationships as well.

Notable examples, the dozens upon dozens of so-called "phoner-toner" cases that the FTC brought, beginning in the 1990s carrying forward, where the victim was another business enterprise. It was a smaller business enterprise, often a retailer that's dealing with a wholesaler or a manufacturer which is using spurious business methods to push prices up or to impose unfair terms.

And the "phoner-toner" cases, again and again, focused upon business-to-business relationships. So who was the consumer? The customer. The customer was a business enterprise. It wasn't an individual consumer.

Most recent example from the FTC's experience is the Fleet Card case. This involves the use of fuel cards by a business enterprise that was offering to retailers, to smaller operators, the use of a fuel card that could be used to purchase fuel for operations. The terms on which this was offered, again, involved a significant misrepresentation-- deceit.

And the FTC challenged this. The FTC's complaint indeed almost uses the terms "customer" and "consumer" interchangeably-- "customer" suggesting that we're not talking about an end user, the individual in a home, the operator in a personal car purchasing gasoline. These were business enterprises that were using the fuel card system in question.

So without a doubt, the FTC has, through litigation, through policymaking, fairly well established an administrative practice and, I think, a widely accepted custom to treat business-to-business relationships as falling within the ambit of its consumer protection authority.

I would say that that question has never made its way up to the Supreme Court. That is, is this an acceptable stretch to treat business-to-business relationships as being encompassed by the unfairness and deception authority of the FTC? That hasn't happened, but my intuition would be that that's probably going to be a supportable position.

What about relationships between employers and workers? There's not much here. There's only a very thin basis of experience for offering any conclusions, and my research suggests it all deals with privacy and data protection.

An issue that arose first with Safe Harbor and later with Privacy Shield was the effectiveness of the FTC's enforcement framework to take alleged breaches of the promises that businesses would make in connection with Safe Harbor and Privacy Shield, notably their promises to respect and apply the standards that come out of the European Union, the European Commission related to privacy. The FTC would use Section 5 of the FTC Act, its deception or perhaps its unfairness authority, to challenge breaches of those promises.

So the FTC Section 5 authority was a crucial ingredient of the effectiveness of both Safe Harbor and Privacy Shield. And on a couple of occasions, European authorities, or non-EU members that wanted to use the framework, asked the FTC, are you really going to enforce this, and is your jurisdiction effective?

Bob Pitofsky signed a letter to the European Commission in the late 1990s during his chairmanship that said, yes, no question. I signed such a letter for the government of Switzerland in 2008 saying, don't worry about it.

What was the specific technical issue that could come up? Lots of the data transfer issues involved taking the data about a single employee located in the European Union, or in this case in Switzerland, and transferring it to a North American entity.

The interest to be protected was the interest of the worker as a worker. The privacy interest of the worker, not the privacy interests of a consumer who had given information to the enterprise. Not a consumer-facing issue, but the data protection mandate encompassed the interests of workers, laborers whose information was being transferred as well as the information of individuals.

No attention has been drawn specifically in any litigation setting to whether they're covered by the FTC's authority. That is, can the FTC use its unfair or deceptive acts or practices authority to treat breaches of this obligation that arguably involve the interests of workers, laborers, as opposed to individual consumers?

Certainly in the two letters-- again, one I signed myself with a little bit of uncertainty about the legal basis for doing this-- Bob Pitofsky's letter and my letter both say, yes, it's covered. Now, this isn't an issue that drew a lot of attention. The Swiss government nor the European Union said, hey, we've studied your consumer protection framework. Are you really sure about this specific scenario? They didn't ask about that. But we gave a fairly blanket suggestion that, yes, it's covered.

My inference from this is that, if you think about developing a foundation for addressing the roster of concerns that Orly mentioned and that our fellow panelists will be discussing later, the argument that what's at stake is a basic distortion of the competitive process itself-- markets for labor, and the effect of restrictions on markets for labor, on competition within a sector. That's a

more promising foundation to build an enforcement program than unfair deceptive acts or practices at the federal level.

I'll mention that, again, if you look at the states, if you look at all the state laws, you see some significant variation in the way in which the consumer protection mandate is spelled out. Some states, again, very clearly talk about consumer-facing relationships right in the text of the law. Others incorporate by reference, basically, federal jurisprudence, federal policymaking, in a sense to absorb what the FTC has done in this area.

The language of several state laws is a bit broader. Arguably, it would allow the state to use its consumer protection mandate to challenge some of these practices, perhaps in litigation. There's an opening there. Although if the competition mandate, which is in parallel in these statutes dealing with unfair methods of competition, is equally broad and significant, I don't know why you wouldn't use that first, as your first theory of enforcement. But in short, the state Unfair or Deceptive Acts or Practices consumer protection mandate provides in some instances a bit more flexibility that, arguably, doesn't exist in the US.

Well, do you try to stretch, if you're the FTC? You try and stretch and say, yes, employer-employee relationships are encompassed in the UDAP framework. Do you do that? You could try to do that. You could try to stretch. There have been a number of instances in which the agency has stretched authority at the boundaries. I'd simply observe, and to come back to this in a moment, that the ability to stretch or to develop a rule that doesn't involve obvious stretching depends so much on the quality of the empirical evidence it's offered to support the rule.

I'd just say that where the FTC has succeeded in the past of using either rulemaking or litigation to expand the boundaries of its authority-- where has it had the most success? It's done it in an environment in which the judiciary was largely sympathetic to efforts to do that. That is, you had courts that were willing to look at the expert agency with a broad mandate and say, we will support you in this extension.

I don't have a rigorous proof for you, but I'd suggest that that judicial environment doesn't exist today. Indeed, judges who at one time had an enthusiasm for entertaining these approaches largely don't populate the federal courts today, least of all the Supreme Court. So that instead, you have skeptics about the extension of the administrative state, skeptics looking at efforts to do things that are more creative.

It's not impossible. That is, well-founded efforts to do things at the frontiers of authority can succeed. This agency has done them in a number of impressive instances. Activists-- Phoebe Putney, NC Dental-- three competition cases dealing at rough, difficult edges and frontiers to the agency's authority, three trips to the Supreme Court, three victories. That didn't happen by accident. So that's my way of saying that if it's hard, and it's difficult, if you use a very careful and well-thought-out process to go about it, there are ways to increase your success.

And when the decisions were taken in those cases at this table, on each one of them, I just suggest to you generally the overwhelming assessment was not that we were going to win. That

these were cases worth doing, but the prognosis was not on the whole favorable. Matters worth doing. Just a way of saying that sometimes you can stretch the frontiers, and you can succeed.

Some concluding thoughts about process. What's the foundation for either doing the good case or developing an effective rule? And let's assume that we go down the path of the competition authority here and that's the way you go about doing it.

The essential foundation is going to be the persuasiveness of the policy analysis that the agency does, not just taking into account research that is sympathetic towards greater protection for employees, but to taking head on and distinguishing research that is not sympathetic to that approach, that is skeptical or critical. That evidentiary debates what's going to be brought out in the appellate process.

And, again, did I mention before it's largely a skeptical environment for doing that? It is. So the bolder the measure, the stronger the evidentiary armor is going to have to be and the more thoughtful the analysis. It's possible to do, it's just a more difficult climb today than it was at an earlier time. And this is the case whether you're dealing with cases, whether you're dealing with advocacy, whether you're trying to promulgate rules.

And again and again, what's the argument here that's going to work? It's going to be the argument that speaks to the courts in the language they want to hear today. It's economic analysis. It's, tell us about actual experience. Draw upon the approach that Orly was suggesting before. What has the actual experience been as a way of anticipating whether the proposed regulatory measure makes sense.

And, yes, part of that involves drawing upon the full range of observations that come in part from consumer protection economics, that come from competition economics, that perhaps show what a new competition approach might do.

In all of it, what the agency is doing is a form of branding. Everything an agency does, day in and day out, speaks to outside audience that either says, we're competent, we're thoughtful, or, by contrast, we are incompetent, we're idiots. Every word that comes out of an agency emphasizes one of those two approaches.

So for a competition authority that has the ability to do research, to develop a program, the coherence, the clarity, and the sense given to reviewing courts and to legislators-- we know what we're talking about. Maybe deference is a mirage. I tend to think it is. I think courts want to hear first that it's a good idea, then they defer. So the crucial foundation for doing good work is to give them a reason to defer in the first place.

So it's the quality of the analysis, bringing to bear all the distinctive skills that the FTC has on the process that builds the foundation that is ultimately persuasive, especially if you want, for example, a rule that's going to denominate areas of per se illegality. In the competition world, that requires a finding that, far more often than not, the behavior is harmful. And it's going to be the quality of the empirical basis to support that it is impressive or not.

One thought about rulemaking. And there's wonderful panelists, including my colleague Dick Pierce, who has forgotten more about this than I'll ever know, about rulemaking and its difficulties. I just say that Magnuson-Moss doesn't terrify me as much as it does a number of others.

There were two wonderful studies that were done in the late '80s, when I was a young person at the FTC, when the rulemaking process was not going so well-- one done by the administrative conference, one by the FTC-- that looked at rules that were good and bad-- good and bad in the sense of how long it took. And both of those studies said, if you do a really good job of framing the rule and think through very carefully what you're going to do, it doesn't take a lifetime. You can do it in two or three years. You can do it more quickly.

My proposition would be a careful study of the ones that worked. And going back to these earlier studies about how to do this work is a good way to begin in thinking about how you frame a rule and do the rule. There's a lot of experience, I fear, more and more forgotten now about how it can be done well. Magnuson-Moss doesn't scare me so much on that point.

There's a lot of room for state and federal cooperation on this. If the FTC were to build a rule and proceed on this basis, it would have to be able to draw upon the assembled experience that is, again, the empirical basis that says it's going to work, and it's a good idea, and it's going to succeed. That cooperation shouldn't be intermittent. That should be a regular element of ongoing work. That should be a working group that does this day in and day out.

Last, my escape hatch. If you're going to think about legislation, perhaps then you go to Congress and say, here are the specific powers we want. We want APA rulemaking with civil penal authority. Give it to us. If they say, where have you ever done that before? You did it with the telemarketing sales rule. You've done it with a number the number of instances. You know how to do it. We've shown you that we can use it responsibly, so give us the authority. Here are the examples where it's worked. It's not scary to do it based upon the case that we made to do this.

And a last thought is that the market regime that the Competition and Markets Authority in the UK has does a nice job of dealing with these problems that have overlapping competition and consumer dimensions. It enables you to do novel things that don't involve showing that there's a violation of existing law. If I was going to import one thing to bring along with me, that's something I think of in my legislative work list. Thank you.

[APPLAUSE]

SARAH MACKEY: Thank you, Bill and Orly. We move to break now until 9:35, and then we'll start again with our panel. Thank you.

JACOB HAMBURGER: --deputy director at the Office of Policy Planning at the FCC. And welcome to our first panel today on the FCC's authority to address non-compete clauses. We're very happy that you guys could join us, both here in person and on the web.

One thing before we start our panel I just want to point out is that we have people walking around with question cards. So if you have any questions along the way, just write down your question, raise your hand, and there will be people walking around collecting them. And then we'll be able to ask them during today's session.

So some quick introductions. You guys have everyone's bios in front of you, so we won't need to go into the full thing. But to my left in order is Jane Flanagan. She is a visiting scholar at the Illinois Institute of Technology, Chicago-Kent College of Law and a Leadership and Government Fellow with the Open Society Foundations.

And to her left is Damon Silvers. He is director of policy and special counsel at the AFL-CIO. And to Damon's left is Randy Stutz. He is the vice president of legal advocacy at the American Antitrust Institute.

And to his left is Eric Posner. He is the Kirkland & Ellis Distinguished Service Professor of Law at the University of Chicago Law School. And we have already introduced Bill and Orly.

So with that, let's go ahead with Jane.

JANE FLANAGAN: So good morning, and thank you for that introduction. And thank you for the opportunity to participate in what I think is a really important event and to be here with these really very distinguished co-panelists. So thank you.

My name is Jane Flanagan. Until about a year ago, I was the chief of the Workplace Rights Bureau within the Illinois Attorney General's office, where, among other things, I led around a dozen investigations and two lawsuits into employers' use of non-compete agreements for mostly low and middle-income workers.

In the course of those investigations and our intake process, I spoke to many individuals--restaurant workers, nurses, health care providers, hairstylists, massage therapists, salespeople, receptionists, employees of local news stations, customer service personnel, child care providers, among others who were subject to and whose lives were impacted by non-competes.

So today I'd like to use part of my time to just highlight some of those experiences and my observations from those investigations with a particular focus on what Orly called the gap, really almost the, I would say, chasm that exists between the legal theories that underpin non-compete law and how I saw them used in practice.

I'll also take some time to discuss the legal theories that we relied upon to do those investigations and conduct those lawsuits and some of the work that other states attorneys general are doing in this area.

So as Orly highlighted for us, existing law governing non-competes is premised on this assumption that these are individualized contracts negotiated between employees and employers. However, in the investigations that we conducted, uniformly, the non-compete clause was one term within a larger employment agreement or contract presented to all employees across a

workforce, typically on an employee's first day of work, to be clicked or initialed, as any of us would in sort of a standard consumer contract that we sign for whatever, a cell phone.

Given that these contracts were sort of unilaterally drafted and presented as part of an onboarding process, many of the employees we spoke with didn't realize that they were subject to a non-compete at all until they attempted to leave their job. It may not have made much difference anyway, as many of the contracts also stated explicitly on their face that agreement to the entirety of the contract was a term and condition of work.

So because these non-competes were applied broadly across the entire workforce with little to no differentiation for individual differences in pay, job duties, or exposure to confidential information, they were imposed on employees for whom there was no legitimate legal justification. Not all employees in a workforce necessarily, but certainly some.

One child care center required an identical non-compete for their groundskeepers, landscapers, maintenance staff, the daycare workers in the classrooms, the lead teachers, as well as the administration. A check cashing and payday loan company required the lowest level customer service representatives, who made $12 an hour or around there, to sign the same non-compete as the assistant manager, regional managers with oversight of large territories.

And I think these observations are consistent with a recent survey of employers conducted by the Economic Policy Institute that found that of employers who report using non-competes, about a third of them use them for every employee in the workforce. Perhaps for this reason, many of the employers that we investigated almost immediately agreed to drop the non-competes for some categories of workers who were subject to them.

We did engage in some negotiations about employees with access to confidential customer data, for example, or customer lists, but these concerns were protected by less restrictive means in existing contracts. For example, confidentiality or non-solicit provisions, which we had not challenged. And also by employers taking steps to limit employee access, for example, to confidential data that wasn't necessary to perform their job.

I don't recall hearing an argument from an employer that the employees would be deprived of valuable training without the non-compete. For most of these workers, the training they received was training necessary to do the job.

So a second observation I'd like to make from our investigations is that court enforceability or lack of enforceability was not particularly material to the employees that were impacted by them. Most employees are not familiar with legal standards governing non-competes. They did not have time or resources to consult with legal counsel, or to hire them to challenge them to wait out the term of a non-compete. As such, we also saw numerous instances in which the terms of the non-compete themselves, forget about who they were applied to, but the actual terms, were also so broad as to be unenforceable.

One high-end steakhouse prohibited employees, for example, from working at any restaurant that featured steaks, chops, seafood, or derived more than 25% of their revenue from the sale of beef.

So an employee that contacted us had lost a job, a prospective job, with another restaurant that didn't believe they were covered by that definition but didn't want to risk litigation.

We also saw broad geographic restrictions. So one advanced practice nurse we spoke with had a non-compete that prevented her from practicing within 25 miles of her former employer. She lived in a small city in a relatively rural area of Illinois, which meant that any competitor hospital or medical facility was covered by that radius, and she was off-limits.

So despite the fact that, I think, most of the legal experts on this panel would agree that the terms I've just described would not hold up in court, it really didn't make much practical effect to employees, because they were not going to challenge them. An informal enforcement was very effective. Employers can mention or remind employees of a non-compete when they leave a job. We saw that multiple times. They can mention a non-compete to prospective employers when they call for a reference check.

I remember speaking to one employee of a small spa and hair salon whose employer had enforced a non-compete against one former employee and would, quote, "brag" about that, or sort of wave around the TRO she'd obtained to prevent other workers or dissuade other workers from looking for competitive offers. And, interestingly, those workers expressed that they felt this not only limited their outside options, but it limited their ability to then complain about things like low wages or bad work schedules at that job that they felt stuck in.

So, in short, my observation has been that employers really have few current disincentives to both overuse and overreach in non-competes and that private litigation is unlikely to discipline the harmful or anti-competitive effects of non-competes for many workers, which is, I think, why talking about a proactive ban makes a lot of sense.

Finally, I just wanted to highlight, and I think we'll talk about this more in our discussion, sort of the basis for some of the investigations that we conducted. So we used a couple different theories in Illinois to do this work.

One, in the court cases we filed, we saw declaratory judgments that, as applied to certain categories of low-wage workers, the non-competes at issue were per se unenforceable under state common law. And the way that we did that is that state attorneys general, including in Illinois, often have parens patriae authority to essentially enforce the common law on behalf of the people and the businesses in their states.

Secondly, we did argue that the blanket application of non-competes in these cases were unfair under the Illinois Consumer Fraud Act. We can talk about the details of this later. We did not make a particularly clear distinction between unfair method of competition and an unfair practice, in part because of Illinois case law in this area.

But we really argued that they offended the public policy against restraints on trade and competition and that they caused substantial injury to Illinois employers in the state in the form of decreased job mobility and entrepreneurship. And Illinois is one of the states that's passed a

low-wage worker ban. So after the Illinois Freedom to Work Act was passed, we also asserted that in some of our investigations that involved employees earning less than $13 an hour.

The New York Attorney General's Office has also conducted some investigations into use of non-compete agreements. They have different broad statutory authority to investigate sort of unlawfulness within the state pursuant to the New York executive law, so that's been kind of the basis. And Attorney General Bob Ferguson in Washington recently filed a case involving baristas at a Washington-based coffee shop, asserting his unfair competition authority under state law.

So, as Orly mentioned, a number of states have passed legislation in the past few years. But it really does-- despite these three states that have done limited enforcement and these handful of states that have engaged in some legislative activity, the majority of states have seen no enforcement or legislative activity in this area.

And state law does really remain a patchwork, largely still governed by common law standards that can only be enforced in court on a largely individual basis, reflecting neither the way that non-competes are used in practice for employees nor giving employers really any clear standard for shaping their internal policies in this area.

So for this reason, a number of state attorney general have publicly supported an FTC rulemaking to ban non-competes, calling it the quickest and most comprehensive regulatory path to protecting workers from these exploitative contracts, and I agree.

JACOB HAMBURGER: Jane, thank you. Damon?

DAMON SILVERS: Great. Thank you, Jacob. I'm Damon Silvers. I'm the policy director and special counsel to the AFL-CIO, America's labor federation.

I want to begin by putting this on a much larger context, which is, I think, why I was asked to be here today, as I am not as expert as my colleagues are on the legal issue, the doctrinal issues involved. But I think this is critical in terms of what some of the speakers said about laying the evidentiary basis for any rulemaking that the commission might do.

Wage stagnation is perhaps the fundamental economic and social problem that the United States faces today. And this has now-- I think there is now overwhelming evidence that this is true not just about the last, say, five-- the period since the economic crisis, but, really, over a generation.

And it underlies, essentially, a series of profound macroeconomic challenges that we face and is increasingly identified by the Federal Reserve-- you don't have to trust me on this matter-- but by the Federal Reserve as the basic challenge that they are facing in trying to manage the US economy and make monetary policy.

Wage stagnation is persistent in our economy, particularly in the portions of the labor market not directly affected by recent increases in the minimum wage. Wage stagnation is prevalent despite

the fact that, by most measures, economists would have cited 10 years ago-- we have been at full employment for a number of years now.

And there's now a substantial body of literature seeking to explain this. There is a growing consensus that at the core of this problem is the decline in collective bargaining and the decline in union density. What we're talking about today is completely intertwined with that phenomenon. Just to remind you, and I think this is in some of the other materials for this meeting, collective bargaining coverage in the private sector in the United States has declined from a high of close to 40% in the 1950s to 6.3% today.

And the other issue that has gotten a lot of attention is the issue we're talking about today, which is anti-competitive practices in the labor market by employers, of which non-compete agreements are a central feature. And as Jane just said, I think we now have a fair amount of data we didn't have until very recently that shows just how prevalent non-compete agreements are.

So, in the past, most studies in this area have surveyed employees. It turns out, for the reasons that Jane was describing in terms of the fact that these are contracts of adhesion, many employees do not know that they are subject to a non-compete agreement until it's enforced on them, and often enforced informally in ways that employees have little ability to judge whether it's in fact an enforceable contract. The type of enforcement I'm talking about is simply a threat by somebody powerful directed against somebody powerless.

It turns out, according to the Economic Policy Institute study that Jane cited, that when you survey employers, that non-compete agreement coverage seems to be somewhere around 40%. And it depends on, again, how you-- which type of answer you take and that sort of thing, but as opposed to the 20% coverage levels that have been gotten by surveying employees and asking them are they covered.

Now, the second piece of data here that we have and that deserves more inquiry, but it's fairly well-established, is that there is a negative relationship between both the existence and the enforcement of non-compete agreements and wage levels. This is what was demonstrated in a statistically significant way by the 2016 Treasury Department study.

Now, if that's not enough, I can tell you-- and I think this is my unique professional expertise here-- I can tell you that unions never agreed on non-compete agreements. I've never seen in collective bargaining an agreement that had one in it. And what that tells you is that this is a phenomenon of contracts of adhesion, of contracts that are not actually negotiated between parties, with profound asymmetries in information and power.

Now, there's a deeper level here in which this conversation is related to the questions of collective bargaining and the overall bargaining power of workers in the US labor market. Non-compete agreements, as we've heard from the prior speakers, are generally justified as ways of encouraging and protecting firm-specific investments in human capital.

And I would suggest to you that the evidence-- that if you look at this, if we step back, all right, from the non-compete issue and realize that what you're being told when-- if the commission is

told this, what they're being told is, it is a solution to the collective action problem in training, that this problem is not within the little box of competition policy.

This is a problem which has been addressed in different times in different places through different means. And I would suggest to you that the non-compete agreement is a fundamentally exploitative and economically destructive solution to that problem, and there are other solutions that are actually not either exploitative or destructive.

The primary solution to this problem historically in the United States has been multi-employer collective bargaining and the provision of-- the funding of training through multi-employer structures, where employees are free to move from employer to employer and the employers as a whole pay for training.

Now, you might say, well, that is a historical artifact of the industrial world, post-World War II economy and all that, except that this is exactly how training is provided in all of our major advanced industrial competitors. This is how the training problem is solved in Scandinavia, in Germany, in Japan, to a lesser degree in South Korea. And it may not be a surprise that the competition authorities in many of these countries severely frown upon this type of handcuffing of workers.

So the argument that we have to have non-competes in order to make human capital investment possible-- never mind the fact that non-competes are prevalent in areas of the labor market where employers are making essentially no investments in human capital, which is what Jane was just describing-- but even to the extent that we actually are talking about this, that there's any substance to this at all, non-competes are the inferior solution to the problem.

Now, finally, I want to call attention to the irony or the paradox of the fact that so many of the non-compete agreements that employees have signed in this country are unenforceable. As we've heard, non-compete agreements are essentially per se unenforceable in California, and many of the non-compete agreements that employees sign as contracts of adhesion upon employment in non-collective bargaining settings are pretty clearly unenforceable under common law, or under some of these new state statutes. And yet, they continue to be prevalent.

What does that tell us? Well, that tells us, for starters, that they are not the product of any kind of well-informed bargaining process of the kind that market theorists would recognize as likely to generate efficient outcomes. And that in and of itself should be part of the evidentiary basis for commission action.

Now, finally, I will just tell you an anecdote that I think says a great deal about what it is we're speaking about. Last night, I was in a very different place, at Georgetown Law School, discussing a very different subject, which is the relative success of the American venture capital system, which is a subject that I'm sure that many of the skeptical judges that we heard about earlier would agree about and be happy about.

And Bill Janeway, an Oxford don, who was giving this talk and who has had a long experience in venture capital, concluded his remarks by saying, you know, among the most important things

to understand is the fact that, really, the explosion of successful venture capital investments occurred when the locus of innovation in the United States move moved from Massachusetts to California. And why did it do that? Because they enforce non-compete agreements in Massachusetts, and they do not in California.

Now, I would close by saying that, if I started by saying that the United States faces this very profound economic challenge associated with wage stagnation, that the other economic challenge we face is whether-- the other central economic challenge we face in an era of global competition, when we will no longer be the world's largest economy, is will we be able to effectively develop and effectively make use of our human capital. And we are inviting-- by the prevalence of these agreements, we are inviting someone else to steal a march on us in this respect.

Now, the last thing I'm going to say has to do with the response to the comments that Professor [INAUDIBLE] made about the courts. The AFL-CIO has been around a long time, and we have seen the courts and the regulatory agencies move back and forth on a number of occasions. It is in our view the role of the regulatory agencies to aggressively address this type of problem in the understanding that, in truth, you can't lose.

If the courts recognize that the factual and legal basis for action is well-founded, then, obviously, you've just won. If they do not, in spite of the fact that it is well-founded, then you have laid the groundwork for legislation.

And even if the courts overturn that legislation-- as, for example, the Lochner era courts did over and over again when state regulatory agencies attempted to address inequities in the labor market-- even when the courts overturned that legislation, it lays the groundwork for the kinds of profound legal changes that ultimately come when legal system fails to address the types of rather serious problems in the most important market we have, our labor market, over time. Thank you.

JACOB HAMBURGER: Damon, thank you. Randy, your remarks.

RANDY STUTZ: Sure. Good morning and thank you to the FTC for assembling this terrific lineup of speakers, both on this panel and throughout the day today. I'm very honored to be here and looking forward to the entire day. And thank you to Sarah and Jacob as well for organizing this panel.

In my role at AAI, I have been thinking about the theory of competitive harm underlying some of the cases that Jane mentioned. But really, any case challenging a non-compete agreement as a potential antitrust violation. And I think thinking about this through an antitrust lens really helps to crystallize what a serious challenge non-competes pose as a competition policy issue.

What I see is a recurring problem in proving competitive harm in these cases. And it's that the competitive effect tends to be an aggregate effect that occurs when non-competes become pervasive in a labor market. But antitrust enforcement is set up so that a plaintiff can usually only challenge one non-compete at a time in litigation.

And this dynamic seems to keep leading to a recurring irony, which is that the non-competes that are easiest to condemn from a public policy perspective tend to be the hardest to prosecute as antitrust violations. And conversely, the non-competes that are comparatively harder to condemn on public policy grounds are comparatively easier to prosecute.

So let me unpack what I mean both about the aggregation problem and this related irony. So the aggregate effect problem arises from the fact that an abusive non-compete agreement itself is typically an agreement between one employer and one worker. And the agreement harms the welfare of the one worker who is the party to the non-compete. But it likely doesn't register an effect on the competitive hiring process in the labor market as a whole unless the labor market is highly concentrated.

But in a given relevant antitrust labor market, if you have most of the employers using non-competes to lock up most of the employees in the market, then collectively the non-competes really do register a very serious anti-competitive effect on the hiring process and the labor market. So we have a situation where employers in the aggregate create an anti-competitive labor market outcome, but they do it unilaterally by acting independently to exploit their bargaining leverage over their respective employees.

And there isn't really much reason to suspect that the employers are either explicitly tacitly colluding with each other in terms of implementing non-compete agreements with their own respective employees. So you end up with a scenario with you have diminished competition among employers, in terms of hiring and retaining workers on the buyer side of the labor market. And you have depressed wages and mobility for workers on the sellers side of the labor market.

And that's exactly what you would expect to get from an illegal and anti-competitive trade restraint. But you just don't get there through any single agreement that seems reachable under the antitrust laws if the plaintiff has to prove that an individual agreement itself had an anti-competitive effect. Now, so the irony arises from the fact that when you consider non-compete agreements individually in isolation, the most exploitative and problematic non-competes, the ones that we're most concerned about from a public policy perspective, are generally less likely to register anti-competitive effects in relevant labor markets.

So think of the non-competes covering low skill, low wage workers who don't really have any meaningful access to trade secrets, aren't giving any meaningful training beyond the unavoidable entry level training that every employer has to provide without regard to a non-compete. In my view, there doesn't seem to be any legitimate justification for this kind of a non-compete agreement whatsoever.

But the pool of employees who are capable of performing these low skill jobs is often going to be quite large. And removing just one employee from the labor market is unlikely to register a meaningful market wide competitive effect. And conversely, if you think about a labor market, for the most highly skilled, highly paid employees with lots of education, very specialized training. In that circumstance, removing one employer from the labor market actually could register an anti-competitive effect, but these are the employees that tend to have some more bargaining leverage on their side.

And as a public policy matter, these aren't the ones we're most concerned about protecting. So you end up with this scenario where plaintiffs have a harder time winning what are arguably the most important cases in an easier time with what are arguably the least important cases.

A second consideration that's closely related to the problem of proving an anti-competitive effect is that private plaintiffs also-- speaking of just private plaintiffs-- have to prove antitrust injury to have standing to sue. Which means they have to show the non-compete cause a kind of injury that the antitrust laws were designed to prevent. And the problem there in a labor market case, our primary concern from a public policy perspective is the exercise of buyer power.

And in a buyer power case, antitrust law is serving to protect seller welfare, rather than buyer welfare. And so, the plaintiff's usually going to have to show an antitrust injury on the seller side of the labor market, which would typically be evidence showing that an individual non-compete caused reduced wages or diminished non wage terms of employment harming workers in some way.

Now while an abusive non-compete agreement viewed in isolation can certainly cause injury to the welfare of the one worker who is a party to the agreement itself, the non-compete itself is pretty unlikely to cause antitrust injury to the remaining workers on the seller side of the labor market. So removing one employee from the labor market, if it's going to have any effect on the remaining employees in the labor market, if anything it's going to raise their wages in isolation.

Looking at an isolation because that makes their services more scarce in the eyes of other employers. So we get another similar irony that comes into play. The people we're most concerned about, the employees, often don't suffer a cognizable antitrust injury if we're reviewing a single non-compete agreement versus the collection of non-competes that are affecting the labor market in the aggregate.

Now, there is potentially cognizable injury on the buyer side of the labor market in this scenario, which is to say there's harm from the employer's perspective. That the employer is experiencing a shrinking pool of available workers and from the buyer side perspective, it's experiencing reduced supply less choice and it's raising the cost of purchasing labor. That's certainly the kind of injury that qualifies as antitrust injury.

But again, the antitrust laws are not serving as an especially helpful policy tool if they're giving a private cause of action to the employers who tend to have all the power in these scenarios and not giving a cause of action to the workers who are the victims that we're most concerned about. So we have a scenario where the anti-trust laws just aren't addressing the policy problem that we're trying to solve.

Now, I mentioned antitrust injury is something that only private plaintiffs have to prove. So it doesn't directly affect the FTC, for example. But the federal government, because of resource constraints, has to rely heavily on private enforcement to pick up a lot of the slack in prosecuting a lot of these cases. So to me, thinking about the antitrust injury challenges, it remains a significant concern whether you're talking about public or private enforcement.

In terms of the other way-- the other important thing to think about from an antitrust perspective is the primary theory of liability that's going to be used in these cases. And that's where the real escape hatch is for a potential plaintiff. And specifically, it comes down to whether plaintiffs can get out from underneath the rule of reason.

If plaintiffs can allege that a non-compete is per se illegal or presumptively illegal under the rule of reason, they're not obligated to prove that the employer has market power, that the agreement caused an anti-competitive effect in order to make out a prima facie case. So to the extent non-competes have to be challenged at the individual level rather than at the aggregate level in a given labor market under an antitrust theory, it's probably safe to say that a more relaxed liability standard is going to be essential for there to be any effective private enforcement in this space.

In terms of the available series of liability that are out there for us to choose from, I would say a section one Sherman Act theory does not hold a great deal of promise for a variety of reasons. Number one, non-compete agreements are vertical agreements. Typically, between vertically oriented parties at least. Not necessarily vertical and their effects. But courts typically apply the full blown rule of reason, which is going to require proof of an anti-competitive effect in market power to vertical agreements.

Non-competes have also been subject to the ancillary restraints defense. The Addison Pipe case, going back to the 1890s, judge Taft actually included employment non-compete agreements as an example of a potential ancillary restraint. So both of those factors that the prospect of-- both the prospect of an ancillary restraints defense and the likelihood of the rule of reason puts that aggregate effect problem back in play under section one theory.

Section 2 cases I also don't see is especially promising. A section two theory. The primary reason being that there is no avenue to a more relaxed liability standard under section two. Section two cases get the rule of reason entirely. One thing worth noting though, is that section two at least does provide a partial solution to the aggregate effect problem.

When you have a single employer that has a policy of implementing non-competes like you had in the Jimmy John's case and the Check Into Cash case in Illinois, a plaintiff can challenge the policy potentially so that at least-- but again, that doesn't account for all the other non-competes imposed by other employers in the relevant labor market.

And again, because we're in rule of reason territory under section two, you're talking about defining markets and proving an anti-competitive effect. So that's going to be very challenging and not very promising. So that leaves the FTC's standalone section 5 unfair competent unfair methods of competition authority.

It's been talked a lot. State versions of that authority have been talked about this morning, but the FTC has some history with standalone section 5 cases. These are arguably the most promising because both in terms of solving the aggregated effect problem and in terms of potentially getting a more relaxed liability standard. So you can look, for example, invitations to collude under section 5.

These are the most well accepted standalone section 5 cases. And that's an example where there is no anti-competitive effect because by definition, an invitation to collude hasn't been accepted. And courts have nonetheless applied an inherently suspect framework to invitations to collude where the plaintiff does not have to prove either market power or an innate competitive effect.

And section 5 also has an incipiency mandate expressly baked into its goals legislatively. So obviously, an invitation to collude is an incipient form of a per se violation, price fixing. So it's unclear whether courts could potentially be comfortable applying an inherently suspect framework to a non-compete, which the incipiency theory there is that it's the beginning of a movement toward the pervasive use of non-competes in the market.

But the individual non-compete itself, as we've said, may not even have an anti-competitive effect to begin with. Only when viewed in the aggregate. One thing that AAI has been advocating for-- and this has been more in the context of no poaching agreements. There have been some challenges to vertical no poaching agreements in Washington state involving entry level fast food workers making close to the minimum wage.

We've advocated for, at least as a floor not necessarily a ceiling, an inherently suspect framework for those kinds of agreements which make no economic sense on their face. I would argue that there's no efficiency justification. There's no ancillary restraint. There's no obvious ancillary restraint defense. This is really socially useless conduct, for the most part.

And so, it seems that there doesn't seem to be any real risk of false positives in condemning these agreements, unless absent an ability of the defendant to offer a justification. I'm well over time, so maybe I should stop there. Thank you.

JACOB HAMBURGER: Thank you, Randy. Eric.

ERIC POSNER: Thank you. I'm going to use Randy's comments as a springboard for discussing in a little bit more detail the reasons why the FTC should act aggressively to address the problem of non-competes. A court's going to require the FTC to provide reasons for acting. A court might ask, why now, for example. Why haven't you acted in the past?

And there's some good reasons that the FTC can give. So I have a theory. I'm not sure I can't prove this, but I'm pretty sure this is right. Which is that technological change has made it easier for employers to use what you might call mass employment contracts where they basically post on the web people's employment contracts and they can put in lots of terms in those contracts.

And non-competes have been added to these contracts in increasing numbers over the past several decades. So I think there's already some empirical evidence for the growth of non usage of non-competes. But I think further research will show that the growth has really been actually quite extraordinary over the course of, let's say, a century. In the old days, it's pretty clear when you read opinions.

Courts think of non-competes as basically bespoke or customized terms that are negotiated between two parties, rather than terms that an employer imposes on thousands or tens of

thousands of employees. As Damon mentioned, over the last half century, you have decline of union density.

And so, you have more people who are subject to this kind of unilateral imposition of non-competes today than in the past. And that probably also accounts for the rise of non-competes. I suspect also that from time to time when employers update their employment contracts and consult with lawyers, lawyers have been saying to them why don't you add a non-compete if one's not already there. What's there to lose?

Under the common law, the worst case is that the non-compete would not be enforced. It's extremely unlikely, especially if you have low income workers, that they're going to challenge the non-competes or that someone else would challenge the non-competes. And so, it gives you a bit of leverage that you wouldn't otherwise have.

Now, and this gets to some of Randy's points. Well, what about antitrust challenges to non-competes? So the common law is, not of course the only vital body of law that could be used by employees to challenge a non-compete. They could bring an antitrust case. And I took upon myself the dreary task of trying to read every antitrust case ever decided involving non-competes. But it turned out not to be that dreary because there are only a handful of such cases. A few dozen, maybe more.

Virtually, none of them successful. Basically, they all fail. The plaintiffs always lose in these cases. Private plaintiffs always lose in these cases for reasons that Randy gave. The rule of reason is applied. The court expects the plaintiff to prove that the employer has market power, even though from an antitrust perspective, it's not clear that that is really necessary.

But in any event, it's hard to prove especially if you're a low income worker who can't afford a fancy lawyer. There's the problem of showing market wide effects. Most workers may not even know that other employees are subject to non-competes. Other employees of the same firm, this is secret information. Other employees in the same market.

So there are all kinds of practical barriers to claims. There are also practical barriers to class actions. Recently, a few have been brought, but class actions are very likely to fail because it's very difficult to even find out which employees are subject to non-competes unless somehow people learn that an employer uses them, like Jimmy John's.

But it is also the class certification problem, and so on and so forth. So lawyers have been very reluctant to bring these cases. Most of the antitrust cases are really antitrust claims that have been tacked on to other kinds of traditional employment law claims or common law claims. And the court-- and then, the final point about these opinions is that clearly, the courts don't really understand the antitrust argument very well.

Some courts will say, well, this is covered by the common law, isn't it? Or why is this even an antitrust case? They'll refer to product markets rather than labor markets. And probably what's going on here is that these are not lawyers at fancy law firms who can retain experts to explain the complicated economics that are involved here. And so, these cases fail.

So I think what the claim I want to make is that non-competes have become massively more prevalent in the past. The legal regime that may have been appropriate 50 or 100 years ago has not kept up. So what can the FTC do? It can start off by pointing out this problem as a justification for a regulatory intervention.

It can cite its authority to regulate unfair competition as a justification for a rule. And just in case this isn't clear, from time to time, people have asked whether non-competes are really an antitrust problem, but they obviously are. And in fact, courts have recognized that non-competes are restraints of trade. They recognized this for literally centuries.

And the Sherman Act was enacted, in part, to create stronger remedies against restraint of trade. So non-competes, as Randy mentioned, they're just an exclusionary agreement that would be subject to antitrust law just as exclusionary agreements on the product market side are. So the FTC's authority strikes me as very clear.

Now, the real problem would be in the case of rule-making. I think persuading a court, maybe a modern skeptical court, maybe a court that demands economic analysis, that a regulation would be justified. And so, for example, some people have advocated a flat ban on non-competes like in California. I suspect that it would be difficult to persuade a court, at this point, that there is empirical evidence that a flat ban would be socially-- would maximize social welfare. Whatever your criterion is.

I think a court might say, well maybe even if it would, maybe there is a less restrictive way of addressing the more problematic aspects of non-competes. And so, a rule that limited a ban to low income workers, or workers making less than the minimum wage-- I'm sorry. Less than the median wage-- would probably be more acceptable to a court.

And there's more empirical evidence. A lot of the recent empirical evidence looks at the effect of those sorts of state statutes and finds that wages go up after those statutes have been enacted. And so, those are studies that the FTC could use if it chose to take this path. And would provide a more comprehensive evidence than a flat band would.

I think another thing that the FTC could do, which would be quite useful, would be to create a rule that's not quite a flat ban, but that may be reversed presumption. So for example, you could imagine a rule that said that non-competes are presented presumptively illegal. But if an employer can provide empirical evidence that the use of a non-compete in a specific case results in higher wages, for example, than the non-compete would not be illegal.

Now that might be difficult for an employer to do. And whether this rule would be advisable would depend on a range of assumptions that you'd have to make in empirical evidence. But I think a nice thing about that rule is it would make private litigation easier. And that actually leads to the final point about FTC litigation, which I think would also be appropriate.

So I think one of the problems for lawyers who want to bring class actions on behalf of workers who've been subjected to non-competes or lawyers who simply want to make an antitrust case based on even a single non-compete is the dearth of precedence. That is, if you look at these

opinions, if you're a practicing lawyer who has to make money and is unwilling to take a significant risk with a case, you look at these old cases and there's nothing there. There's nothing really helpful because people haven't made sophisticated antitrust arguments in the past and courts haven't acknowledged them or written sophisticated opinions about noncompliance.

But the FTC could bring cases under its authority to enforce the Sherman Act. And it could bring cases and the FTC has resources. It has resources. It has access to economic analysis, and it has a high level of legal sophistication. And if it brought cases in, let's say more egregious situations, it should be able to get some good judicial opinions where courts recognize that non-competes are clearly subject to the antitrust laws, that perhaps provide a recipe for how to bring an antitrust case.

Especially in difficult cases where it may be maybe hard to prove, for example, that the employer has market power. I'm not sure whether the FTC has authority to do this, but it would be nice if it could order or persuade employers to publicize their use of non-competes. Some kind of requirement. Maybe this would have to be legislative, maybe some other agency could do it. Some kind of requirement that large employers, let's say employers with more than 1,000 employees or something like, would be required to publicly disclose their use of non-competes.

I think that would be very helpful. It would be helpful both for the policy debate. It would be helpful for litigation. And I think that's something that could be done in a relatively simple way. Thank you very much.

JACOB HAMBURGER: Thank you, Eric. So let's kick off our discussion today with a question from the audience. And so, this question will be for everyone on the panel, but I think it would be-- it's especially directed toward those people on the panel who are contract professors.

[LAUGHTER]

And so, this first question is based about how we can form a rule. Can contract law, in a particular state contract law, form the basis for a commission rule? And in particular, could the FTC codify the restatement of contract language as a rule? And how do we do it? So is there a contracts professor who wants to take a stab at it? Eric?

ERIC POSNER: Well, I am a contracts professor. So I'm teaching contracts tomorrow, in fact.

[LAUGHTER]

But the FTC-- state-- the FTC doesn't have any authority over state contract law. The FTC, I think, could use the restatement or it could use the common law of various states as the basis for issuing a rule. I mean, it would have to rely on its legal authority to issue the rule. But I certainly think would be sensible to draw on the common law tradition.

Because after all, courts respect that. And so, would be more willing to take seriously such a rule. But I think that what I would say is the common law is far too weak. It has some kind of

useful material for thinking about non-competes, but a non-compete problem is really an antitrust problem. It's not a contract problem.

And the reason why it's not a contract problem is that a non-compete has third party effects. So when we think of contract law, we usually think you've got two people, the employer and the worker or the buyer and the seller. And when they get together and make a contract, have they engaged in deception or have they done something that would result in a contract that is harmful to one of the two parties? And contract all kind of focuses just on those two people.

When you have a contract that has third party effects, then contract all usually says well, that's a matter of public policy. And the common law regime on non-competes is kind of this public policy. And antitrust law also incorporates public policy. Just let me add one final thing. It is very important to understand that the harm caused by non-competes is not simply to the worker who signs it.

I mean, the common response to that, I don't think there's a huge amount of evidence for it. But there is a common sensible response is that if the worker, at least if the worker is sophisticated, understands that a non-compete is being demanded by the employer, the worker will demand a higher wage. And so, the worker's actually not made worse off by a non-compete. So what's the problem? That would be kind of a contract law perspective.

The problem, though, is on labor markets generally. So the non-compete might make it more difficult for other employers to enter into the labor market and hire workers, which results in the suppression of wages, less production, higher prices for consumers. Those are the third party effects that antitrust law more directly addresses.

WILLIAM KOVACIC: Jacob, my guess was that most employers would say you want to incorporate the restatement provision, we're happy with that. That is, it's not terribly daunting, I think, for them. It's a rule of reason analysis. It talks about the duration. It talks about the geographic scope. It talks about the substantive scope. It said we lived with that for a long time, that's fine. We'll take it. I sense it would not address the concerns that are being expressed here.

JACOB HAMBURGER: Thank you. Anyone else? Sure.

DAMON SILVERS: I mean, I'm not a contracts professor. But I think there's two points here that the commission ought to really be zeroed in on. The first is the non marginal nature of non-competes in the US labor market today. We are not talking about a phenomenon that is either confined to, essentially, highly top end employees.

Which is that the legal and regulatory structures here, cases, literature all sort of assume that what we're talking about here are executives and advanced degree professionals with access to legal counsel and a clear sense of their own power in the labor market.

That's not what we're talking about. We're talking about something on the order of a third to 40% of the labor market. And in an environment in which the institutions that potentially could provide those people with that type of information and power have been systematically

destroyed. All right. Secondly-- and I might also add that it's also not a question of the very bottom end of the labor market.

And I would be very wary of any kind of rule that effectively only focused on minimum wage workers because the problem cuts across the entire labor market. And what I was talking about earlier, in terms of wage suppression, is most serious as an economic matter at the center of the labor market.

Now, the other point I think is really the core of this hearing or this roundtable, which is who actually is being harmed here. And there is now a significant body of evidence that workers are being harmed, and harmed into a significant degree. Where there isn't as much evidence and where work by the FTC would be very helpful is to the point that my fellow panelists made about the impact on employers and employers seeking to compete with other employers.

The clear purpose of a non-compete agreement is to prevent employers from doing that. Now, even if you buy the idea that the FTC has a narrow jurisdiction, which I do not, and I think that the presentation that preceded this panel made a pretty compelling case that the FTC's jurisdiction is broadly anti-competitive behavior in markets.

Even if you don't buy that and you think that somehow the FTC is actually limited to quote consumer protection, who's the consumer? The consumer here is the consumer of labor who is prevented from hiring labor they wish to hire. And the consequences of that, I think, are not as well understood as the consequences to the workers themselves.

I'm obviously here on behalf of workers who are being severely harmed here. But we are not the only people who are being harmed.

JACOB HAMBURGER: Thank you.

SARAH MACKEY: So if we look at another way to maybe draft the laws and we look back at what some of the states have been doing, not the laws, but if we were to craft a rule looking back at what some of the states had been doing, could we maybe-- and think about how this would work-- craft a rule that had a presumption of unlawfulness for the non-compete clause? And it would be considered presumptively an unfair method of competition if the workers pay salary or commissions is less than a median income of a family of four, the employer failed to give the employee notice of the non-compete clause within a certain period of time before they were hired so they could consider it, and if the employer failed to give the employee notice of that non-compete clause existence when they left.

So how would that kind of rule work within this scenario? Would it-- I mean, we've had what Damon just raised. It shouldn't just be the low wage worker. We should think about maybe more the middle class worker, how that would work. How could we craft a rule? Do we need to follow what the states have done? Is that a-- would that be a good rule or would there be elements that we could tweak and improve, looking at both of unfair methods of competition or you'd have unfair or deceptive act or practice? How would we engage in that? I'm going to open that up to the floor, or to the panel. Not to the floor.

ORLY LOBEL: Well, I can take this. So I think we're all talking about the fact that there are multiple harms. And the different harms are run across the different types of workers and different types of professions and industries. But the focus is perhaps different. So I think it was Randy that talked about the irony of winning these cases in antitrust level because of these different harms. Because there are third party harms and they're the wage harms.

But one thing that I'll put on the table that I've seen now being an expert witness in a lot of these cases and various different industries and different kinds of workers. So first to your actual question of what about this kind of rule. I think that that kind of rule is better than no rule. I'll start with that.

But what is it missing is kind of the other part of it. So why is it better than no rule? I think everybody has pointed to various aspects of this answer, but I'll add that just from a contract perspective, again, I see these clauses having such a strong effect on decision making of workers. And how they operate in a contract, in an employment contract, is that they send a message that they're enforceable even when they're not enforceable.

How do they do that? Not only because of misinformation and the fact that they're conscious of adhesion, and nonnegotiable and the threat that comes later. But also, they appear with choice of law clauses. They appear with choice of forum clauses. They appear with reaffirmation clauses in those same contracts.

So even the more sophisticated employees, the ones that are higher earners, the ones that are high skilled, the ones that know, for example, that in general non-competes in California are non enforceable, when the next clause is that the forum will be Delaware and the law would be Delaware that is already very confusing. So that's one way that it goes all the way up.

The other way is that in cases that I've been involved with, you see this pattern where an employee is very, very unhappy. And we've seen now we're at a moment where we know more about hostile work environments. We know about problems in various industries. Also, with higher paid employees that just feel that they have no voice and they have signed really strong NDAs, non disparagement clauses, against their harassing employer, for example.

And they're locked in because they have a non-compete the industry is very, very concentrated. So I've seen this in broadcasting. There's been a recent couple of cases that I've been involved with where women workers, workers that are immigrant executives, and they're told we'll use your immigrant status to not allow you to move. That's how I see a rule.

Just looking at a raw salary and saying after that, we're not going to be concerned. I think that that's-- it's just not satisfying a lot of the concerns. And then certainly, with regard to competition and entry of entrepreneurs and startups, that irony that was pointed out by Randy I've worked on a case, for example, in network security which is there's a limited number of really, really strong people that are innovators that can create the next algorithm that will be the safer software.

And when they're signed on non-competes, it's impossible for a new firm to come in. So there's kind of that irony of the most experience become the untouchables and that's a real loss to the

industry, and to the American competitiveness because like network security I'll say that Israel is really strong in that field. And some of these workers will just not come here because they know that some of the competes will be enforceable.

SARAH MACKEY: I think I see a couple people. I think Bill. I'm going to go down the line because I see Bill raising his finger and I see Eric. So let's start with Bill next.

WILLIAM KOVACIC: I think rather than pick a specific template, I think you surveyed the experience that the states have had as a whole and derive from that what you think is the best package. And you also in doing that, you look at the experiences you've had as a rule making institution and look at your greatest hits.

Maybe the most successful FTC rule, certainly one of the top five in its history, is the eyeglasses rule. This is the rule that gave individuals access to the prescription that their ophthalmologist drafted. The previous practice had been that you couldn't have that. It went right to the optometrist who fitted the lenses and glasses.

Crucial to the FTC's rule-making effort was to study state experienced very carefully. And there had been a natural experiment. Some states did not impose a restriction, others did. And a study performed by the Bureau of Economics, a rule that was formulated as a consumer protection rule and is an information provision rule.

But with a strong competition ethic, use that state experience when the courts ask the crucial question how do we know it works. Is this your idle speculation as an enforcement institution or is this based on something more? So you look at the state experience very carefully to put yourself in a position to get a sense of what's worked, what hasn't, what would they have done differently if they had the chance now.

But it gives you the opportunity to assemble the experience base to answer hard questions that ultimately come from a review in court, for example, about whether it's going to work and how you know. In that respect, the state experiences and enormously valuable in helping you design the specific framework and answer questions about efficacy.

Same thing with telemarketing sales through do not call. There was a lot of nascent experience that helped inform the agency's judgment. So rather than say we're going to take this one, you look at the aggregate. You look at the collective experience and say this seems to be the strongest position.

SARAH MACKEY: Thank you, Bill. And Eric, before I go to you, I wanted to remind people that we do have a person walking around with question cards like this. If you have a question that you want to pose to the panel, please flag her down. She's in the beige shirt back there, a sweater. And she'll bring him up to us. Sorry. Eric.

ERIC POSNER: Just quickly, I think the rule is you should not consider this rule. I think it's not quite worse than nothing, but I do think it is nothing. And the reason is that an employee can escape this-- An employer can escape this presumption simply by giving notice or providing a

copy of the non-compete clause after the employee is terminated. That would do nothing about the problem of market power.

Notice, there's been a lot of studies about notice. Nobody pays attention or understands notices of any type. So that's not going to do anything. But more seriously, if you just say to the employer, hand the non-compete to the employee on his way out, that's not going to address the problem at all. In fact, the employer probably already does that. So I think you have to do more than this, if you're going to do anything at all.

SARAH MACKEY: OK. Jane.

JANE FLANAGAN: So I agree with Eric. And I guess I would only add that I think there is some value in a notice requirement prior to starting work. I believe the new Maine law, for example, requires employers to give notice in job advertising. So when a job is posted that a non-compete will be required. I think the value there is really more about transparency value. This idea I think that Eric mentioned earlier of how do we get this information out there in the public. But I do think it does anything to change the bargaining power that the two parties bring to the contract.

SARAH MACKEY: And skipping back to Randy first.

RANDY STUTZ: Yeah, so just wanted to go back to a point that Jane, and Orly, and others have raised, which is the experience of California where non-competes are flatly banned, but still included in the number of contracts and enforced through ignorance and threats. That phenomenon should factor into any conversation about the appropriate standard. Presumptive unlawfulness is still going to depend on the employee having some education and being able to take advantage of the standard.

SARAH MACKEY: Damon.

DAMON SILVERS: You know, I think you're getting you're kind of boring uniformity out of us as a panel. But two points about this. The substance of my initial remarks really goes to the point that it's not clear to me that when you understand non-competes as a response to the problem of human capital investment, that it is a good response. There are other responses that are better, and that have served both us and our competitors globally well.

So it seems to me that non-competes really don't have a legitimate purpose in any broad sense in the labor market. And that may seem like a rather radical position, but I think if you step back a minute, you'll see that it's well-founded. And therefore, rules that kind of seek to bound it aren't the right approach.

And secondly, and I wanted to throw in a piece of data that may surprise people who are not familiar with the labor market. Since non-competes have become prevalent in the American labor market in conjunction with the decline of collective bargaining in the private sector, rather shocking thing has happened, which is that worker mobility has declined. By the way, you'll

frequently hear in uninformed discourse that oh, now people change jobs a lot, whereas in the old days we all worked for one company our whole lives. That's simply not true.

Most people actually are more tied to their employer today than they were in the 1970s. And it's hard not to conclude that part of this is the fact that both enforceable and unenforceable non-compete agreements have essentially intimidated people. How much is that contributed to it as opposed to, for example, general fears involved in a soft labor market for decades? I don't know. It's the kind of thing you could perhaps do research on.

But the point being that this is not an issue of well, there have been some abuses and we need to curtail them. This is an issue of a destructive practice that needs to be the exception rather than the rule. And I think that the way to approach it is to think about. And the core question is as all of us have said in different ways is the question of bargaining power.

And so the formulation that I would propose to you that you think about and work on is the formulation that says these are non-compete agreements are an unfair trade practice. They're not allowed unless the employer can show substantive evidence of a bespoke contract. It's a bargain contract between well-informed parties. And as I said, when a union is on the other side of the table, you never get an agreement.

We just we just don't agree to these things and we're never asked. There it is an indicia of an exploitive workplace relationship to have one. Unless, of course, you're dealing with somebody who really has deep firm specific knowledge. An executive, someone profoundly embedded in an innovation process, this kind of thing. And in those cases, as I think we all know, those contracts are bargained.

And so, and the other point I would make about what you were putting in front of us, Sarah, is that the issue of the median wage is not the right way to do this because that, essentially, would appear to authorize these agreements above the median wage. And the problem stretches across the labor market. So that if you were looking-- if you wanted to take the wage approach, I would basically put a very high number there. Top 10%, top 5%, something in that range.

JACOB HAMBURGER: So let's dig into one of those points you made a little bit more. And this is directed to Eric, but could really be answered by anyone. Are there reasonable business justifications for non-compete clauses? And assuming that there are, what is the analysis that would support this or discredit them?

ERIC POSNER: Well, they're two that have been discussed in the academic literature and to some extent, the cases. The one which the first which Damon has mentioned is that employers need to protect their investments. In human capital literature, it's usually called general skills. The worry is that if the employer invests in, let's say, your ability to use some accounting software, that increases the worker's value to some competing, let's say, accounting firm.

And the employer is not going to do that in the first place, unless it can prevent the employee from moving. And that hurts the employee and it hurts the economy, generally. The second,

which is actually most courts don't accept that argument, by the way. Some courts do. But I believe that in most jurisdictions, simply training is not sufficient.

The more common argument could be called generally an employer's investment in intangible assets. This could be trade secrets, as Orly mentioned. It could mean it could be customer goodwill. I think you also mentioned. And the problem here with an intangible asset is if you have an intangible asset, like an idea or something, you're the employer, let's say an entrepreneur, you can't actually use it unless you tell an employee about it.

And then once the employee knows about it, the risk is the employee's going to go elsewhere and give it to a competitor. And so, without the non-compete, the employer is not going to be willing to do that. Now, I'm actually quite skeptical about both of these arguments. And the better courts are themselves pretty skeptical.

They will put in the common law cases, they'll put a lot of pressure on employers to actually prove that this is the case and not just say it. And some employers can and some can't. But my basic source of skepticism is that there is already an enormous amount of friction in labor markets, which has been documented over and over again by labor economists.

These frictions come under the rubric of search costs. And there are psychological reasons why workers don't want to leave their existing employer. They're friends with their colleagues, there's a good commute. There's some sophisticated labor economics literature that points out that the incumbent employer has better information about the abilities of a worker than competing employers, and that gives the employer an advantage over competing employers who are trying to lure a worker away.

And so, the upshot is it's not entirely clear that you need a covenant not to compete to protect either your investment in general training skills or your intangible assets. I think in the case of intangible assets, the argument can be stronger. Of course, there are independent sources of intellectual property laws, as Orly had mentioned and how those things interact are complicated.

But so there could be benefits for employers that are socially recognizable. They may well be quite marginal, or they may well be limited to very specific types of employees, including let's say chief executives or the guy at Coca-cola who actually knows what the coca-cola recipe is. But I think people haven't fully figured out-- I don't think economists figured out the extent to which non-competes are really necessary above and beyond these already quite significant frictions.

JACOB HAMBURGER: Great.

SARAH MACKEY: I'm going to point out that our time is getting limited. And I'm getting great questions also from the audience. So I'm going to skipped to one of the audience questions. And this one is specifically for Randy, but others can then follow on. And the question is why does the aggregation issue pose a problem for government competition law enforcement action? For example, in Amex, DOJ challenged under section 1 provisions in contracts between Amex, and

Visa, and MasterCard initially, and thousands of merchants. So looking at the grant aggregation issue and your questions and how we would enforce, I'm throwing that to Randy first.

RANDY STUTZ: Yeah so that's-- the Amex comparison is great for illustrating the challenge posed by the market definition problem with these cases. Amex relied on direct evidence of anti-competitive effects. I think Amex had a 30% market share. And that was a point of skepticism, but they were able to get around the market definition issuers. Well, ultimately they weren't. But that was how they dealt with the problem.

But still, to prove an anti-competitive effect, which the FTC, as I said FTC doesn't have to prove antitrust injury but they would have to prove an anti-competitive effect in anything other than potentially a section 5 case. You, eventually, are probably going to have to get into defining the relevant labor market. And that's where the irony I mentioned, comes into play. If you have a very large, broad labor market involving low skill workers who can substitute to a lot of different kinds of jobs potentially, that's where it gets harder to prove the anti-competitive effect.

JACOB HAMBURGER: So my next question is directed towards Bill or Randy, but anyone can answer it as well. Are labor issues particularly those related to non-compete clauses reachable under the consumer welfare standard?

WILLIAM KOVACIC: Short answer, yes. This is an area, of course, where the vocabulary really gets in the way of thinking about the issues. I think a proper conception of consumer welfare takes account of, not just as the caricature says, narrow price effects. It takes effect innovation, quality effects. Dynamic conditions in a particular sector and especially if we look at the question of how just one issue-- how these restrictions affect dynamism, innovation, growth, productivity in particular sectors, that's right in the bullseye. No question.

RANDY STUTZ: I agree. I think there's no question, whatsoever. I think to look for proof or confirmation that the consumer welfare standard or the antitrust laws serve to protect competition and input markets, there's plenty of cases out there. The old cases, like Mandeville Island Farms involving buyers cartels, but more recent cases like Weyerhaeuser.

I would suggest go read the government's amicus brief in the Weyerhaeuser Supreme Court case, which involved predatory overbidding where they expressly pointed out that there was no risk of harm in the output market affecting consumers. There was really only a risk of harm in the input market. There have been labor-- wage fixing has been illegal going back to the turn of the century, so I really don't think there's a--

SPEAKER: Turn of the previous century.

[LAUGHTER]

RANDY STUTZ: Previous century.

SARAH MACKEY: OK. So we are, of course, one of the two antitrust enforcement agencies. And so, I'd--

SPEAKER: What's the other one?

I think they're called the Department of Justice. They also enforce antitrust laws. How does the dual antitrust enforcement work with an FTC constructing a rule based on competition? What does the DOJ do in this situation? If we were to have a rule as an FTC rule that FTC enforces, we've done something that DOJ can't. How do we approach that? How does that balance out for workers and for employers? I'm gonna throw that to you, Bill.

WILLIAM KOVACIC: In a Greenfield in heaven--

[LAUGHTER]

--the two institutions recognize their complementary contributions to the development of a national competition policy system. And recognize that in 1914, with subsequent amendments, Congress expected the FTC to have a capacity to engage in a process of adaptation and adjustment through a variety of policy tools to provide the empirical foundation by conducting studies convening events, like this, to feed that into a scalable, elastic mandate that permitted adjustments over time in light of changing circumstances and to use litigation, to use rules to propose measures to Congress as a way of solving the problem.

And an institution that lacked that capacity, we'd say this is a valuable source of adjustment and vitality in a competition law system. And we welcome it. And we'd be at peace with it. And indeed, instead of seeing it as a reluctant element of the system, would engage in a cooperative process with the agency on a routine basis to say what do we want the dimensions of our competition system to be, and how do we achieve adjustments over time. That is the way it ought to be. And a completely adult like attitude to the system would see it that way as well.

SARAH MACKEY: I think Damon wants to raise his hand in this.

DAMON SILVERS: That's beautiful theater.

[LAUGHTER]

WILLIAM KOVACIC: I can do it the other way too, you know.

[LAUGHTER]

DAMON SILVERS: Any good actor can. No, I'm not suggesting that wasn't sincere. No. I want to take the opportunity because we're running out of time--

SARAH MACKEY: We are.

DAMON SILVERS: --to address a theme that Bill raised with some vigor in his opening remarks. But which I think really is extraordinarily important to speak to further, which is so what is the role of an agency that has to exist in a larger legal and political environment. And I think that was the last ques-- that was kind of what Bill was talking about.

And particularly, when you're talking about shifting circumstances that were envisioned by Congress in 1914, one important shifting circumstance here is that at least until there's changes in federal labor law, that the labor markets are not-- that the labor markets do not have the structures of countervailing power that were envisioned at various times and actually existed at various times when prior case law and prior rule-making were done in this institution.

So part of the shifting framework is a vacuum is opened up, and an extremely destructive one at every level, in terms of the labor market imbalance of power within it. Now secondly, there's this broader question of well, what if other institutions in government are hostile? Courts, the Justice Department, various other. What if?

And here, it's extremely important. I mean, hey, the agent-- the commission has a legal mandate. And the fact that other people may not like it does not change what the commission's legal mandate is. But stepping back from that in a spirit of more realistic inquiry into our system, these things are solutions to big problems. Like this problem has been developing for decades.

It's hard to imagine that that would be solved in an afternoon or even in the term of any particular commissioner. This commission is likely to be a fight that will take some time. And there is a critical role for the agencies that have the jurisdiction to seek to actually solve the problem. That sets the larger process in motion.

I did not refer to Lochner by accident earlier today. The Lochner Supreme Court case that sought to cripple the ability of the American political system to regulate the labor market was a response to efforts at the state level at a time when this organization did not exist. Efforts at the state level to regulate the labor market.

Where did the Lochner-- what did the Lochner case lead to? The Lochner case led to the Fair Labor Standards Act, the National Labor Relations Act, and the reversal and the embedding in our constitutional order the right and ability of the federal government to regularly the National labor market.

It took a little time. But if somebody hadn't started, that process would not have ended.

ERIC POSNER: Can I just-- I just want to actually echo part of that. Which is that I think what the motivation here should be that two things. That labor markets have changed a great deal, and that the understanding of labor markets by economists have changed has changed a great deal in the last 10 years. The Justice Department doesn't have any authority over that. It's not something the Justice Department thinks about.

These changes all have to do with competition. And it seems like the FTC is the agency in the appropriate position to investigate these changes and incorporate the new economic understanding, and then do something about it.

SARAH MACKEY: Thank you. I think our time is a little limited now to ask another very full question. So I wanted to say what a great panel you guys have all been. It has been a clear

pleasure. We could go on all day talking, but I don't think I have time for that, which is unfortunate. So I'm going to-- as Eric just noted, a lot of the economics have changed.

Our next presentation will be about the economic literature that has been studying this area. So I'm going to throw us to break now. We will be back at 11:20. And then, we'll start talking about the economic literature. We'll lunch break and then, we'll come back to have a panel discussing that literature as well. And in the middle of that, we'll have remarks also from Commissioner Slaughter.

And then I'm not even getting to the afternoon yet. So it is a great day. Please come back. And thank you very much for participating and for everybody being here, and for people watching the webcast. Thank you.

[APPLAUSE]

SARAH MACKEY: It is my pleasure to introduce Commissioner Slaughter. She was sworn in to the Federal Trade Commission in May 2018. Prior to joining the Commission, she served as chief counsel for Senator Chuck Schumer of New York, who is also the Democratic leader. She is a native New Yorker, but we still welcome her here to Washington DC. And in DC, we can't seem to manage even a hint of snow, as we all know from the other day.

But rather than go into her great depth of resume, I'm going to let her take your time. Her time is more valuable than my time, so let's listen to Commissioner Slaughter. Thank you.

[APPLAUSE]

REBECCA SLAUGHTER: Thank you so much, Sarah. And thank you. I also want to thank the chairman, the folks at OPP, and the rest of the FTC staff who work so hard to put together this workshop. I was watching upstairs from my office this morning on the livestream and really enjoying it. It seems like it's going great so far, and I know you have a packed day ahead of you.

So in addition to thanking everyone who has put this workshop together, I also want to thank the advocates and academics, including those participating today who've raised awareness about and contributed both research and new ideas to the discussion about non-compete provisions in employment contracts. State attorneys general and their staffs have also been at the forefront of this issue by investigating and initiating legal action to end unjustified and anti-competitive non-compete clauses.

And finally, I want to thank those in the labor community who advocate day in and day out to improve the plight of workers in our country. You play a critical role in the antitrust law and policy community, and we appreciate your expertise on this issue and others that lie at the intersection of labor and antitrust.

The principle message I hope to convey with my remarks today is that while antitrust enforcement and competition policy initiatives will not be a panacea for the struggles facing American workers, ensuring competitive labor markets is a key ingredient of the recipe for

improving economic justice for workers. A competitive market for labor benefits workers through higher wages and better benefits and other terms of employment.

Workers suffer when competition for their labor is chilled and employers are insulated from competition. Job opportunities become more limited and workers are less able to negotiate better pay, benefits, or working conditions. It is fitting that we are here today at the dawn of a new decade to discuss non-compete provisions in employment contracts and whether the FTC should initiate a rule-making to address unfair or anti-competitive use and enforcement.

Today's first panel provided useful insight regarding the legal issues surrounding non-compete provisions. I'd like to follow this by taking a step back to talk about why we're here in the first place. American workers and their ability to reap the benefits from fair and open competition for their labor. And before I dive in, I want to make a brief note about word choice.

Non-compete clauses are often referred to by folks across the ideological spectrum as non-compete agreements. But you may notice that throughout my remarks, I refrain from using the term agreements to refer to these provisions since agreements refers to a willing meeting of the minds between parties. One of the concerns I have about these provisions is that they rarely represent real agreements, but are rather restrictions unilaterally imposed upon workers by their employers, as Damon highlighted this morning.

Surveys have estimated that 16% to 18% of all US workers are currently covered by non-compete provision, meaning that they have restrictions on where they can go to work after they leave, lose, or let go from their current job. This includes 12% of workers who earn less than $20,000 per year and 15% of those who make $20,000 to $40,000 per year.

While it would be impossible to know how many workers have been prevented in practice from leaving or seeking to leave a job due to a non-compete, we know that all it takes to chill workers from seeking a better opportunity is a manager waving a non-compete or threatening to sue them if they get a new job. We've already heard about the Jimmy John's example that the Illinois Attorney General pursued effectively in court.

AG Madigan and Jane Flanagan, one of our panelists today, also wrote about how several employees of a spa and hair salon so that their employer bragged about threatening lawsuits against anyone who left for a rival salon. The employer even went so far as to threaten a former employee by brandishing court papers. They also cite instances of employers mentioning non-compete provisions during reference checks for their former employees.

These non-compete clauses are often boilerplate provisions in contracts with all of a firm's employees without any regard to whether there may be any plausible legitimate justification or a less restrictive means of protecting trade secrets or proprietary business information. New York and Illinois brought suit against WeWork, which prevented workers at all levels from executives, to baristas, to cleaners from working for competitors.

The settlement exempted all but 100 executive level leaders at WeWork from the non-compete restrictions. Similarly, Illinois investigated a child care provider that required the same non-

compete for all of its employees, including kitchen staff, bus drivers, housekeepers, teachers, and landscapers. And we know that non-compete clauses can limit employee mobility and competition, even in states where they are legally uninforcible.

The examples of how non-competes affect people's livelihoods and ability to earn a living go on and on. And mindful of the clock, I won't rattle off all of the examples, but there will be a litany of them available in my prepared remarks, which I will post later today. I will note, however, the non-competes are applied across the wage spectrum from highly skilled professionals to low skilled professionals, and even unpaid interns.

As Professor Lobel mentioned earlier, disturbing statistics show that non-compete restrictions may disproportionately harm women who tend to have less geographic mobility and are often less likely to negotiate employment terms. These clauses affect wages, as well as mobility for workers. They affect employers who cannot compete for labor. And they can also harm consumers.

For example, by prohibiting them from seeing providers of their choice. Take the example of home health care aides, where non-competes have become common in contract between aides and health care staffing agencies. A longtime health care aide wanted to switch agencies to follow a client, but the employer threatened to sue the aide for $4,000 for violating the non-compete provision.

The company relented only when the client wrote a letter in support of the home health aides transition to the new company. Physicians are also increasingly being subject to non-competes, which means patients can lose their longtime and preferred doctors. According to one survey, approximately 45% of primary care physicians are subject to a restrictive covenant that prohibits them from taking patients to a new competing practice.

With hospital consolidation continuing and more physicians becoming employees of large health care systems, this may result in greater bargaining leverage for the hospital systems and less bargaining leverage for physicians and other health care providers to fairly bargain over the non-compete clause. One of the public comments filed for this proceeding emphasizes this concern on behalf of both patients and doctors.

While some argue that non-competes serve a legitimate business interest, this raises the question of whether such a business interest is being promoted at the expense of patients. So what do we do? A handful of states have exhibited great leadership in enforcing against unjust non-compete restrictions, and legislating to limit their usage and enforcement.

This is significant and important work, but it is still only a patchwork solution to a problem that is rampant throughout much of the country. Proposed federal legislation, particularly the bill introduced by senators Murphy and Young, is a positive development. But we need not wait for legislation to tackle this issue head on.

The workshop we're having today is a valuable mechanism for the FTC to gather information and learn more about the effect non-compete provisions are having on firms, workers, and the

economy. But information gathering should not be the end of this exercise. We should also take action.

Without prejudging the outcome of a rulemaking proceeding on non-competes, I strongly support the FTC's undertaking such an endeavor. And I want to acknowledge and express gratitude to Commissioner Chopra for his white paper calling for the FTC to take advantage of our statutory authority to engage in rulemaking on unfair methods of competition. I also want to credit the many advocacy groups who came together to petition the commission to undertake a non-compete rulemaking specifically.

I want to conclude my remarks by mentioning a few other ways I believe the commission should increase its focus on workers beyond a rulemaking on non-competes. We should also give consideration to a rulemaking on no poach agreements between franchises and their franchisees that unduly hamper the competitive marketplace for workers labor. And it's worth considering whether other contracting terms apply to workers, such as mandatory arbitration requirements, may be appropriate subjects for rulemaking.

In addition, labor market concentration ought to be a greater focus in merger review. I'm pleased that the chairman and the leadership of the Bureau of Competition have acknowledged the potential for labor monopsony concerns and mergers. And I'm hopeful that such series of harm will increasingly be considered as part of our merger review.

Similarly, the commission should make it a priority to examine and investigate other conduct and potential restraints that may be inhibiting competition for labor. Finally, I share the concern that has been expressed by many labor law experts about the misclassification of gig economy workers and other workers as independent contractors. Classifying workers as independent contractors allows firms to avoid the obligations and requirements associated with treating these workers as employees, while insulating the firms from the labor protections and rights afforded to employees to collectively bargain.

I think that workers who fall into those categories should, at a minimum, have the benefit of the antitrust exemption for labor organizing. While I think this would be most effectively achieved through legislation, I believe in the interim that the FTC should not use its limited resources to bring enforcement actions against such collective action by workers.

I look forward to the rest of the day's presentations and panels. And I also have the pleasure of introducing our next speaker, Ryan Nunn. Ryan is a fellow in economic studies at the Brookings Institution and policy director for the Hamilton Project. He was previously an economist in the office of economic policy at the US Department of the Treasury.

He has conducted work on a variety of topics ranging from occupational licensing and non-compete contracts to labor market trends and geographic disparities. So, thank you and welcome.

[APPLAUSE]

RYAN NUNN: All right. Well, thank you very much to Commissioner Slaughter and to the FTC. Thank you for the introduction. These are really fascinating and important topics that I'm glad we have an opportunity to talk about in such detail. As Commissioner Slaughter said, I am a-- I was previously a labor economist in the office of economic policy, which is where I started working on this. And a lot of what I'll talk about today will draw on the work done there.

Since then, I've worked at the Hamilton Project and the Brookings Institution and have really benefited from the work that Hamilton has done, that Alan Krueger, Eric Posner, Matt Marx have done in recent years, as well as an extensive reliance on the research of Evan Starr and his co-authors as you'll see going forward here.

So what I'd like to do now is just say a few words about what we know about non-competes and particularly, what we know about the comprehensive evidence on non-compete contracts. There's a large literature going back a number of years that focuses more specifically on certain occupations of CEOs and other specific groups, rather than the workforce as a whole.

And it's really only quite recently that we have high quality, comprehensive evidence on the entire labor market. So beginning with a survey by Evan Starr and his co-authors from 2014 followed up by some more recent surveys, we learned from workers themselves that nearly a fifth of them have non-competes on their current job, with substantially higher fractions reporting that they had non-competes on a previous job to their current one.

We know non-competes are broadly distributed across occupations, across educational categories, income levels as has been previously mentioned. So I think that this finding has really jumpstarted a lot of discussion of this and a growing sense amongst economists and policymakers that the widespread use of non-competes is something that needs to be studied. Something needs to be better understood and we need to think carefully about what the labor market effects are.

So I'm going to talk now a bit about the larger economic context in which we're learning about non-competes. I think there's-- as was said in the previous panel, there's a growing understanding that labor markets often do not look like the classic competitive markets that we once applied to them. They're actually characterized by a considerable amount of market power. As a straightforward implication of the labor search models beginning to be developed in the 80s and 90s and elaborated since then.

And so, where non-compete contracts would in that context have seemed perhaps unimportant or maybe irrelevant, again in a classical labor market model, we now see them as instruments of market power or at least symptoms of employer market power in the labor market. We also have evidence, again quite recently, that labor market concentration is important. It's quantitatively substantial in many local markets, and it has effects on labor market outcomes.

We know that, in addition, wages for the median worker have grown extremely slowly over the last 40 or 50 years. Much slower than productivity has. And I think this is leading many folks to reappraise the labor market institutions more generally that affect how wages are bargained for and the relative position of workers and firms in the labor market.

So one figure that I like drawing on work that economist Doug Weaver has done is right here. The fact is that in the classic labor setting, you would think that the labor supply elasticity facing a firm would be infinite. You cut your wage even 1%, you'd lose all your employees. That is not the case.

I think economists are perhaps more surprised that this is not the case than others. But what we've learned from this work and the work of others is that labor supply elasticity is facing firms are actually quite low in many sectors. And that there appears to be a relationship between those labor supply elasticities and typical wages. So when a firm has more pricing power, more wage setting power, you see lower wages.

So again, this is the economic context in which I think about non-competes and what they might be doing in our labor market. So it's also important, I think, to talk about the policy context in which we're learning about non-competes and discussing them today. The first thing to note, in my view, is the dramatic decline in private sector union density. So that was discussed on the previous panel, and I want to echo some of those thoughts.

Unions bargained on behalf of many workers and really help to set standards for many workers who weren't covered by the unions. And over the last 50 years, we've seen union membership decline in the private sector from about 24% to just over 6%. And I think that this decline has opened the door to contracts that unions would not have agreed to. Or if they had agreed to them, would've agreed to under more favorable circumstances for workers.

Another type of arrangement that's often considered in any discussion of non-competes are so-called no poach agreements just mentioned by the commissioner between franchisees and franchisers that restrict the ability of franchises to hire workers away from other franchises. I think these agreements have, like non-competes, been shown to be quite common and they're now under a great deal of scrutiny.

And finally, other types of restrictive covenants. There are many, but non solicitation agreements, IP assignments, and others are often used by employers in conjunction with non-competes. This is the subject of some ongoing work that I am doing. So, I want to talk now a bit more about non-competes specifically, and organize my discussion of the evidence about them in terms of what we think they do in the labor market, and what the potential explanations and justifications of non-competes are.

So again, in the modern understanding of a labor market, there's a lot of scope for employers to exploit and even extend their market power. By extend, I really have in mind Evan Star's slightly modified phrasing the intertemporal conduit of market power. Whereby an employer exploits a moment at the beginning of an employment spell when it has a great deal of market power, perhaps more than it will later. And then, tries to cement that position going forward.

On their face, non-compete agreements look like a potential candidate for an instrument that would allow employers to do this. But non-competes could also serve other purposes with more social value than this. And I think we need to apply theory and evidence wherever possible to

sort through these different accounts of non-competes. And so, that's what I will endeavor to do in the rest of my time.

So the potential explanations that emphasize social benefits are typically-- and in my view, most importantly trade secrets, first of all, and training for workers. And then, there are explanations that emphasize the private benefits to employers. And really, the lack of social benefits.

And the first is that intertemporal conduit of market power. The second is really workers lack of understanding of either what the non-competes entail for them, whether they've even been signed, and also the state of the enforcement regime. There's also a potential explanation that I won't talk about, except just very briefly right now. About screening.

So you could imagine that non-compete arrangements exist to help employers screen for workers who are less likely to leave later on, but there's really very little evidence on this. There's a bit in the work by Evan Starr and his co-authors and their survey where they ask workers what their anticipated likelihood of job hopping is. And they don't seem to be systematically different. The workers with and without non-competes.

So I'll hop right into these justifications and think through conceptually what they might mean and then what we know about them. The trade secrets justification starts with this premise that trade secrets litigation is protracted, it's costly, it's difficult for employers to win. Non-competes maybe a more effective or at least lower cost way to prevent the theft of trade secrets than would a more narrowly targeted law that simply sanctions the exposure of the secrets themselves.

I think the underlying idea here is that it's necessary to prevent those trade secrets from being divulged in order to induce the employer to share that information in the first place. The idea being that the employer shares the trade secrets with a worker. It facilitates their joint production and contributes to social welfare. Because the employer knows that information won't be divulged outside the firm.

But there are a couple of caveats to this that I want to be careful to make. First, this justification is really limited to workers who plausibly have economically meaningful trade secrets, first of all. And second, it is limited to situations in which employers actually have a choice as to whether they're going to share those trade secrets with their employee. For some types of production, there may be no other good option than to share the information.

In which case, there won't be much employer response to changes in non-competes and the enforcement regime and presumably less of a economic distortion on that margin. And lastly, I think a note that often doesn't get emphasized enough in this discussion is that I think client lists, which are often mentioned in the same breath with trade secrets, are really not the same thing from an economic standpoint in my view.

Trade secrets have a pretty clearly positive some aspect, in the sense that you invest. You make costly investments, then you produce trade secrets. And that contributes to economic output. Client lists, while they may have that character, they're more plausibly zero sum in my view and

there's less of a social objective, a social interest in facilitating the employer investments towards generating those client lists.

What do we know about non-competes and trade secrets? We don't know a ton. And that's a theme throughout what I'll say. Workers report having trade secrets at a substantially higher rate 25 percentage points higher than those who do not have a non-compete. Sorry. The workers who have trade secrets are more likely to have a non-compete by that amount.

But most workers with non-competes report not having access to trade secrets. So you think that's not the whole story. And as has been emphasized earlier today, we know that non-competes are quite common across workers with low and high pay, low and high educational attainment. And it's just less plausible that workers lowering income distribution or in the education distribution really have these trade secrets that we're interested in here.

OK. So moving on to the training justification for non-competes. I think this was a little more complicated. It starts with this widely held, the correct premise, that worker training is generally undersupplied. On the worker side, you have liquidity constraints. You have lack of information about the quality of the training that's on offer by an employer. And this limits their willingness or their ability to pay for the worker training themselves through reduced wages at the outset of their tenure.

On the firm side, the expectation that a worker will at some point leave or after having received training bargain for higher wages and capture some of the benefit of that training, I think that limits the employer's willingness to pay for the training. And what a non-compete does is it gives the employers an assurance that this won't occur after they make the training investments.

It gives them more assurance, so it gives them some sense that they'll be able to retain that employee they've invested in. And there is some evidence to support this. A firm sponsored training is more common in states that more stringently enforce their non-compete agreements. In particular, states that will modify an overbroad contract and enforce it, despite its initial noncompliance with state law.

Those states appear to have more firm sponsored training. But I think, again, there are caveats here. So the first for me is that there are a lot of policies that would reduce worker bargaining power and that would, in so doing, increase the willingness of employers to invest in workers. I don't think those policies should be justified or sought on that basis.

Secondly, there are contracts that can more narrowly target this justification. So if you're an employer, and you want to have a contract that requires repayment of some fraction of your investment in the training, you can write a contract like that that would allow you to recoup some of that cost in the event of an early departure of a worker from a firm. And that would be a more narrowly targeted means of addressing this issue than a non-compete, which of course has broader implications, negative implications for workers ability to develop their careers.

So now, I want to turn a bit. Turn to the explanations that emphasize private benefits to employers. So I think first, non-competes can in principle cement that employer friendly

bargaining situation at the beginning of an employment spell. I want to just emphasize a worker who has just accepted an offer, potentially turning down other offers, or has not yet accepted but it's gone through time consuming interviews and so forth is really in a tough position.

She may just have gone through an unemployment spell. And we know from a great deal of good work that the labor market is not kind to those who have gone through lengthier unemployment spells. And we know the job search itself is costly and very uncertain. And so more generally, I think what this means is that workers just before and after job acceptance, especially after acceptance, often don't have a ton of leverage in their negotiations with employers.

And so, you could imagine the non-compete agreements being imposed in a moment of worker weakness and then used to maintain that advantage going forward. I don't think we know as much as would be helpful here. We do know that non-competes are often presented to workers after the job offer was accepted or even on or after the first day of work. And so that's suggestive, but we really do need more evidence and theory here.

And so, I want to show you this figure from Matt Marx's work, looking specifically at electrical engineers. But with a great cut of the data, seeing when workers report having signed their non-competes. Some of those non-competes are provided with the job offer. Some are provided after the offer before starting the job. But nearly half of the non-competes in Marx's sample are workers are reporting having signed those non-competes on the first day of work or after.

OK. So potentially, having been given the agreement learning that they were being asked to sign this, and then needing to sign it as a condition of actually starting and continuing at the job that they've just taken on. OK. The other explanation that emphasizes private benefits to employers is about salience and worker understanding of both the non-compete itself and the enforcement regime.

The first thing to note is just the workers aren't likely to be compensated fairly or at all for something that they don't know they have signed, or that they don't know has these implications for them going down the road. The timing is suggestive here. It's also of note that workers just don't often report bargaining over the non-compete agreement in a way that we would expect if these things were mutually beneficial.

There's lot of confusion. In very recent work that Evan and his co-authors are doing about just what the enforcement regimes are. Early on as I started studying non-competes, I was really struck by the fact that in California, you have about the same fraction of workers with non-competes as elsewhere. California, of course, being the main state that doesn't enforce them.

And so, there are multiple explanations that are consistent with that. But it's suggestive that employers may be exploiting worker lack of understanding of what the enforcement regime is, or else, presumably, the non-compete wouldn't have much value to them. I think the non-compete can be very non salient right up until that moment when the worker says, I would like to take an outside offer. And then it gets brought to their attention. And so, that's sort of the fundamental issue here.

And then the last thing to say is that the litigation is not the channel through which all labor market effects of non-competes would occur. There are-- we think that the bulk of the effects are coming outside of litigation, which is pretty uncommon. But rather, through a chilling effect of the non-compete. So I want to show you now a map that relies on Russell Beck's invaluable resource here.

It's a little bit outdated there may be some changes relative to this. But the point is just to emphasize that in the vast majority of states, non-competes are enforced to some extent. The dimension of non-compete enforcement stringency that I'm emphasizing here is the one I mentioned a moment ago. That in some states, overbroad non-compete contracts can be modified and then enforced.

In some states, an overbroad contract will simply not be enforced. And then in a few states like California, they're just not enforceable at all. And again, I think the thing that's always on my mind when I think about enforcement is the state of worker knowledge of enforcement. And presumably, any labor market effects of different enforcement stringency really have to run through worker beliefs about the enforcement regime.

So now, what I want to do is think through what would have to be the case if non-competes or more stringent enforcement of them are beneficial for both workers and firms. I think we should see more worker training. We should see more business investment and higher wages. Some combination of those things.

So what's the evidence on all of this? Again, it's limited, but here's what I'm familiar with. There is more worker training in situations where enforcement is more stringent. There is a bit of evidence that there may be more investment at incumbent firms when non-competes are enforced more stringently. But there is a somewhat larger body of evidence that non-compete stringency and enforcement diminishes entry.

It makes it harder for startups to scale up and to compete. I know that in states that enforce non-competes more stringently, you see lower age wage profiles. That's not identified in the economist sense, but possibly suggestive. And we have higher quality evidence recently coming from an Oregon policy change among others that suggests that once you ban non-competes, you get higher wages. And when you make non-compete enforcement less stringent, you can get higher wages.

So that flies on its face in opposition to the presumption that non-competes are mutually beneficial. But that's actually not even the whole story. So I think some of the recent work-- and you'll probably hear more about this from some of the researchers after lunch. But we also should care about what the spillovers are to actors outside of the worker firm relationship that's at issue.

So what we're learning is that in occupations, in labor markets, where you have more non-competes and more stringent enforcement, you seem to have less entrepreneurship. You seem to have less innovation, in that case, looking at patent citations within a state. You see that in states

that are more stringently enforcing non-competes that there's less information flow of the kind that we want to see because it's conducive to economic productivity growth and output.

And we also see reduced mobility of workers who don't have non-compete agreements. And there is labor search theory that would make sense of that. In an interest of time, I won't get into. More broadly, I think we need to think about these kinds of effects in the context of a labor market that has been declining in dynamism in previous decades.

As was mentioned in the previous panel, we see worker mobility falling, workers less likely to move across states. We see firm entry falling, job reallocation declining. So there are a host of broader concerns that labor economists have about this declining dynamism that I think need to be in the back of our minds as we are thinking about non-competes.

OK. So finally, I'm just going to kind of tee up maybe some subsequent discussion after lunch by running through what I see as some of the major options for addressing non-competes. So if you start from a view that non-competes and their stringent enforcement maybe producing that harms, I think you want to do one or more of the number of things.

The most ambitious thing you can do is just try to band on competes or render them unenforceable. Banning them is, of course, more ambitious than making them unenforceable. And for reasons I've already gotten into, they're not the same thing. And you need to be thinking about the distinction and need to be thinking about the fact that workers' lack of understanding of the rules makes this distinction especially large.

The other thing you can do is simply ban non-competes for certain groups of workers. You can pick a wage threshold, restrict non-competes to certain occupations. Those have their various advantages and disadvantages, and can be somewhat crude. You can try to limit non-competes to jobs that have trade secrets. That sort of aligns them with what I think is the most powerful social justification for the non-competes.

You can adjust enforcement of non-competes. So you can remove the potential for modification in the courts. You can try to tighten the scope, shorten the duration of non-competes. You can also look to requirements on compensation. So I know there is some research suggesting that requirements that legal consideration be provided in exchange for non-competes tend to result in workers getting a better deal in their non-compete.

You could imagine requiring that legal consideration beyond simply continued employment would be required. You can require garden leave. You get some fraction of your previous earnings for as long as you're being bound to the non-compete. And then of course, you can require enhanced transparency and notification.

I know that was discussed in the previous panel in much more detail. But again, trying to make non-competes more salient, trying to establish the conditions that would permit a more mutually beneficial arrangement. So with that, I will stop. And I really look forward to the conversation after lunch. Thank you.

[APPLAUSE]

SARAH MACKEY: Thank you, Ryan. And with that, we are on break until one o'clock.