FEDERAL TRADE COMMISSION

NON-COMPETES IN THE WORKPLACE: EXAMINING ANTITRUST AND CONSUMER PROTECTION ISSUES

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FTC Headquarters

600 Pennsylvania Avenue, N.W.

Washington, D.C.

FEDERAL TRADE COMMISSION

I N D E X

FEDERAL TRADE COMMISSION

I N D E X (Continued)

P R O C E E D I N G S

WELCOME AND INTRODUCTORY REMARKS

(8:30 a.m.)

MR. SAYYED: 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 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 10th. We will -- we have put some questions out for comments. 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 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 D.C. 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 would 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, 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 will 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.

Okay, so with that, I'll offer some quick introduction to our two first -- two initial presenters. Our first presenter 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 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 to 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 new faces, Bill is a professor at George Washington University Law School, where he is Director of the Competition Law Center. He is also Nonexecutive Director of the U.K.'s Competition Markets Authority.

He was an FTC Commissioner from 2006 to 2011 and served as Chairman from 2008 to 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 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 the fall of 1983.

So with that, I turn it over to Professor Lobel.

(Applause.)

STATUTORY AND JUDICIAL TREATMENT
OF NON-COMPETE CLAUSES

MRS. LOBEL: Thank you. 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 anticompetitive 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, ten 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 on -- 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, you know, 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 the -- in itself, I think, in some ways the neglected stepchild of intellectual property law, plays a role not only in the definition sometimes of

the -- or 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 I'll show that 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 will 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 lives 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 are 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 zero -- 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, a legitimate business interest, or this need, this legitimate business interest is outweighed by the hardship on the employee and the public's interest, 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 triangular 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 the legitimate business interest, I mentioned already trade secrets. Those are, I think, the best case for protectable interests 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 business 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 is a -- you know, 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, is 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 -- 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 nonsolicitation of customers, nonsolicitation of coworkers, of former coworkers. 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 in force 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 the -- 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 is 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-age 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 ten-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 they 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's, again, great variation. It's still the sea vacillating and 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, you know, this scope of profession, we'll cull it a little bit. You know, it's not nanotechnology, it's nanotechnology in particular, engineering, like a medical device application or -- 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 this is important, and when, 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, the -- one of the calls to the state by the President at the kind of 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 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, there's -- 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 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 someone 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've learned, 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, you know, 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, you know, 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 nonenforceable 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 effect, I have ten. I like the number ten, 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, On Amir, at UCSD on just the effect 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 market, the product,

is a human resource that makes its own decisions as well on, you know, how it will behave. So it's not just a company that's making kind of a 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, you know, 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 Southern California, it's biotech; and Los Angeles it's entertainment; and Silicon Valley, tech. Come here, your talent will be 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 and -- 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 -- you know, it's kind of the -- Gary Becker, you know, very basic 101, how do you eradicate an equality. 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 over -- specifically over their abilities.

Okay, 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 are just conceptual in the idea stage, things that were completely developed on one's own. NDAs are frequently much broader than what trade secrecy, the statutory trade secrecy definition is.

We now have, and recently Congress has strengthened trade secrecy by passing, the Defense 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 established incumbent company and start something new in the high-frequency market of, you know, trading market and develop a new algorithm without being sued or 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.

Okay, so finally, the point that I've already made about how there's a lot of evidence that even in nonenforcing 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 don't think -- 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, you know, what is the actual practice in the market, what do people understand from what they sign and how is behavior chilled. And that's where -- that's the lead to the end of my talk and now the kind of 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, you know, in litigation 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 don't -- 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 Antitrust 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 are 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, a new entry in a market, which is really something that's of great concern and they affect all employees. So they have -- so non-competes, again, have been shown to have these negative externalities, not only on 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 for, you know, 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. You know, it's in the words themselves. It kind of falls squarely in that standard, and I think -- I think the FTC is really well positioned to think about things that -- 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, you know, how concentrated versus how much competition there is in a particular market, but looking at all these multiple effects, like the ten, 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.)

APPLYING STATE AND FEDERAL UDAP PRINCIPLES
TO NON-COMPETE CLAUSES

MR. KOVACIC: 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 heard -- you've seen the best roadmap, 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, 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 of 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-domed

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, here's what I'd ask them 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 the 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, focus opened business-to-business relationships. So who is the consumer? The customer. The customer was a business enterprise; it wasn't an individual consumer.

The most recent example from the FTC's experience is the fleet card case. This involves 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 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 involve 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 interest of a

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

No intention 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, when I signed myself with a little bit of uncertainty about the basis, 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 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 U.S.

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 that's offered to support the rule.

I 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.

Actavis, 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'd just suggest to you generally the overwhelming assessment was not that we were going to win, that these were cases worth doing, that 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 toward 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 debate is 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 analyses. 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 and the language they want to hear today. It's economic analysis. 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 an 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 of 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 the 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'd 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, this 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, in 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. They'd say, where have you ever done that before? You did it with the Telemarketing Sales Rule; you've done it in a 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 the last thought is that the markets regime that the Competition and Markets Authority in the U.K. 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'd think of in my legislative work list.

Thank you.

(Applause.)

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

(Recess.)

PANEL 1: FTC AUTHORITY TO ADDRESS
NON-COMPETE CLAUSES

MR. HAMBURGER: Good morning. My name is Jacob Hamburger. I'm an attorney in the Office of Policy Planning at the Federal Trade Commission, and to my right is Sarah Mackey, Deputy Director at the Office of Policy Planning at the FTC, and welcome to our first panel today on the FTC'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 our 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 the first -- 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 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've already introduced Bill and Orly.

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

MS. 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 copanelists, 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, healthcare providers, hairstylists, massage therapists, salespeople,

receptionists, employees of local news stations, customer service personnel, childcare 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 sort of highlight some of these experiences and my observations from those investigations with a particular focus on, you know, what Orly called the gap, really almost 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 these 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 signed 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 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 specifically 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 sort of 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.

So one childcare 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 and 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 percent 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, and 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 "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, you know, 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 anticompetitive 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 bases for some of the investigations that we conducted. So we used a couple of different theories in Illinois to do this work. One, we saw -- in the court cases we filed, we saw declaratory judgments that as applied to certain categories of low-wage workers that 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 sort of the details of this later. We did not make a particularly clear distinction between an

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 sort of 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 sort of 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 this 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 given employers really any clear standard for shaping their internal policies in this area.

So for this reason a number of state attorneys generals 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.

MR. HAMBURGER: Jane, thank you.

Damon?

MR. 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 in 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 -- 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 over, really over a generation. And it underlies essentially a series of profound macroeconomic challenges that we face and has -- 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 U.S. economy and make monetary policy.

Wage stagnation is persistent in our economy, particularly at -- 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 ten years ago we have been at full employment for a number of years now.

And there are -- there is 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 percent in the 1950s to 6.3 percent today.

And the other issue that has gotten a lot of attention is the issue we're talking about today, which is anticompetitive practices in the labor market by employers of which -- 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, and 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 -- that non-compete agreement coverage seems to be in somewhere around 40 percent, and it depends on, again, how you -- you know, which type of answer you take and that sort of thing, but as opposed to the 20 percent coverage levels that have been gotten by surveying employees and asking 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 agree to non-

compete agreements. I have never seen a collective bargaining agreement that had one in it. And what that tells you is is that this is a phenomenon of contracts of adhesion, of contracts that are not actually negotiated between parties with profound, profound asymmetries in information and power.

Now, to get -- there is 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 U.S. 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 they -- and I would suggest to you that the evidence -- that if you look at this, we step back, all right, from the non-compete issue and realize that what you are being told when -- if the Commission is told this, what they are being told is it is a solution to the collective action problem in training, that this problem is not within with the little box of competition policy.

This is a problem which has been addressed in different times and 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 -- and 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 of 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 that 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.

Finally, I want to call attention to the irony or the paradox of the fact that so many of the non-compete agreements that are -- that employees have signed in this country are unenforceable. As we have heard, non-compete agreements are essentially per se unenforceable in California. Many of the non-compete agreements that employees sign as contracts of adhesion upon employment in noncollective 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. That in and of itself should be part of the evidentiary basis for Commission action.

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. This is a subject that I am sure that many of the skeptical judges that we heard about earlier would be -- would agree about, be happy about.

Bill Janeway, an Oxford don who was giving this talk and who has had 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 an innovation in the United States 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.

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, effectively develop and make use of our human capital. We are inviting -- by the prevalence

of these agreements, we are inviting someone else to steal a march on us in this respect.

The last thing I'm going to say has to do with a response to the comments that Professor Kovacic 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 with 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.

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 our 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.

MR. HAMBURGER: Damon, thank you.

Randy, your remarks.

MR. 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 am very honored to be here and looking forward to the entire day. 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 channeling a non-compete agreement as a potential antitrust violation. 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 is 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. 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 policy -- public policy grounds are comparatively easier to prosecute. So let me unpack what I mean both about the aggregation problem and this related irony.

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; 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 anticompetitive effect on the hiring process and the labor market.

So we have a situation where employers in the aggregate create an anticompetitive labor market outcome but they do it unilaterally by acting

independently to exploit their bargaining leverage over their respective employees. 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 seller's side of the labor market. And that's exactly what you would expect to get from an illegal and anticompetitive 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 anticompetitive effect.

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 anticompetitive effects in relevant labor markets. So think of the non-competes covering

the low-skill, low-wage workers who don't really have any meaningful access to trade secrets, aren't given 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 employee from the labor market actually could register an anticompetitive effect, but these are the employees that tend to have some more bargaining leverage on their side. 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 and an easier time

with what are arguably the least important cases.

A second consideration that's closely related to the problem of proving an anticompetitive effect is that private plaintiffs also -- and speaking of just private plaintiffs -- have to prove antitrust injury to have standing to sue. This means they have to show the non-compete cause -- the kind of injury that the antitrust laws were designed to prevent. The problem there -- in a labor market case -- our primary concern from a public policy perspective -- is the exercise of buyer power. In a buyer power case, antitrust law is serving to protect seller welfare rather than buyer welfare. 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 an individual non-compete caused reduced wages or diminished nonwage terms of employment, harming workers in some way.

While an abusive non-compete agreement viewed in isolation can certainly cause injury to the welfare of the one worker who was a party to the agreement itself, the non-compete itself is pretty unlikely to cause antitrust injury to the remaining workers on the seller's 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 probably going to raise their wages in isolation, looking at it in 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 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.

There is potentially cognizable injury on the buyer side of the labor market in this scenario, which is to say there is harm from the employer's perspective, that the employer is experiencing a shrinking pool of available workers. 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.

We have this scenario where the antitrust 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. 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 important thing to think about from an antitrust perspective is the primary theory of liability that's going to be used in these cases. 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 a non-compete is per se illegal or presumptively illegal under the rule of reason, they are not obligated to prove that the employer has market power, that the agreement caused an anticompetitive effect in order to make that a prima

facie case.

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 theories of liability that are out there for us to choose from, I would say a Section 1 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 in their effects. But courts typically apply the full-blown rule of reason, which is going to require proof of an anticompetitive effect in market power and vertical agreements.

Non-competes have also been subject to the ancillary restraints defense. The Addyston 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 -- 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 a Section 1 theory.

Section 2 cases I also don't see as especially promising. The primary reason being that there is no avenue to a more relaxed liability standard under Section 2. Those get-- Section 2 cases get the rule of reason entirely. One thing worth noting, though, is that Section 2 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, 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 of 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 2, you're talking about defining markets and proving an anticompetitive effect. So that's going to be very challenging and not very promising.

That leaves the FTC's standalone Section 5 unfair methods of competition authority. That's been

talked a lot -- the state versions of that authority have been talked about this morning. But the FTC had 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, at 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 anticompetitive effect because by definition an invitation to collude hasn't been accepted. 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 anticompetitive effect.

Section 5 also has an incipiency mandate expressly baked into its goals legislatively. Obviously an invitation to collude is an incipient form of a per se violation -- price fixing. It's unclear whether courts could potentially be comfortable applying an inherently suspect framework to a non-compete. 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 anticompetitive effect to begin with -- only when viewed in the aggregate.

One thing that AAI has been advocating for in -- 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 minimum wage. We've advocated for at least -- 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 -- 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 am well over time so maybe I should stop there. Thank you.

MR. HAMBURGER: Thank you, Randy.

Eric.

MR. POSNER: Yeah, 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. The FTC -- courts are 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 are some good reasons that the FTC can give.

I have a theory. I'm not sure I can 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. 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 -- 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 a decline of union density. So you have more people who are subject to this kind of unilateral imposition of non-competes today than in the past. That probably also counts 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 will challenge the non-competes. And so they give you a little 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? The common law is not, of course, the only body of law that could be used by employees to challenge a non-compete. They could bring an antitrust case. 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 or 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 know, you're a low-income worker who can't afford a fancy lawyer.

There's the problem of showing market-wide effects. I mean, 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 there's 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.

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 you know, 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.

I think the claim I want to make is that non-competes have become massively more prevalent than 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 is unclear, 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've recognized this for literally centuries. And the Sherman Act was enacted, in part, to create stronger remedies against restraints 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 rulemaking, 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 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's 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 -- 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. Those are studies that the FTC could use if it chose to take this path. And it provides more comprehensive evidence than a flat ban 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 maybe reversed presumption. So, for example, you could imagine a rule that said that non-competes are 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, then the non-compete would not be illegal.

Now, that one might be difficult for an employer to do, and whether this rule would be advisable would depend on a range of assumptions that

that you would have to make and empirical evidence. I think a nice thing about that rule is that it would make private litigation easier.

And that actually leads to the final point about FTC litigation, which I think is also -- would also be appropriate. So I think one of the problems for lawyers who want to bring class actions on behalf of workers who have 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 non-competes. But the FTC could bring cases under its authority to enforce the Sherman Act, and it could bring cases -- you know, 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 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 that, 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, you know, in a relatively simple way.

Thank you very much.

MR. 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 contracts professors. So this first question is based about how we can form a rule.

Can contract law, in particular state contract law, form the basis for a Commission rule? And in particular, could the FTC codify through restatements of contracts 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?

MR. POSNER: Well, I am a contracts professor, so I'm teaching contracts tomorrow, in fact. But, you know, the FTC -- you know, state -- let's see, the FTC doesn't have any, you know, authority over state contract law. The FTC, I think, could use the restatement or it could use, you know, 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 it 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 -- you know, 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 the 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. 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 law kind of focuses just on those two people.

When you have a contract that has third-party facts, then contract law 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.

I do -- just let me just 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 the common kind of common-sensical 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 is 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.

MR. 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 -- 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. They'd say we've 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.

MR. HAMBURGER: Thank you.

Anyone else?

MR. SILVERS: I am not a contract professor, but I think there's two points here that the Commission ought to really be zeroed in on. The first is the nonmarginal nature of non-competes in the U.S. labor market today. We are not talking about a phenomenon that is either confined to essentially highly, top-end employees, which is 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 are are with talking about.

We're talking about something on the order of a third to 40 percent 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.

Secondly -- and I might also add that it's not -- 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 it cuts -- 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? There is now a significant body of evidence that workers are being harmed and harmed to 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, right? 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 presentations that preceded this panel made a pretty compelling case that the FTC's jurisdiction is broadly anticompetitive behavior in markets, even if you don't buy that and you think that somehow the FTC's -- FTC is actually limited to "consumer protection," who is 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.

MR. HAMBURGER: Thank you.

MS. MACKEY: So if we look at another way maybe to 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 have been doing, could we maybe think about how this would work, craft a rule that had a presumption of unlawfulness for the non-compete clause. It would be considered, you know, presumptively an unfair method of competition if the workers pay, salary or commissions is less than the 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, you know, 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 presumptive -- would that be a good rule or would there be elements that we could tweak and improve looking at both unfair methods of competitive or UDAP, 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.

MRS. LOBEL: Well, I can take this. So I think we are all talking about the fact that there are multiple harms and that 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 on the antitrust level because of these different harms, because there are third-party harms and there are 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 industries and different kinds of workers, so first to your actual question of, you know, 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. I see these clauses having such a strong effect on decision-making of workers and how they operate in a contract, an employment contract. They send a message that they're enforceable even when they are not enforceable. And how do they do that? Not only because of misinformation and the fact that they are contracts 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 reformation 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 nonenforceable, 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 -- and 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. We've seen now -- we're at a moment where we know more about hostile work environments; we know about problems in in various industries. Also with higher paid employees that just feel that they have no voice and they have signed really strong NDAs, nondisparagement clauses against their harassing employer, for example. They're locked in because they have a non-compete, and the industry is very, very concentrated.

So I've seen this in broadcasting. There has been a recent -- a couple of cases that I've been involved with where women workers, workers that are immigrant executives and they're told, you know, we'll use your immigrant status to not allow you to move. That's how I see a rule of just looking at a raw salary and saying after that we are 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 at by Randy, I've worked on a case for example in the -- 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 sign non-competes, it's impossible for a new firm to come in.

So there is kind of that irony of the most experienced 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 non-competes will be enforceable.

MS. MACKEY: I think I see a couple of 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.

MR. KOVACIC: I think rather than pick a specific template, I think you survey the experience that the states have had as a whole and derived from that what you think is the best package. You also, in doing that, you look at the experiences you've had as a rulemaking 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 rulemaking effort was to study state experience very carefully, and there had been a natural experiment. Some states did not impose the restriction; others did. And a study performed by the Bureau of Economics -- a rule that was formulated as a consumer protection rule -- an information provision rule but with a strong competition ethic, used that state experience when the courts asked 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 will ultimately come from a reviewing court, for example, about whether it's going to work and how you know. And in that respect, the state experience is enormously

valuable in helping you design the specific framework and answer questions about efficacy.

The same thing with the Telemarketing Sales Rule, 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.

MS. 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 is in the beige shirt back there, or sweater, and she will bring them up to us.

Sorry. Eric.

MR. POSNER: Yeah, 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, I mean, there have 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, you know, 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.

MS. MACKEY: Jane.

MS. 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 of a transparency value. This idea, I think that Eric mentioned earlier of how do we get this information out there in the public, but I don't think it does anything to change the bargaining power that the two parties bring to the contract.

MS. MACKEY: Okay. And skipping back to Randy first.

MR. STUTZ: Yeah, so I 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 a 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.

MS. MACKEY: Damon.

MR. SILVERS: I mean, I think you're getting 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. 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 kind of bound it aren't the right approach. All right?

And, secondly, and I wanted to throw in a piece of data that may sort of surprise people who are not familiar with the labor market. Since non-competes have become prevalent in the American labor market, in conjunction with a decline of collective bargaining in the private sector, a rather shocking thing has happened, which is that worker mobility has declined. By the way, you will 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. Now, how much has 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 kind of the 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, as multiple -- 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 are not allowed unless the employer can show substantive evidence of a bespoke contract -- a bargained 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, right? We just don't agree to these things and we're never asked. It is an indicia of an exploitative 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, right?

And so -- and the other point I would make about what you were sort of 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 percent, top 5 percent, something in that range.

MR. HAMBURGER: So let's dig into one of those points you made a little bit more, and this is directed to Eric, but it 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?

MR. POSNER: Well, there are 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, like, some accounting software, that increases the worker's value to some competing, let's say, accounting firm; 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 -- that's 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 be customer goodwill, which I think you also mentioned.

And the problem here with an intangible asset is if you have an intangible asset like an idea an idea or something, you're the employer, let's say an entrepreneur, you know, you can't actually use it unless you tell an employee about it, right? And then once the employee knows about it, the risk is the employee is going to go elsewhere and give it to a competitor. 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. 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 is 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.

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 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, you know, the guy at Coca-Cola who actually knows what the Coca-Cola recipe is. I think people haven't fully figured out -- I don't think economists have figured out the extent to which non-competes are really necessary above and beyond these already quite significant frictions.

MR. HAMBURGER: Great.

MS. MACKEY: I'm going to point out that our time is getting limited, and I am getting great questions also from the audience, so I'm going to skip 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 aggregation issue and your questions and about how we would enforce, I'm throwing that to Randy first.

MR. STUTZ: Yes. The AmEx comparison is great for illustrating the challenge posed by the market definition problem with these cases. AmEx relied on direct evidence of anticompetitive effects. I think AmEx had a 30 percent market share, and that was a point

of skepticism, but they were able to get around the market definition issue or, well, ultimately they weren't, but that was how they dealt with the problem.

But still, to prove an anticompetitive effect, which the FTC, and as I said, FTC doesn't have to prove antitrust injury, but they would have to prove an anticompetitive 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-skilled workers who can substitute to a lot of different kinds of jobs potentially. That's where it gets harder to prove the anticompetitive effect.

MR. 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?

MR. 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 kind of 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 bull's eye, no question.

MR. POSNER: 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 in input markets, there's plenty of cases out there. The old cases like Mandeville Island Farms involving buyer 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 made -- 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 is --

MR. KOVACIC: Turn of the previous century.

MS. MACKEY: So we are, of course, one of the two antitrust enforcement agencies, and so --

MR. KOVACIC: What's the other one?

MS. MACKEY: 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, it's an FTC rule that FTC enforces, we have done something that DOJ can't. How do we approach that? How does that balance out for workers and for employers?

I'm going to throw that to you, Bill.

MR. KOVACIC: In a green field in heaven, 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 would say this is a valuable source of adjustment in vitality in a competition law system, and we welcome it and would be at peace with it. 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.

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

MR. SILVERS: That's beautiful theater.

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

MR. 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 -- 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 kind of the last question -- that was

kind of what Bill was talking about. And particularly when you're talking about sort of 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 rulemaking were done in this institution. So part of the shifting framework is a vacuum opened up, in an extremely destructive one at every level in terms of the labor market and balance 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, the various other -- you know, what if? And, here, it's extremely important. I mean, A, 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 sort of realistic kind of inquiry into the system. These things, solutions to big problems, like this problem has been in -- has been developing for

decades. It's hard to imagine that it would be solved in an afternoon or even in the term of any particular commissioner at this Commission. It's 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 an embedding in our constitutional order the right and ability of the Federal Government to regulate the national labor market. It took a little time, but if somebody hadn't started, that process would not have ended.

MR. POSNER: Can I just -- I just want to actually echo part of that, which is that, you know, 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 has changed a great deal in the last ten 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.

MS. 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 a break now. We will be back at 11:20, and then we'll start talking about the economic literature. We'll have a 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.)

(Recess.)

REMARKS: REBECCA KELLY SLAUGHTER

MS. MACKEY: Let's listen to Commissioner Slaughter. Thank you.

(Applause.)

COMMISSIONER 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 worked so hard to put together this workshop. I was watching upstairs from my office this morning on the live stream and I'm 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 have 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 anticompetitive non-compete clauses.

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 principal 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 rulemaking to address unfair or anticompetitive use and enforcement.

Today's first panel provided a 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 percent of all U.S. workers are currently covered by a non-compete provision, meaning that they have restrictions on where they can go to work after they leave, lose, or are let go from their current job. This includes 12 percent of workers who earn less than $20,000 per year and 15 percent of those who make $20,000 to $40,000 thousand dollars 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 have already heard about the Jimmy John's example that the Illinois Attorney General pursued effectively in court.

AG Madden and Jane Flanagan, one of our panelists today, also wrote about how several employees of a spa and hair salon said 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 bought 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.

We know that non-compete clauses can limit employee mobility and competition even in states where they are legally unenforceable. The examples of how non-competes affect people's livelihoods and ability to earn a living go on and on.

I am 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, that 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 healthcare aids, where non-competes have become common in contracts between aides and healthcare staffing agencies. A long-time healthcare 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 aide's transition to the new company.

Physicians are also increasingly being subject to non-competes, which means patients can lose their long-time and preferred doctors. According to one survey, approximately 45 percent 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 healthcare systems, this may result in greater bargaining leverage for the hospital systems and less bargaining leverage for physicians and other healthcare 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 are 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, and 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 applied 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 am pleased that the Chairman and the leadership of the Bureau of Competition have acknowledged the potential for labor monopsony concerns in mergers and am hopeful that such theories 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 U.S. 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.)

EFFECTS OF NON-COMPETE CLAUSES:
ECONOMIC LITERATURE REVIEW

MR. NUNN: Well, thank you very much to Commissioner Slaughter and 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 an economist -- 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 large literature going back a number of years that focuses more specifically on certain occupations, 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.

Beginning with the 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.

I think that this finding has really jump-started 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 that needs to be better understood, and we need to kind of think carefully about what the labor market effects are.

I'm going to talk now a bit about the larger economic context in which we're learning about non-competes. So I think that there's -- as was said on 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 is a straightforward implication of the labor search models beginning to be developed in the eighties and nineties 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 sort of re-appraise 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.

One figure that I like, drawing on work that Economist Doug Webber has done just right here, the

fact is that in the classic labor setting, you would think that the labor supply elasticities facing a firm would be infinite. You cut your wage even 1 percent, you would 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 elasticities 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. Again, this is the economic context in which I think about non-competes and what they might be doing in our labor market.

It's also important 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. 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 helped 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 percent. 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 have 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 franchisors that restrict the ability of franchises to hire workers away from other franchises, and these agreements have, like non-competes, been shown to be quite common, and they are now under a great degree of scrutiny.

And, finally, other type of restrictive covenants -- there are many -- but nonsolicitation agreements, IP assignments, and others are often used by employers in conjunction with non-competes, and this is the subject of some ongoing work that I am doing.

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.

Again, in the modern understanding of the 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 Starr's slightly modified phrasing, "the intertemporal conduit of market power," whereby an employer sort of 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.

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. 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 in their survey, where they ask workers what their anticipated likelihood of job-hopping is, and they don't seem to be systematically different between the workers with and without non-competes.

So I'll hop right into these justifications and sort of think through conceptually what they might mean and then what we know about them. The trade secret justification starts with this premise that trade secrets litigation is protracted, it's costly, it's difficult for employers to win. Non-competes may be 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 their worker, it facilitates their joint production and contributes to social welfare, because they know -- because the employer knows that 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 an 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 sum aspect in

the sense that, you invest, you make costly investments, and 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.

Okay. What do we know about non-competes and trade secrets? We don't know a ton, and that's a kind of 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 -- 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 we 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 in the income distribution or in the education distribution really have the kind of trade secrets that we're interested in here.

Moving on to the training justification for non-

competes, I think this is a little more complicated. It starts with this widely held and I think 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 for 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 investment, gives them more assurance, so gives them some sense that they'll be able to retain that employee that they've invested in, and there is some evidence to support this.

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, and

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. 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 a worker's ability to develop their careers.

Now I want to turn to the explanations that emphasize private benefits to employers. 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, though, a worker who has just accepted an offer, potentially turning down other offers, or has not yet accepted but has gone through time-consuming interviews and so forth, is really in a tough position.

He 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 that 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 negotiations with employers, and so you could imagine the non-compete agreements being imposed in a moment of worker weakness and then used to kind of 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, you know, 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, okay?

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 have just -- that they have just taken on.

The other explanation that kind of emphasizes private benefits to employers is about salience and worker understanding of both the non-compete itself and the enforcement regime. I think the first thing to note is just that 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 a lot of confusion -- I mean, 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 nonsalient 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 litigation is not the channel through which all labor market effects with non-competes would occur. There are -- you know, we think the bulk of the effects are coming outside of litigation, which is pretty uncommon, but, rather, through a -- sort of 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, and 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 are 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.

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 larger body of evidence

that non-compete stringency in 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's sense, but is 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 sort of flies on its face in opposition to the presumption that non-competes are mutually beneficial.

But that's actually not even the whole story. 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. 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 sort

of 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 sort of makes sense of that, but that, in the 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 on the previous panel, we see worker mobility falling, workers less likely to move across states. We see firm entry falling, job re-allocation 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.

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. If you start from a view that non-competes and their stringent enforcement may be producing net harms, I think you'd want to do one or more of a number of things.

The most ambitious thing you can do is just try

to ban non-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 are not the same thing, and you need to be thinking about the distinction -- you 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. 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 can 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, and I know that was discussed on 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.

And so with that, I will stop, and I just really look forward to the conversation after lunch. Thank you.

(Applause.)

MS. MACKEY: Thank you, Ryan. With that we are on break until 1:00.

PANEL 2: EFFECTS OF NON-COMPETER CLAUSES:
ANALYSIS OF THE CURRENT ECONOMIC LITERATURE
and topics for future research.

MR. MCADAMS: Welcome back, everyone. This next session is going to be dedicated to the current economic literature on non-compete agreements, as well as topics for future research. We have four panelists here today, Kurt Lavetti who is an Associate Professor of Economics at Ohio State University; Ryan Nunn, who you heard from before lunch, who's a Fellow and Policy Director at Brookings; Evan Starr, who's an Assistant Professor of Management and Organization at Maryland; and Ryan Williams, who is an Assistant Professor of Finance at Arizona.

I just want to start off by saying thank you to all our panelists. We really appreciate that you guys came out today and are going to share your expertise with us. And I also want to thank Dave Schmidt, who organized the panel.

The format is just going to be -- we are going to have the three economists who haven't spoken yet each give a presentation, and then we will have the remainder of the time for questions. And I think someone is going to be circulating with note cards. If you have a question, just flag that individual down,

and then they'll hand off those questions to me, and then I'll ask them during the Q&A.

So first up is, I believe, Kurt Lavetti.

MR. LAVETTI: Yeah, I'd like to reiterate, thanks to the organizers. It's a pleasure to be here. I would like to organize my discussion in terms of thinking about what economists sort of refer to as the welfare consequences of non-compete agreements, and I think there are three primary channels, each of which has been discussed in isolation a little bit previously today, and those are effects on workers, on firms, and on consumers.

I think we've got a relatively large amount of empirical evidence on the first channel, on workers, and some of that's been mentioned by Ryan today and by others, but I'd like to talk a little bit about what's missing from the empirical literature and what we know and what we don't know yet about this discussion. So I want to emphasize the fact that, even though the focus is on labor markets -- rightfully so -- there is potential for non-compete agreements to impact welfare outside of labor markets.

On the worker dimension, to reiterate what's -- a lot of what has been discussed today, we're frequently concerned about impacts on earnings levels;

on the career trajectory of earnings within a job or over one's career; mobility patterns on job matching, by that we mean the ability of a worker to be matched to the job at which their skills are most productive; and on training of workers that impacts their productivity over their career cycle.

On the firm side, we might be concerned about hiring costs, both for firms that use non-competes and for those that choose not to use non-competes. Other concerns are the ability to invest in innovative activities, other forms of investment decisions, and competition both in input and output markets.

On the consumer side, the concerns primarily take the form of concerns about product prices, but there's also concerns about access and service continuity, which I will talk a little bit about in the healthcare sector.

My overall assessment, I think I would say, is that the empirical evidence has quite convincingly shown that strengthening the enforceability of non-compete laws reduces average earnings and worker mobility, and that has been consistent across a broad range of studies. I think we're still far from reaching a scientific standard of concluding that non-compete agreements are bad for overall welfare, and

by overall welfare, I mean including those other two components about which we have relatively less information.

I don't think we fully understand the distributional effects of non-competes on workers, and I'll talk a little bit about why I emphasize the word average relative to distributional effects. I also want to think about -- talk a little bit about the context-specific welfare tradeoffs and the extent to which the welfare effects might be heterogenous across contexts. So with respect to employees who might think about -- employees of different levels of education, different earnings levels, some of which has been discussed today, on the firm side, we might want to distinguish between research-intensive firms, manufacturing firms, and service firms, and thinking about the reasons why firms might benefit from non-compete agreements and the justification for using them in different contexts.

And then on the consumer side, I'll also draw a contrast between things like healthcare versus Jimmy John's, which has become sort of the punching bag of this discussion, and thinking about the extent to which we should care about things like service continuity across different consumer settings.

There's been a lot of great discussion so far summarizing the literature by Ryan. There's also a new working paper by John that provides a great overview of this literature. I'll add a little bit of that from a recent working paper that we -- some coauthors and I just completed a couple months ago that I think corroborates what the story is that a lot of others have discussed today.

In the recent paper by Matt Johnson, Mike Lipsitz, and I, we study within-state changes in the enforceability of non-compete laws over just over 20 years. What we found is that increasing the enforceability from the 10th percentile to the 90th percentile of the distribution -- that is, so if we think about the entire policy space, California doesn't allow the enforceability of non-competes at all, other states, like Florida, allow them to be enforced quite liberally -- we think about sort of what is the range of policy spectrums that we could consider. If we move from the low end of that spectrum to the high end of that spectrum, wages fall on average by about 3 to 4 percent for a typical worker, and job mobility falls by about 9 percent.

If we were to extrapolate a bit further, what would an outright ban do? We estimate that wages would

increase, on average, by about 7 percent. Now that's a sort of extreme extrapolation a little bit, but I think when you -- so that's the headline number, and a lot of similar numbers have been discussed today, but when you dig into the details, it actually looks even a little bit worse than this.

The earnings effects are twice as big among women and minority workers as they are for white males. So to some extent there appears to be an interaction between the impact of non-compete agreements and these demographic groups for whom observably similar skills are not rewarded as highly in the labor market, potentially due to other concerns about bargaining and bargaining position.

There is -- if you think about the labor -- the literature in labor economics more broadly, there is long-standing evidence that firms tend to ensure workers against shocks or productivity. So most workers understand this colloquially, but this was first shown by Beaudry and DiNardo in 1991. Essentially what that means is that past labor market conditions affect wages today, even conditional on current conditions.

One simple story of that is that during a recession, firms tend to not cut nominal wages. So

workers are protected. Even though the firm might take a productivity hit, they might be losing money, workers' wages are not cut commensurately. But when firms are doing well, to some degree workers share in the upside growth of that. So firms implicitly insure their workers against shocks to productivity.

This is a known fact about labor markets. What we show in this paper is that even though this fact is true on average, and it remains true today despite many changes in the labor market over the last 30 years, there's a lot -- there appears to be an interaction between the enforceability of non-competes and the extent to which this is true today. So we find that this fact only holds true in states that have weakly enforceable non-compete laws.

If you look at states that allow strict enforceability, it is not true that this holds. So firms do not appear to be insuring their workers against risk -- downside risk and shocks to productivity, and the mechanism through which this occurs seems to be that non-competes dampen the ability of workers to renegotiate higher wages during good times commensurate with the productivity gains of their firms. So even these things that we think of as sort of stylized facts about the way that labor markets hold

seem to be evolving today, and our understanding of them sort of interacts with the enforceability of non-compete agreements.

And a third argument which Eric Posner mentioned this morning relates to the freedom-to-contract argument. So one argument in favor of allowing non-compete agreements to be enforced is that they potentially fall within the scope of freedom to contract. An informed worker and an informed firm should be allowed to write such an agreement. From a policymaker perspective, that argument comes really into question if you think that there are spillover effects on other workers who are not themselves a party to this contract, and we find exactly that in the study.

The way that we do that is we look at labor markets that are commuting zones that are bisected by state borders. So you could think about Cincinnati on the Ohio-Kentucky border. It's a single labor market that spans both states. Each of those states has different policies regarding the enforceability of non-compete agreements. What happens when one state changes the laws that affects a portion of the labor market but not the other portion?

What we found was that there are, in fact,

spillover impacts on workers across the state border. Those workers are not themselves directly affected by the non-compete laws. These are workers that live and work in a different state, but they share an overlapping labor market with the workers who are affected. We estimate that, on average, about 90 percent of the negative wage effect spills over to the bordering counties. As you go further away from the border, the effects dampen.

We can reject that the spillover is smaller than 10 percent. So there is very convincing evidence that there are spillover effects, there are negative externalities on other workers, and I think this is pretty convincing evidence that something ought to be done to protect especially vulnerable workers.

But returning to a sort of broader discussion of the welfare components, I'd like to return to the idea that the context matters. So although non-compete agreements can reduce earnings on average, in some contexts, there's evidence that they might systematically increase earnings. There is work by Ryan and co-authors on corporate executives. There's some other great work on this. I have a paper with some co-authors studying physicians that shows that -- show that both physician firms and workers appear to

benefit from the use of non-compete agreements. I'll talk a little bit more about the extent to which consumers benefit from that, but the context seems to matter.

A little bit of background on the primary care physician case, because I think this is an informative and a little bit cautionary example about the potential impacts of a blanket ban on non-compete agreements. So in this paper with Carol Simon and Will White, we conducted a survey of primary care physicians in five states. We found that about 45 percent of primary care doctors operating in group practices were currently bound by a non-compete agreement, and in the paper we explore the reasons why physicians tend to use non-compete agreements and try to compare empirical evidence with theoretical models about what is the justification for using them.

What we conclude is that non-compete agreements actually appear to play a fairly valuable role in this context in the sense that patient relationships are a valuable asset to physicians. It's illegal for physicians to implicitly buy or sell patient referrals. We have laws protecting against that. So this very valuable asset, essentially physician groups, physicians themselves, have no legal control over their

primary asset.

If you look at when physician practices are bought and sold, the price of the purchase is typically a function of the book of patients, but there's really no way to protect that asset, and non-compete agreements are a mechanism that allows firms to -- is sort of a second best form of protection.

What we find is that in physician groups that use non-compete agreements, doctors are much more likely to make referrals of their patients to other doctors within the same practice, because they don't have to be as concerned about their fellow colleagues getting to know their patients and then opening a business next-door and pushing the patients.

That, in turn, leads these practices to generate 17 percent more revenue per hour worked. For an average physician who signs a non-compete agreement, the net present value of the earnings effect at the time that they sign the contract is positive $650,000 over a single job spell, which is about 15 years, on average. They make substantially more money, and all of that difference comes from larger within-job earnings growth.

So at the time they sign the contract, they make about the same amount of money as physicians that

don't, but their earnings grow much faster, and the story is really this patient-sharing story. There's much more fluid referral of patients across doctors within groups that use these types of contracts. And these gains don't seem to occur in states that have nonenforceable NCA laws.

So I think there is a potential argument to be made here that both workers and firms can benefit in some cases, but on average, that's not, of course, the overarching story, just a sort of cautionary case study in thinking about the extent to which we should consider boundaries in policy regulation that limits the ability to use non-competes.

I want to point to one other case study that sort of builds on this as a cautionary -- another cautionary tale in thinking about what those boundaries should look like. So if you listen to this sort of physician case study, you might think that, in the context of high-skilled service firms that care about relationships with their patients, there's potential value to non-compete agreements, such as physicians. There is a recent working paper by Gurun, Stoffman, and Yonker that study what looks like a very similar market, financial advisors. What they find is that when non-compete agreement policies are relaxed -- and

this is due to a within-industry change specific to financial advisors -- advisors take clients with them to other firms, and this looks very similar to the story of patient relationships with doctors. It's client relationships with financial advisors.

But what they show is that relaxing the enforceability of non-competes actually makes firms less willing to fire their workers and leads to higher rates of misconduct among financial advisors. So this could actually be potentially harmful for consumers. Consumers are also charged higher fees. So even though it looks like the motivation and rationale for using these contracts is very similar to the physician case where both workers and firms appear to benefit, in this case, it might not be as obvious that this is a positive welfare effect because of the higher rates of misconduct.

Impacts on firms, so the second major channel through which non-competes might relate to or might cause welfare consequences is through impacts on firms. There is some suggestive evidence in the empirical literature on innovation and investment incentives and the extent to which they relate to the use and enforceability of non-competes, but I don't think we have nearly as much comprehensive evidence on this

dimension as we do for labor markets.

I'll talk about one recent study that Naomi Hausman and I just completed on impacts on firms that I think gives you some intuition for why this channel might potentially be important, even though we know a lot less empirically about this channel overall. So this is from a study of primary care physicians looking at changes in within-state enforceability of non-compete laws and what happens to the organization of physician practices as these laws change.

This is a graph, if you can see it, the vertical axis here is the concentration in physician markets measured by practice size. So, loosely, how many doctors are there at each office?

The vertical line in the middle is year zero. That's the year in which the enforceability of non-compete agreements in that state increases. So what you can see is that essentially after the ability to enforce non-compete agreements goes up, physician offices got smaller. There were fewer doctors per office. So something about the use of non-compete agreements was related to firms' decisions about staffing and how many doctors were going to be employed at each office.

However, if you sort of recalculate the axis,

instead of thinking about the size of a particular office, think about the size of the firm as a whole. Allowing for the possibility that physician groups often have multiple locations at which the doctors treat patients, firms overall are growing. So firms increase in size even though there are fewer doctors at each location.

This is suggestive that the ability to use and enforce non-compete agreements potentially has some impact on firms to coordinate across locations, potentially impacting merger decisions. It remains to be seen whether this is good or bad for consumers. Consumers may, of course, value access to convenient, integrated practices, where records and computer systems are shared across locations. There are more convenient locations for them.

The flipside of having larger firms, of course, is that there could be higher prices negotiated with insurance companies, and, in fact, that's what this slide shows. This is showing that when the enforceability of non-compete agreements goes up, a one-tenth increase in the policy spectrum -- so moving from, say, the median state policy to the 60th percentile, a relatively modest increase -- is associated with 10 percent higher physician prices for

an average bundle of services.

If you were to extrapolate that to estimate what the impact would be of a national ban on the enforceability of non-competes on just physician spending alone, it would be $25 billion per year. So potentially very large consequences for consumers in terms of prices.

Now, a lot of this, I want to caution, comes from the fact that we see smaller establishments. Because establishment size is shrinking, small establishments tend to have higher overhead and, therefore, higher prices, and so this is really operating through an organizational channel, in part, and that's -- but there are implications for consumers and prices.

So just to summarize, I think overall I would say that more empirical evidence is necessary before a comprehensive ban would be scientifically justified to curtail non-competes in all contexts. It does seem like there is very convincing evidence that workers are harmed on average, but there are some important exemptions, and I think it's worth exploring whether there is scope for a reasonable compromise between worker protection and the need for more evidence to be gathered before a more comprehensive ban would be

justified.

There is a lot of discussion about attributing general wage stagnation in the labor market to non-compete agreements. I just want to comment that I think, to some extent, that's an oversimplification. There's a lot of factors that have contributed to this, and I don't think we really have come close to being able to conduct a thorough decomposition of all these factors, including changes in skill bias, technological change, and how those types of other exogenous things that have been happening in the labor market interact with the use and enforceability of non-compete agreements over time. I just want to sort of caution against thinking that policy changes are really going to have a first order effect on wage stagnation given how much is unknown elsewhere about the broader labor market trends.

The empirical evidence, as I mentioned, is a lot more sparse when we think about the welfare -- the channels through which non-compete agreements might affect welfare on the firm or consumer sides. Even in the case of physicians, where sort of as a case study industry, I think the literature is a little bit more developed, it's still quite difficult to make an overall welfare assessment about the extent to which

the labor market or firm side of things offset the consumer side.

My summary opinion overall, just to wrap up, is that my own opinion is that the scientific standard for a complete ban on non-compete agreements should be quite high. Non-competes have been used for a long time, and the literature is, in a relative sense, nascent compared to the history of the use of non-compete agreements. I think there are policies that can be used to protect vulnerable workers while still permitting non-competes in other contexts, that a lot of other people today have discussed examples of such policies, like setting minimum earnings and wage floors for workers who are bound by non-compete agreements.

Another way of structuring this would be to say that if you sign a non-compete agreement, there has to be an explicit compensating wage differential that's tied to that non-compete agreement. So, for example, in the contract it might say, you know, if you accept this non-compete agreement, your wage will increase by X dollars. That will also potentially deal with some of the other issues that panelists have been discussing today about the salience of non-competes and contracts, the fact that a lot of workers don't read their

contracts thoroughly or might not be aware that they're signing these.

If there's a line in your contract that says your salary is going to be $5,000 higher if you check this box, that will potentially reduce some of the salience issues. So making a more explicit tie between a change in compensation and the acceptance or rejection of a non-compete agreement, rather than just a wage floor, might be a way to sort of approach these two birds with one stone.

And then building on the discussion of timing, it seems unequivocal to me that some progress can be made here in regulating the extent to which firms should be allowed to disclose the requirement of a non-compete after a job has already been accepted. It's hard to imagine any economic rationale why that would be welfare-improving, to allow firms to do that.

MR. MCADAMS: Great. Thank you, Kurt.

(Applause.)

Next up, we have Evan Starr.

MR. STARR: Okay, I am going to come up to the podium. Thank you. Thank you, John and David, for organizing and having me here. It's a real pleasure. Over the last five years or so, I've been working on understanding the use and effects of non-competes and

the policies that enforce them, and I want to share with you today some of that research.

I want to begin with a simple description of why I think the FTC should care about non-competes, and many of the points I'm going to make were discussed on the first panel. So, first, I just want to highlight that these are restraints on trade in the labor and the product markets because they prohibit workers from starting new firms, not just joining incumbents.

The second thing I want -- the second point I want to make is maybe a little bit nuanced, but I just want to say it up front, that if you are thinking about major labor market concentration in the first place -- and there's a whole range of recent studies which are trying to do exactly this -- many of them don't account for non-competes or similar restrictions, and I just want to highlight that if you're trying to measure labor market concentration, then a non-compete is essentially going to knock out many of the within-industry opportunities that you have, and so if you ignore that, what that means is you're going to essentially find that the observed concentration that you can see in the data is less than the effective concentration that would be in place if you could see that there were non-competes in that labor market.

And so if you are going to think about anything to do with concentration, M&A, whatever it is, non-competes and similar provisions are going to be important for the Federal Trade Commission to think about and the DOJ.

I also want to highlight that because these are also restraints on entering the product market, that if you have a concentrated market, sometimes justifications are made that potential competition in the future is going to prevent firms from abusing their market power. And so if you think that this argument about potential competition in the future is really important, then you also need to think about non-competes, because non-competes are going to potentially prevent that future potential competition from coming to fruition. So I just wanted to start with those broad points.

The key tension in the non-compete debate, as I see it, is that non-competes essentially give firms future labor and product market power, and there are many bad things that we can think of that will come with that power. There is potential for reduced wages, for firms to underemploy their workers, lower entrepreneurship, lower firm output, higher consumer prices, and the potential for negative externalities.

On the upside, though, there are several

efficiency justifications, a few of which we've touched on. The first one is this incentive motivation that firms can basically be incentivised to invest because they're not scared that their employee is going to go and join a competitor and share everything that they have given to them.

The second common argument was this freedom-to-contract argument, and this is pretty straightforward. It just says workers are never going to agree to a contract that hurts them. And these are -- I think are really good arguments, and the question is, where does the evidence lie? Where does this put us?

And so let me just summarize some existing evidence today, and I'd like to highlight some of the discrepancies in the work, including Kurt's and Ryan's, and point to some directions for future work here. Let me start with what I see as a key distinction in this literature.

I want to make the distinction between studying the use of non-competes and the enforceability of non-competes. Most of the studies that are in this literature are examining within or cross-state changes. So this is like studying California versus Florida or examining, for example, Oregon before and after they pass

a ban on non-competes, relative to a set of states whose policies remain the same. That's a study of enforceability.

A study of use would be comparing a worker who has signed a non-compete to another worker who isn't bound by one, or you could imagine comparing the same worker over time when they're bound by a non-compete versus when they're not. And a few recent studies take this approach, and I just want to highlight that these two approaches estimate very different parameters. One estimates hopefully the causal effect of passing a certain policy. The other one estimates the causal effect of signing such an agreement, and those can be very different, though they might be related.

And, in particular, the approach of enforceability incorporates the possibility of spillovers, because you're allowing the possibility that other workers in the market are affected, and that's not the case in the studies of use, okay?

I also want to highlight that it's much harder to estimate the causal effect of using non-compete agreements. I'll show you some evidence in a moment. CEOs are the most likely to sign non-compete agreements. Low-wage workers still sign them but less so. And so when you compare workers who have signed a

non-compete to those who haven't, you have to worry that there are other differences between those workers, not just whether they have signed the non-compete, which could be driving any outcomes you observe. And it makes it really tricky, and I don't think we really have any great studies so far that really isolate random variation in the use of non-competes.

Let me just start with some facts. Non-competes are widespread. In a 2014 survey that I ran with J.J. Prescott and Norman Bishara, we found that about 18 percent of the U.S. workforce was bound by non-competes. Colvin and Shierholz have an establishment-level survey which suggests the number is closer to 28 percent, at least 28 percent as the lower bound.

You find them more frequently in executive positions, about 70 to 80 percent. You find that tech workers are more likely to sign them, physicians are more likely to sign them, but you still find them in low-wage occupations. So you find 14 percent of them that are earning less than $40,000, and I think this is for me one of the most surprising facts.

When you look at who is bound by a non-compete, 53 percent of them are paid by the hour, which means that the modal non-compete signer is not some executive

or not some high-tech worker or some physician. It is an hourly paid worker, and the median earnings for those guys is around $14 an hour.

So what happens when we ban non-competes? Let me run through a few studies here. So this is a recent study with Mike Lipsitz where we examined this policy in Oregon where Oregon was the first state to ban non-competes for low-wage workers. And so Oregon passed this law under some very recent pressure from lawyers who were discovering that non-competes were used in jobs where they didn't quite expect them to be used. And so what they did is they banned them for hourly workers and for workers who were under the median income for a household of four.

The hourly ban alone, just to keep us in perspective, accounts for 67 percent of the workforce in Oregon. So this ban affected over two-thirds of the workers in Oregon, even though hourly workers don't necessarily sign them at very high rates. So what we do in this study is we looked at the wages and mobility of workers in Oregon relative to workers in surrounding states that didn't have their policies changed.

And so the graph on the left here shows you two patterns. The dotted blue line is looking at those who

were in job -- those who -- so all these are hourly workers. The blue line are those in jobs that are most likely to be bound by non-compete agreements. The black line is the overall average. And you can see the pattern is roughly the same, that before 2008, Oregon is kind of trending similar to other states, but then there is this kind of discrete increase rising over time up to -- you know, in the high-use occupations, quite large, point estimates of around 10 percent. For the average population, we get up to about 5 or 6 percent.

But if you look at what happens to job-to-job mobility in Oregon -- that's in the right panel -- and in the right panel what you can see is that overall mobility rises after 2008 and that this is largely driven by an increase in within-industry mobility, which is what non-competes would prohibit.

And so overall this paper kind of suggests that barring them for low-wage workers does appear to benefit low-wage workers. We do a whole bunch of extra analyses. We find the effects are stronger for women, just like Kurt did in his other paper, and so I think this is kind of interesting to say that maybe these low-wage bans that have been proposed, maybe they are on, you know, somewhat solid footing here.

But what about moving up the occupation chain? What happens if we ban them, let's say, for high-tech workers? And so here in this paper with Natarajan and Balasubramanian and many other co-authors, we study the recent ban on non-competes for high-tech workers that Hawaii implemented in 2015. And I'll show you the same graphs here as I showed you for the mobility graph on the last slide. It was the low-wage graph on the left side.

So Hawaii bans non-competes in 2015. On the left graph, what you can see is that the wages for new hires starts rising almost immediately after the ban. It's about 4 1/2 percent higher. And we also see mobility in Hawaii starts spiking after this ban is in place, and so it looks like even when you ban them for high-tech workers, we see wages and mobility rise similar to the low-wage workers.

So what about the investment story? Well, in a followup paper, I look at training and wages as separate outcomes for workers, and I'm trying to get a sense of, okay, are workers -- if you happen to live in a state that more vigorously enforces non-competes, do firms actually invest more in their workers? And so in the left graph what I find is that workers do receive more training, about 14 percent if you compare an average enforcing state to one that doesn't enforce

them at all, but workers also suffer wage losses. So they are not capturing the returns to this training. The firms appear to be capturing the returns to this training. So there's a little bit of tradeoff there.

I want to talk about entry as well. So similar to Kurt's study, I have a paper where we're looking at physicians and the provision of medical care, and what we exploit in this paper are several bans that occurred in the late seventies and eighties of non-competes for physicians. And so there's been a recent move by several states to ban non-competes for physicians, but it's actually an old policy that was adopted in the late seventies and eighties.

And so there are three states here, like Delaware, Massachusetts, and Colorado, which banned them all around the same time period, and so what we do is compare those states where non-competes became banned relative to states where they were still enforced, and we're looking at a variety of outcomes here, and I'll just show you two.

This is the log number of medical practices in the county and then the log number of practice locations, and some practices could have multiple locations. In both of them we find that the number rises after these bans take place, suggesting that the

non-competes were, in fact, holding down medical -- the number of medical establishments in the area, that banning them would increase access to care.

I want to highlight another dimension as well, which is that non-competes may not only discourage entry, but they may also make it harder for firms to hire, and I think Eric Posner highlighted this earlier, that if you agree to a non-compete with a worker, one of the third parties that's affected by that are the firms that may want to hire that worker in the future, who are not party to that contract.

And so in this paper, with Natarajan and Balasubramanian and Mariko Sakakibara, we look at the universe of workers in three states, and we find firms -- we look at what happens to the size of new firms and their subsequent growth and survival if they happen to be in a state that enforces non-competes more vigorously versus those that are less likely to enforce them.

We also exploit in this paper the little known fact that non-competes are unenforceable for lawyers in all 50 states, and that kind of forms part of our control. And so I am not going to run through all the numbers here, but in column 8 you will see there is a negative 0.14, which highlights that if you are a firm

that more vigorously enforces non-competes, those firms tend to start out smaller if you are in a higher enforcing state which is indicative that these firms struggle to hire. It's harder for them.

There are some differential effects here for firms that we call within-industry spinouts, which there are fewer of those in states that enforce non-competes, but they could be relatively better off through what we think is a screening mechanism.

Okay, so coming back to some of the key questions, does this evidence suggest that the freedom-to-contract story is wrong? And if you look at the evidence from enforceability, you would say, yes, workers appear to be hurt. Why would they be hurt, right? But if you look at some evidence of the use of non-competes, the evidence has been more nuanced.

There is some evidence that suggests the freedom-to-contract story is wrong. One is that less than 10 percent of workers reported negotiating over non-competes. Another one is that 83 percent, when you ask them, simply sign and read the contract. Only 17 percent report consulting friends or family or legal counsel. When you ask workers what did you -- what were you promised in exchange for signing a non-compete, 86 percent of them say nothing. And

roughly a third of non-competes were delayed until after the worker accepted the job without any change in responsibilities or a promotion.

So all of these suggest that maybe this freedom-to-contract story is a little bit wrong, but when you look at some of the correlations, you do see that when workers are provided with non-competes up front, they appear to have higher earnings, and there are some caveats to that finding.

One, which I think is really important, is that when you include controls for other contractual provisions that workers sign, like nondisclosure agreements, nonsolicitation agreements, nonpoaching agreements, a lot of the non-compete -- the positive non-compete contract, it falls, suggesting that there could be some selection here that we're not accounting for.

The second thing that is counterintuitive is that we do find positive wage effects, but they are reduced in states that more vigorously enforce non-compete agreements, which is the opposite of what you would expect. If you thought the non-competes would be always good for workers, you would expect that in higher enforcing states, those are the workers that would benefit the most, and that's not what we find

here.

And then, of course, Kurt's study, which he just went through, and Ryan's study of executives -- which I will let him talk about -- find that there may be some benefits to workers from signing non-competes.

Okay, I also want to highlight that these studies all ignore the potential for spillovers, and I want to just reiterate Kurt's concern about spillovers in the market, and I have one study on the topic. And the idea here is to compare workers and labor markets where non-competes are really prevalent and highly enforceable to labor markets where they may be less prevalent or less enforceable. And what we are going to do is look at the workers who haven't signed them, so look at the workers who are not bound by these provisions, and we are going to ask if they're affected by the use and enforceability of these contracts.

Now, what you would expect -- if half of the workforce, let's say, was bound by a non-compete, you might expect that the other half would get all of the labor demand and that their wages would rise more. They would be more in demand. And so you would expect that there would be positive spillovers, but that's not what we find at all.

We find that where non-competes are really

common and highly enforced, the whole labor market suffers. Wages are lower. Mobility is lower. Job satisfaction is lower. Job offers are less frequent. And so it seems to me that there are some negative spillovers here that maybe push us outside of this freedom to contract argument a little bit and provide maybe a more sound base for public policy responses.

What about the investment argument? Is that wrong? I just want to highlight a few arguments here that you hear quite commonly. The first one is that people point to Silicon Valley as an obvious counterargument to say that, well, how could it hurt innovation if we have Silicon Valley in California? That provides sort of a baseline of maybe thinking that maybe it's actually good that we've banned non-competes for innovation, and there is some evidence suggesting that investment in innovation is hurt when you enforce non-competes.

On the other side, there are a few studies which find benefits here from non-compete use and enforceability, and so I think that we really -- we haven't really resolved this question about which is correct, and this is sort of an important avenue for future work.

Okay, but I want to push forward and I want to

ask this question of how -- about unenforceable non-competes. So here's a map of the U.S. We have talked about how non-competes are unenforceable in several states, here in California, Oklahoma, and North Dakota, and there's also -- you know, they're permitted with some exceptions in the gray states and permitted more liberally in the black states.

Where do you find non-competes? So this is a very, very recent -- literally I think three weeks ago -- from Heidi Shierholz and Alexander Colvin, looking at the use of non-competes, and they break it out by states. So here's California at the top, and what they do is they ask -- this is an employment survey, so it's a survey of firms, and they ask, does your firm use any non-competes with any of your workers? And then they ask, do you use it with all workers. So just look at that top-line result. They find that 50 percent use them with any employees, and 31 percent use them with all employees.

If you go to the second line, you will see that broken down by California. So this -- they find, as I found in my other work and I think others have found as well, that 28.6 percent of firms in California use non-competes with all employees, and these non-competes would be totally unenforceable if

they made it to a court of law.

So you might ask yourself, well, so what? Who cares? Does this matter? I have a second paper looking at the importance of even unenforceable non-competes. This is from survey work with J.J. Prescott and Norman Bishara, and we asked workers in this survey about job offers they had received from competitors, and if they told us that they had declined a job offer from a competitor, we just asked them a direct question that you can see here in panel A. Was your non-compete a factor in your choice to turn down your job offer from a competitor. And these are only people who are bound by non-competes.

So, overall, 41 percent said their non-compete was a factor, but we can break it down further based on the state that they were in, and we find that the percentage in nonenforcing states -- like the California, Oklahoma, and North Dakota -- 37.5 percent versus 42 percent in states that enforce non-competes. So roughly the same, okay?

So then we followed up and we tried to figure out why some workers were more likely to say that their non-compete was a factor but others weren't, and what we found was that the role of the law actually had nothing to do with it. What mattered were a few

things. The first things were, what do you believe about the law? The second is, do you believe your firm's going to go after you? And the third was, did your firm remind you about your non-compete.

So this prompted us to look more into the beliefs. What do workers believe about non-competes? I want to show you some very recent work with J.J. Prescott. We also asked workers in this survey who signed non-competes, if you went to court, what's the likelihood that the court would enforce your non-compete agreement. That's the probability on the left axis here of this graph. On the X axis is the level of enforceability.

On the far left, you have got states like California, North Dakota, Oklahoma. On the far right, you have got states like Florida and Connecticut that vigorously enforce them. And then I am breaking this graph out here both -- by education, just to show you it doesn't matter, okay?

So what you see here is that essentially workers are totally uninformed about the law. In fact, in California and these nonenforcing states, workers still believe their non-competes are enforceable, and if they were informed about the law, these all should be upward-sloping lines, but they're relatively flat

and, in fact, maybe even downward-sloping.

This prompted us to look into one potential reason why, and that's that workers can be reminded about non-competes. If you're leaving your job, you get an alternative offer, your firm can say, hey, remember that contract you signed? We are going to call that a reminder.

We also asked about that in the survey, and to our surprise, we couldn't believe this, but when you look at reminders, they happen about 50 percent of the time, but they're almost 25 percentage points more likely in states that don't even enforce non-competes. And so you have these firms in California who are more likely to remind workers of unenforceable contracts when they're departing than in states where they are actually enforceable.

Okay. So finally I want to end here -- I may have one more slide after this -- looking at the whole suite of provisions, right? Non-competes are just maybe the tip of the iceberg, maybe the most restrictive tip, but just the tip of the iceberg. There's many other restrictions you can think of that are relevant. Here are just six of them.

You have got a nondisclosure agreement, a nonsolicitation agreement of clients, nonsolicitation

of coworkers. You have a non-compete, an IP assignment agreement, which gives the firm ownership of any intellectual property you create on the job, and then you have also got arbitration agreements.

In a survey of firms, we were able to ask the firms, do you use these provisions with some or with all of your workers? And I just want to show you the histogram of the use here. This is the histogram looking at does your firm use any or all of these provisions, and so what you can see is bunching here at 5 and 6, those are the highest likelihood outcomes, which means that most firms here are using all of these provisions together. It is not just non-competes. It's not just NDAs. They're bunching -- they're bunching all of these practices together, okay? And so I think I want to echo Orly's comments in the beginning to begin to expand our inquiry outside of just non-competes.

Let me close up here. So where do I think future work should go? I think we need to estimate -- we need studies to estimate the causal effect of non-compete use. I think this is really challenging because, one, you need some longitudinal data, and second, you need some exogenous variation, right, and that's -- we haven't had that so far.

I think we need to reconcile some of the investment discrepancies in the literature that exist. I think we need to examine substitution across all of these various provisions and see if there is differential effects on investment especially. It would help to have data on actual contracts to do that instead of relying on surveys, and more on product market effects, like Kurt suggested.

Let me just say where I think there is consensus. I think there is consensus on the fact that non-competes are widespread and in jobs where they're totally unwarranted. The fact that 53 percent of them are paid hourly and that they can be implemented in less than transparent ways, those are very concerning in their own right.

I think there's agreement that banning non-competes raises wages and mobility for even technical workers and that there's evidence of negative spillovers, and this in some sense challenges the freedom to contract and investment arguments on their own.

Finally, CNCs are prevalent and effective in states where they are entirely unenforceable, and so because they're unenforceable, they can serve very little investment purposes. And I think that once

you realize that it raises -- it should -- the fact that they are so prevalent in nonenforcement states should raise some concern about the validity of the investment arguments in states where they are actually enforceable, right?

I think I will end on that point. Thank you.

(Applause.)

MR. MCADAMS: Thank you, Evan.

Next up we have Ryan Williams.

MR. WILLIAMS: Thank you to the organizers for the invitation. I appreciate coming out here. I'll try to keep things quick given -- uh-oh -- given that we all had lunch and all that other good stuff. Speaking of lunch, I had a really awesome sandwich, and given that Jimmy John's has been kind of the whipping boy today, I found myself wanting to ask the workers about non-compete contracts. Even living in Arizona, my Spanish is not quite up to snuff for such a joke, so I had to skip that.

So we -- as Kurt kind of mentioned, I get to be Professor Happy here and say some good things about non-compete contracts. We're looking at CEOs here, so specifically non-compete contracts for executives, and we do have some of the data that Evan highlighted,

so hopefully it's a starting point for researchers.

If I look at this from the company's point of view, I have a bunch of assets, right? I have factories, I have machines, I have forklifts, and I have employees. My human capital assets are unique in that in our legal system, I'm not allowed to own human capital. I can own every other form of capital except for human capital.

As a retired college baseball player, I would also like to say there is this weird social loophole for athletes. They can be bought and sold apparently with no problem. I like to joke with attorneys that they wish, you know, they could trade one partner for two principals at another firm, and just to terrify their staff, an associate to be named later, some of these other things. So there is this one weird situation where you can buy and sell humans, sports, but otherwise, you can't do it.

Companies obviously want to control these assets somehow, and we look at non-competes as a way for them to not own but in some way control, talk talent within the boundaries of the firm. So, again, the way we're looking at this problem is a little bit different than what we've seen today. We're not talking about low-level workers. We're talking about

CEOs who presumably, a lot of times they have their own legal representation in these contracts, so we're kind of evening out, in a sense, the bargaining power that you don't get with regular employees in our study.

We look at three things basically. They're all related. Where do non-compete contracts come from in these settings? As Evan mentions, some CEOs in firms have them, some CEOs in firms don't, so we try to explain who has them and who don't. There's this puzzle in finance that's been around for a while that shows that CEOs don't get fired for poor performance as often as theory would predict they do, and so we look at non-competes in that context and hope to solve -- not solve, but partially solve that puzzle. Then we look at what happens after these things are signed. So what do CEOs do and what do firms do after they sign these non-compete contracts?

Again, as I mentioned, my tone is going to be mostly positive, because we're talking about CEOs and not sandwich workers, but it does seem like there's some rational bargaining going on here between the CEO and the firm. I'll give some details in a minute, but as a company, as my predation risks go up, as I worry more about competitors poaching my talent, they are more likely to insist on these things, and then as

me, as the CEO, as my perceived job risk goes up, I'm less likely to agree to one.

So if the company is riskier, if the industry is riskier, then I am going to push back harder not to sign one of these things. Again, kind of a rational story here between both players, and, again, this is because there's a bargaining game here, unlike some of the worker-level studies that we've seen today.

The other thing you see is that when there's a non-compete in place, the firm is more likely to fire a CEO for bad performance. As I mentioned, there's kind of this weird puzzle that's been around for decades in finance that CEOs don't seem to get fired often enough for poor performance. What seems to be going on is, you know, even if they're not that great as a CEO, if you fire them and they run with all your trade secrets to the competitor, then you're worse off. So there is kind of more leash when there is not a non-compete.

There's a lot of states where non-competes are enforceable even if you are fired, and that's where we tend to find this effect. It does seem to make them more accountable for performance when they have a non-compete in place. And then after the fact, as mentioned earlier, the CEOs understand that this

increases their job risk. They're losing something by signing a non-compete, so they get more compensation as a tradeoff for this job risk.

And I'll talk very quickly about our empirical identification for my econometrics nerds out there, but I'm not going to spend a lot of time on it today. The firm does give them higher compensation, but remember, as a CEO, I can do things to make the firm less risky, so things that may not be in my shareholders' best interests. I can cut back on R&D spending. That's probably not a great thing for the firm, but it makes my job safer. So the firm responds with compensation in the form of equity-based pay that does encourage these guys and gals not to kind of screw around with the risk levels of the firm.

So overall, between executives in the firm, what we find seems to be a relatively positive story, that there is a bargaining going on before the contract is signed, and then after the contract gets signed, the CEO gets compensated for this risk, and the firm compensates them in a way that kind of makes them make good decisions in a sense.

So we actually -- to Evan's point, in our study, we do use the state-level data on enforceability that I'll talk about in a second, but we actually also

had an army of research assistants go out for 1500 publicly traded companies over 22 years, read every one of these contracts and build a database. This took about two years, and I just want to flash a couple up here.

So we have individual contract-level data for the 1500 largest companies in the U.S., publicly traded, and give you an idea of what the courts look at when they decide the enforceability of these things. This was DirecTv's, I think, 2010 non-compete agreement with their CEO. This was for two years, which you tend to see between one to three here, and it very, very specifically says -- all right, it says what companies they can't go to. So they are basically saying you can't go to any sort of multichannel video company.

The other thing I wanted to point out, it's kind of funny, this isn't California -- I will have a little bit to say on California as well -- and if you notice down here in the last paragraph, this is written under New York law. You tend to see about 20 or 30 percent of these are written under the state law, the state that they're not in. If they got sued in California, tough luck. A California court just won't even -- I don't care what state you put on the

contract.

If the lawsuit happens in California, California courts will enforce California law. You do tend to see in about a third -- less than a third of our sample, that the state of the legal regime is different from the physical location of the headquarters.

And then another one, just to flash -- so this was for Petsmart, and I like this one because if you look and see who they are not allowed to go to, it's basically Petco, okay? So for my pet owners in here, it says you can't go to a pet food store that has 10,000 square feet of retail space. In the U.S., that's Petco. So that's basically saying Petco without saying Petco in the contract. And this one was for one year.

So, again, we collected data. I think we have in whole about 17,000 CEO contract years in the sample, and that's about half, because about half of these men and women do not have official employment contracts at all.

Okay. So, again, I mentioned we collected this for 22 years for 1500 companies. They have to put these in SEC filings, so we did have an army of RAs go through and read these. And, again, about half of

these companies don't use contracts at all with their CEOs. Kind of a surprise there. There's implicit contracting going on and not explicit contracting. Out of the half we find, the contracts for about 60 percent of the CEOs have non-compete clauses in there, in their contracts.

Again, just very quickly on the empirical stuff, we have all sorts of control variables that mostly are interested in the job risk of the CEO and the sort of product market predation risk for the firm, and as the job risk goes up, the CEO is less likely to sign these, and as the firm's product market risks go up, they are more likely to insist on them.

Then we go in and what we're going to do -- so Evan spent a lot of time talking about use versus enforcement, and since we have data for both, we have time series variation in the states' enforceability, as well as cross-sectional and time series variation in the firms with contracts, so CEOs within the firm go from not having a non-compete to having a non-compete, and it's rare, but also the other direction, they go from having one to not having one, especially later in their career. So we piggybacked on a great study by Garmaise, and we have a discrete index that goes from zero to 14 on how enforceable non-competes are in that

state, and these are just a sample of some of the questions.

So does the state have a law about non-competes, that's the first one, a yes or no. Basically, who has the burden of proof in court? Sometimes it's the company that has to prove damages, and other times it's the employee that has to prove damages. If it's the company, then they're less enforceable.

And then this -- there's one in here called blue pencil that's a really fun one. It's already mentioned today, but basically it's if there's one line in the contract that violates state law, in some states, the entire contract gets tossed. In other states, the judge can go in and what's called blue pencil -- sometimes you see purple pencil as well, it's kind of a hybrid between the two -- but the judge can go in and change the one offending item.

My favorite example -- and this state is in our data actually -- but there was one state where the contract just said "you can't compete for 12," period, onto the next sentence. And so two weeks later, the employee was working for another company. They sued each other, and the employee got to court and said, "Oh, I thought it was 12 days." And the judge said

that clearly they meant 12 months, and basically took his blue pencil and wrote "months" into the contract. So the -- you know, where you don't have to toss the entire contract for every typo -- we're human beings, right, we screw up, there is no such thing as a perfect contract. So that also factors into this questionnaire.

So, again, we piggybacked. Garmaise had done this up to, I think, 2008, and then Russell Beck, who's in the audience, was kind enough to share his year-by-year survey for the rest of the year so that we are able to extend Garmaise's enforceability index out into the end of our sample period.

This is a little bit of a busy slide, but it basically shows for each state what that score was. This is in our papers, so I won't spend some time on it, but you also have up here a column for whether or not these things are enforceable if you get fired or not, which is kind of important for our study, and you see that in a lot of states they are. A lot of states, it's not come before a judge, and so all my attorneys in the crowd, these are the states to go sue somebody in because you can set precedent.

Okay. And then, again, just to piggyback on something, I did want to say thing about California

here. So this is -- the index goes up left to right, and then we have got our states plotted up here. You can see that even for the CEOs with contracts, about 40 percent of them in California have signed a non-compete. And so just to play devil's advocate to all the discussion that's been going on today about California, which is these -- you know, the companies are being mean to their employees and threatening them with non-competes even when they are not enforceable, that may be true at the worker level, but the CEOs in the firms are not stupid, right?

So if it's going on in California with the CEOs, then they are clearly making some kind of rational source here, and it's not because the CEOs in the firms are dumb or they're feeling threatened or something.

In my litigation consulting work, I've done some valuation of these non-competes for California firms, and what seems to be going on is as long as they abide by them and they don't -- there is no lawsuit, then they can use the cost of the non-compete agreement -- remember, it costs the CEO something to sign these, they can't go work for another competitor -- but they can use the economic value of that cost to offset their severance package for tax

purposes, so if there's no IRS people in the room.

There is no federal law, which is part of what today is meant to discuss, but it seems like at the federal level, since there is no overarching federal non-compete law, they are using it to offset income taxes basically for these non-competes in California. So, again, just to provide a little bit of a different tint here for -- because for executives, it's pretty unlikely that they don't know what they're signing. At least 40 percent of the largest firms in the U.S. in California, I think that's kind of a tougher one to swallow.

So, again, this is the time series variation. I think it was Illinois down near the bottom was the one with the 12 -- the 12 months that was -- the employee said 12 days, and, again, from 2008 onward, this data came from Russell Beck, so thank you. I'm really indebted to him.

So, again, basically I have a -- again, a largely positive story when we talk about these things for executives, because here, unlike the employees, where I think there is a strong argument that the bargaining power is heavily in favor of the firm with the employee-level things, for CEOs, this is equalized a little bit. They seem to know what they're signing.

As their job risk goes up, they are less likely to sign these things, and as the firm's product market risks go up, they are more likely to insist on them.

It seems to improve the turnover performance sensitivity. So the CEOs are more likely to get fired for bad performance when there is a non-compete in place, so it seems to in that sense benefit shareholders. CEOs seem like they understand this job risk. They demand higher compensation. The board gives them higher compensation, but it's highly incentive-based pay to keep the CEOs from messing around with the firm's risk as well.

So at least for the CEO/executive side, it seems to be more of a rational bargaining game than what we're seeing the evidence at the employee level here today, and, again, we do have contract-level data, so hopefully it's a step in some of Evan's calls to future research in that we have contract-level data, we have longitudinal time series panels to where we can use some of these staggered shocks and things to get better identification and make more causal arguments than we have gotten in the past.

So I will finish early so we have some time for questions. That's all I've got.

(Applause.)

MR. MCADAMS: Okay. Thank you, Ryan.

So we have time now, about half an hour, for questions. If there are any questions from the audience, we can take those.

Dave, do you want to go ahead?

MALE AUDIENCE MEMBER: So on the last point, so when we observe in California, observe non-competes and we suspect that they are supposed to serve the same function as in places where they are enforceable -- people don't know they're unenforceable -- if your story is that the CEOs, everybody knows the score, then why would you ever -- why would you ever sue them?

MR. WILLIAMS: Right, so that -- I mean, question has come to mind. We don't have any data on that, but having spoken to other valuation people out in California, one potential story -- again, in case there is any IRS people in the room -- one potential story is that there is an economic cost to these, right? And as a financial valuation guy, I can value that. So I look at what my salary would be without a non-compete, I look at what it's going to cost me in terms of lost salary in the future to have that non-compete, and I can put a price on what that is worth or what it costs me.

And so when they get fired or leave or whatever

or they get a big severance payout, they can apply the cost of that non-compete against the severance and reduce their taxable income to the IRS, so that seems to -- and as long as they don't go to court and I just go sit on the sidelines for six months or whatever, then, you know, there is no -- I mean, you have to sue somebody to end up in front of a judge to get it tossed. That discussion was happening all morning, that the lower level employees don't know or don't have the resources to take this to court.

MALE AUDIENCE MEMBER: Can I ask one followup?

MR. WILLIAMS: Yeah.

MALE AUDIENCE MEMBER: If that's the case, if the only reason why, like, fully sophisticated people had them was for the tax reason --

MR. WILLIAMS: Yeah, I don't know that that's the only reason.

MALE AUDIENCE MEMBER: Well, if that is the reason, that would have the implication that you could look and see if they are complying to people for whom that tax deduction is available. I assume it's not for every worker in the company. So you can see whether you think there's a set of people for whom it's true that you deduct this cost and see if the non-competes are confined to them among the sophisticates or not,

and then that would inform that story.

MR. WILLIAMS: Yeah. So there's definitely a positive relation between the existence of a severance package and a non-compete, but I can't say that that's causal. So it could just be that those are the people more likely to have all the -- I mean, as Evan said, when you look at these contracts, they tend to just have the kitchen sink thrown in. So I don't know that the non-compete is causally affected by the severance, but -- or that they just put all that stuff in the contract.

But definitely there is a positive relation between the existence of a severance agreement and the existence of a non-compete clause for CEOs, for CEOs at least, so consistent with what your idea was.

MR. MCADAMS: Do we have any idea why states like California don't just ban non-competes rather than making them unenforceable?

MR. WILLIAMS: Yeah, so -- one thing I kind of skipped over is that in the states there's some that -- some states don't have non-competes because there was a court decision, that's most of them, but about a third of them, the legislative body in the state has passed a law. Georgia is one in our study where it was actually a legislative decision and not a court decision,

but as mentioned, it's kind of a patchwork at the state level.

So some are courts, some are, you know, legislated, and it's frustrating for everybody here, but as an empirical researcher, I love this patchwork, because it gives me clean identification for the studies.

MR. STARR: Can I jump in there, John? So I think that the California law was adopted in 1872, and, you know, I think that in many situations there aren't penalties written into most of these laws for banning non-competes. That's a relatively recent phenomenon. I think most people thought that making it voidable would do most of the work.

And so I think that as we uncover more evidence about how even unenforceable contracts affect worker behavior, I think we are going to see more attempts to deter firms using purely unenforceable provisions, but I think it's a relatively recent phenomenon.

MR. MCADAMS: And here's a more technical question from the audience. For studies that use variation in state enforceability for identification, are we worried that there's sort of not no first stage effect on use but sort of a somewhat attenuated first stage effect on use?

MR. WILLIAMS: So just a general -- in ours, when we -- the first thing we do is try to predict whether or when -- what situations you see a non-compete or not, and definitely the enforceability plays a role in whether you're going to see the non-compete or not. So the states where they're enforceable -- and I had the graph up, right? So the states where they're enforceable, you definitely see, on average, more non-competes at the CEO level.

What we did is since we had data on the contracts is we interacted, in a sense, enforcement times use, and, on the technical side, we put in firm fixed effects, so that when -- within a firm, when the non -- when it goes from a zero to a one, in a sense, non-compete to not having a non-compete, we can look at the effect within the firm of the change of non-compete status, change in enforceability on things like the turnover performance relation or salaries or these sorts of things. So, again, it's not perfect identification, but hopefully it's getting towards what Evan was demanding in his presentation.

MR. NUNN: I think the premise of the question, though, is well taken when it comes to the bulk of workers for whom -- you know, we are just starting to get this evidence that Evan talked about that, you

know, the beliefs are not really associated with the actual regime at the state level in as tight a way as we might worry, but it does make me think about what exactly are we thinking of as the first stage here? Is it the use of non-competes or is it worker beliefs about non-competes? And maybe there's a different answer depending on that.

MR. STARR: I would say it is concerning to me, John. It's a great question that I -- the first time I saw there wasn't a super high correlation at least in some of my data sets about the use of non-competes and enforceability, it raised red flags, and I do think that it's possible that a non-compete in California versus a non-compete in Florida could have differential effects. It certainly -- I think it certainly concerns me, and I would say at this point I don't think we have a great understanding of why non-competes are so common in states where they're entirely unenforceable and have been so for a long time.

MR. MCADAMS: I guess I would add -- this is somewhat of an interpretation question -- if you think about the fact that policymakers, the lever that they have is enforceability, to some extent it's less of a concern exactly who has a non-compete and who doesn't if what you know is the aggregate effect is X, right?

That's the lever you have to work with.

It could be that changing enforceability changes the share of the workforce that's bound by a non-compete agreement, and these sort of complicated changes in composition and changes in sort of size of an effect translate into some aggregate dimension, but ultimately, as a policymaker, what you might care about is just the overall outcome.

I would also add that because of the evidence in many studies of externalities, it doesn't necessarily matter what the size of the first stage is, because you can't take an intent-to treat estimate and scale it by the fraction of workers who are bound by non-compete agreements to recover a treatment on the treated when there are externalities. There are spillover effects on the unaffected people. So that information, while it's useful, is secondary I think in this case.

So, Evan, you mentioned heterogeneity, and I know state policy variation is kind of hard to come by in this context, but do we know anything about the components that go into these enforceability indexes, like how, you know, different levers might have different effects?

MR. STARR: Yeah. So, I mean, I think Ryan did

a pretty good job describing several of the pieces that go into these overall indices, and I'm not sure it's worth running through all 14 components that Brian Malsberger covers in his book, but basically the -- you know, the way these are constructed are based on this enormous tome by Brian Malsberger, which is updated every year on every single state policy on several dimensions.

And basically we have people read these books and they calculate some index for all of these different components, and then they weight them and add them up together, and that's how you're getting these kind of overall scores. And I do think that, you know, in about ten years, after several of these states have passed new laws, like Massachusetts and Illinois and Washington, in, you know, five, six, seven, eight years, we can do studies looking at the long-term effects of those, and that's going to be a much more clean kind of on/off switch than these kind of policies that we have put in the past.

MR. NUNN: Let me just put a plug in for -- Evan didn't mention sort of, he has a somewhat more sophisticated way to kind of provide relative weights to those components, which I think is a nice -- using confirmatory factor analysis and sort of letting the

data speak as to which dimensions of enforceability are most important.

MR. STARR: Yeah. Yeah, and I think the conceptual point is that suppose you're interested in, for example, the firing dimension. You want to know, you know, will a state enforce a non-compete even if the worker is fired from their job? But suppose that rarely ever happens, right? Suppose that happens, you know, less than 1 percent of the time. Then if a state changes their policy, there's not much of an effective change. And so that's the argument for wanting to weight these various dimensions.

MR. MCADAMS: I think we have heard two theories as to why we might see relatively high incidences of non-competes in states that don't enforce them. Are there any other theories you've heard or evidence you've seen? The two theories being there's some sort of tax benefit and it might be a low-cost way for employers to sort of dissuade workers from leaving.

MR. NUNN: The other explanation I've heard is that firms that have operations across many states are just not trying to employ contracts that are specialized to conditions in a given state.

MR. LAVETTI: I guess I would add that we found out about 30 percent of doctors in California have

non-competes. These are non-hospital-owned primary care doctors that typically don't span state borders, and they're common even with in-state establishments.

MR. WILLIAMS: Again -- well, just to add to Ryan's point, I had shown the DirectTv example where they were headquartered in California, but the contract was written under New York law. What you see sometimes is even if I'm in California, I write the contract under the law of the state where my competitor is headquartered, and so if they go to work for the competitor, I can sue them in that state's court where the contract is written.

So, again, this kind of patchwork of state laws is a bit of a mess from a legal perspective is, you know, there's some shopping for the jurisdiction, and, again, this is at the CEO level. It's unlikely I am going to go chase down my Jimmy John's worker in Texas, but there is some strategic choice of contract based on where the competitor is likely to be as well. So I think there's -- to Ryan's point, when you have a national or international firm, does it really matter if your headquarters are in California if your competitor's not?

MR. MCADAMS: I know some of you have touched on this already, but what types of policy

responses do you think the current economic evidence supports? A broad-based ban, a targeted ban towards certain occupations or income levels, some sort of disclosure requirement, a garden leave provision, that sort of thing?

MR. STARR: I'll start. For me, I think the low-wage story is relatively compelling. I haven't heard anyone really offer a great reason why minimum-wage workers or even those making, you know, a median income should be bound by these things. Maybe there are some specific occupations you can think of, but I haven't heard great arguments. I think there is broad-based agreement on that.

The other arguments -- the other one that I think there's broad-based agreement on is the need for transparency, especially in contracting. I think there's a -- so I think both of those are sort of uncontroversial. The question is, how high up the ladder do you go if you are going to ban these things? And I think there you get into questions like maybe you're okay with executives signing non-competes. I'm totally okay with that.

But if you look at the study of tech workers and you see that their wages don't respond, maybe that suggests that the threshold should be relatively high.

I think that there are some questions here that -- you know, about exactly what that level is and how exactly to pitch it that need to be resolved in a way that is -- attempts to be not totally arbitrary.

Russell Beck and I have talked about maybe using FLSA or nonexempt status, other ways to kind of tie it to existing law. I think that the evidence does support a ban for some occupations, low-wage occupations. I think that that evidence is pretty strong. We do need more evidence on outcomes, on various, you know, prices and other outcomes, but I think the evidence, at least for the worker side, is pretty strong at this point.

MR. NUNN: I agree with Evan and would add just that I think on modification of overbroad non-compete contracts by courts that, you know, you do want to avoid the situation where it's not that employers have a typo in their contract, it's that they've intentionally written an overbroad contract to have the chilling effect of that, knowing that in the event that it does go to litigation, they will be able to rewrite the contract, and so that seems like a relatively easy thing to modify.

MR. STARR: Can I amend my testimony briefly? The thing that most concerns me is really not what

happens in the courts or not what happens to executives. It's all of the workers who are chilled by these provisions in the first place, especially ones that wouldn't hold sway in court at all.

And so from a policy perspective, I think the question is, how do you deter the use of these provisions in the first place? And I think that is a place where we don't have a lot of answers, because if you hold them unenforceable like we do in California, we see that that didn't really do very much. And we can debate about the executives at another time.

And so if you are -- if the goal is to reduce the use of non-competes, then you need to think about either offering some carrots to employers, you need to think about maybe requiring the employers to pay workers during the prohibition period, or otherwise known as garden leave, or you try to catch them and you fine them.

Another approach which I think is really interesting is just to provide information. Just a few years ago Amazon was caught using a non-compete with hourly temporary workers. It came out in the news. Within a day, they dropped the non-compete.

Cushman and Wakefield was involved in a litigation -- I think it was last year, where is Eric,

somewhere here -- with a janitorial supervisor, and the janitorial supervisor was making $18 an hour. It wasn't a pure non-compete. It was a contract that said she couldn't work at a particular location that she had worked at before. That got some press, and they dropped it immediately.

And so somehow the provision of this information appears to be enough in some cases to get these firms to drop these lawsuits and non-competes entirely. And so I think that if there was a more sustained effort to gather evidence, to require firms to report and to post it publicly, I think that could go a long way on its own.

MR. WILLIAMS: Yeah, just to jump in as well, I think there -- even in mine, right, I've made a big emphasis on bargaining power, and I think that's really kind of the key. Where do you draw the line, I think that's always a sticky -- it's kind of like a national minimum wage. It means something very different in rural Nebraska than it does in New York City.

The tech worker thing is interesting to me as well because it -- you know, the R&D has a longer term life cycle, I'd say, in a sense, and if you talk to people in Massachusetts that have been in this game for a long time, there's a perception -- because until the

early nineties, Massachusetts was the tech hub of the U.S., right -- and so there's this perception that California used the unenforceability of non-competes to suck the tech talent out of Massachusetts, out to California, and create the tech boom, and they're kind of giggling and pointing now when you see things like Uber steal the guy at Google who was doing the self-driving car technology and there was not a darned thing that Google could do about it since they're all headquartered in California.

And so now as these tech startups are becoming more mature companies, you know, 20, 30 years down the road, you're starting to see that those companies have different incentives now than they had when they were startup companies and poaching talent. Now they're getting their talent poached, and they are singing a very different tune than they were 20 or 30 years ago, so...

Evan did mention ten years from now going back and looking at things. I would be curious to see the tech worker stuff, look at that again, now that California has become giant firms instead of startups, so I'm just curious. You get a very different perspective when you speak to employment attorneys in Boston, for example, that have done this for 30 years.

FEMALE AUDIENCE MEMBER: Ryan, if I could just say, it's not that there's not a darn thing that they could do. They can sue under different laws, and they actually got a huge settlement, and that guy was ousted, and now he's criminally prosecuted. (Off mic).

MR. WILLIAMS: Right, and so this -- no, and see, that was a good point, because this morning in your presentation, the non-compete agreements are just one piece in this patchwork of trade secret laws and involuntary disclosure laws, and you have other weapons in the arsenal even if the non-compete is not enforceable. So I think that you made that point this morning, and that's an excellent point. Yeah, absolutely.

MR. MCADAMS: Is there any empirical evidence or data on how often employers take legal action to enforce non-competes, understanding that they might have a chilling effect even if they aren't enforced in the courts?

MR. STARR: I think if you look at the data, there's about -- where's Russell? -- correct me if I'm wrong, about 1500 non-compete lawsuits a year?

MALE AUDIENCE MEMBER: I don't remember the number, but it's leveled off. (Off mic).

MR. STARR: Yeah, it's leveled off, but I think

it's more than -- there's like 1500 reported cases in a year, but I think that -- and I'm not an attorney who litigates these things, but from my conversations, I think that those cases -- that's just the tip of the iceberg in terms of what you mean by enforcement. That's kind of the final stage.

But if you think about firms sending threatening letters, you know, that's -- from what I've heard, 90 percent of the time, that stops it right there. That's kind of the most common, informal enforcement mechanism.

MR. MCADAMS: And I have one last question. So if, hypothetically speaking, you were tasked with designing a study to understand the effects of non-competes and you had the resources of the FTC behind you, what do you think would be the data or information you think would be most useful to acquire?

MR. NUNN: The first thing I would love to be able to do is go back in time and ask workers 10, 20, 30 years ago how likely they were to have non-competes. Sadly, we don't have that.

MR. STARR: There's so many things.

MR. LAVETTI: You have written a lot of papers on this, too.

MR. STARR: Yeah, I mean, I think -- so the key issue -- so I think there's a few low-hanging fruits. One is that the FTC could gather data and just report the data. Whether you are going to report the firm name alongside, I'm not sure of the legal issues. The firm is maybe unwilling to share that information with you if they know their name is going to come along with it, and so I think those are issues there, but I think that, the FTC could begin collecting this data on a longitudinal basis.

I do think that hopefully the Bureau of Labor Statistics has added a question to one of their longitudinal surveys and should have more data forthcoming, but the FTC -- there is no reason the FTC couldn't also engage in that sort of practice.

I think that the key would be to identify places where the use of non-competes becomes -- is random and so you can identify the proper counterfactuals. And so I think that that is -- I think it's going to be challenging to do. I don't have the best research design, because you don't control the firms and the CEOs, and you can't tell them to randomly deploy them at some branches and not other ones; you can't randomly tell them to use them with some workers and not other workers. And so it's a really tricky

question.

A shot in the dark, the FTC could form another branch and then randomly deploy them with some workers over there. See how it goes.

MR. WILLIAMS: Yeah, I mean, just to echo that, I think, knowing -- just knowing what's going -- this goes back to the disclosure calls all morning long, is to make firms disclose what they are doing to the workers. It would be great if they disclosed it to researchers as well, right? That was really a pain in the neck to spend those two years just getting the CEO contracts. I couldn't imagine the workload involved to get it at the employee level for a lot of these companies. I think it would have to be something that they report to the -- maybe the Bureau of Labor Statistics or something like -- which sounds like it's going on.

MR. STARR: And let me just say, the challenge is -- even if the FTC did collect all the data, right, so you know which firms are using non-competes and which ones aren't; you know for which types of workers they are, which ones they aren't. The key issue is maybe there are other differences outside of the non-compete that are going to cause wages to be different, that are going to cause innovative outcomes

to be different, and so it's not clear you are going to be able to overcome any of those challenges with just purely observational data.

And so you're going to need -- you might need something else, maybe a natural experiment or something to take advantage of. So, you know, I'm not -- maybe there's examples of firms who are -- who are dropping them randomly that you could exploit, but it is not an easy task.

MR. LAVETTI: I was moving in the same direction as Evan. I think, for all the discussion of how prevalent these are, in labor markets, if we think of non-competes as this costless thing that firms can tack onto any contract, it should be surprising that not all firms use them. The majority of firms still don't use them.

And I like to think as a labor economist that although labor markets are very frictional and there are lots of information asymmetries and gaps in this market, there is still a market here, and that some of the firms that are not using non-compete agreements and some of the workers that are not bound to them are sorting to those jobs by choice.

So there's something taming the market, and without a study that can accommodate the sort of

sorting on preferences, for example, that it's really difficult to address all of these confounding factors. I think to do it appropriately, you would probably have to randomize at the worker level rather than at the firm level to get around some of those issues.

MR. WILLIAMS: The SEC has been known to do this just randomly, put short-selling bans on random firms so we can do experiments in academia. So you guys could do the same thing.

MR. NUNN: If I could add real quick a research question that we haven't discussed that kind of concerns me and that I'd just love to know more about. What's the substitution on the employer side between non-competes and other restrictive covenants and illegal employer collusion? I mean, I worry in places where non-competes are not used, they are not enforceable, that they might go that route, and I just -- I don't think there's much evidence here.

MS. LOBEL: If I could just jump in on that, it's not only those substitutions but also positive (inaudible) and retention and performance-based pay, stock options, and all of that, and there is some -- Garmaise has some evidence on that (inaudible). (Off mic).

MR. NUNN: Yeah.

MR. MCADAMS: Is there any international evidence on non-competes?

MR. STARR: I think the answer is yes. I don't know how high quality evidence it is, though, so I -- yeah, I would be -- I would be -- I mean, and there's one study I'm aware of which looks at enforceability across countries and finds reduced entry of firms, but I think that there's not much international evidence at this point.

MR. WILLIAMS: We were trading emails a couple weeks ago and apparently they have them in France, which surprised both of us. I was stuck there for the strikes recently, and we were talking about French non-compete contracts. They have them, which is surprising given their employment laws.

MR. MCADAMS: So my questions are exhausted. If there are any more, we have three minutes.

MALE AUDIENCE MEMBER: Are there any -- so CEOs might be the ones for whom those sort of efficiency claims would be strongest (inaudible). Are there -- is there any similar evidence -- probably not (inaudible) at the table -- of people who are, like, high enough that you would think they would be sophisticated and not, you know, be easily pushed around, but don't -- you know, but don't have -- like a

high-end surgeon or something like that or like -- they get paid a fortune because they're great at brain transplants or whatever, but, you know, they don't know anything that would -- because that would matter, because if they really are confined to the people -- even at the high end to people who -- for whom one of these efficiency justifications seems to attach, then that would make you really say, all right, unless you have a great efficiency -- you know, if you observe these where there's not a great efficiency story, you should think they're (inaudible). Is that question clear? (Off mic).

MR. STARR: Yeah, I think so.

MALE AUDIENCE MEMBER: (Inaudible). (Off mic).

MR. WILLIAMS: Yeah, I mean, we -- again, our study was only CEOs, but you definitely see that when it's -- there's a lot of intellectual property and these sorts of things, they're more likely, and specifically if you sort on industry, kind of what some of the -- you get some weird industry outliers where you wouldn't expect to see non-competes, but one thing that comes up in industries is these industries where there's a lot of processes that are nonpatentable -- so for example, I can't patent algorithms or computer code and things -- you tend to see the non-competes more in

those industries.

So if I can patent this thing, it doesn't really matter if they walk away or not, they can't use my patent, but if the intellectual property is up here and I don't have any legal claims to that, I try to exercise that if I can through a non-compete. Is that kind of what you're going after?

MALE AUDIENCE MEMBER: Yeah.

MR. STARR: Let me -- I mean, I think so. In my paper on low-wage workers with Mike Lipsitz, we do look at managers, and we find that the -- after you ban non-competes, the wages go up the most for managers, and so -- now, these are hourly paid managers, and so maybe they are not the VP or whatever level you're thinking of, but the fact that wages rise when you ban non-competes for managers suggests that even that high up, they were -- they were being hurt by these provisions, that it wasn't the kind of executives that Ryan's looking at.

MR. MCADAMS: Does the existence or prevalence of arbitration clauses impact data availability and outcomes?

MR. STARR: Well, I don't know if we --

MR. WILLIAMS: I don't know, actually. Sorry.

MR. STARR: I think we are just beginning to

learn about these arbitration agreements as well. I mean, I think that -- what was the most recent evidence? Something like over 50 percent of firms are using arbitration agreements? Our study, Ryan and mine, you know, I think we find that firms are bundling arbitration agreements with these other contracts, and so certainly I think they are often found together, and I think we should probably talk about class action waivers as well, and I think that a large concern with low-wage workers, if you're thinking about the whole bundle, is that workers have signed away their right to be a part of a class and they have agreed to arbitrate, and so it makes it really hard for them to get legal counsel if they experience some wrongdoing in the workplace, whether it's a non-compete or wage theft or something else.

MR. LAVETTI: Building on a comment that Orly made and that others have touched on with respect to these other contractual restrictions, I think it's worth thinking about -- and I don't think we know empirically any answers about this yet -- what the substitution patterns would be if non-competes were banned in a specific occupation. Are there substitute provisions that would likely be used?

And those might not be the types of provisions

that are on your list. So, for example, there's a paper by Jim Rebitzer and Lowell Taylor that argues that the reason why we see law practices use the sort of up or out style structure in promotion to partner is because the legal profession bars the use of non-compete agreements, and that's sort of a second or third best actual way of rewarding the people who stick around, sort of backloading compensation, because they can't use non-compete agreements.

So there are substitution patterns that are not just these restrictive covenants within contracts but might affect the entire organizational practice of firms, and I don't think we know enough about what those substitution patterns will look like.

MR. MCADAMS: I think we have time for one more question. Do any states have penalties for signing non-competes?

MR. STARR: In Oregon's 2008 law, they mandate that the worker would be paid 50 percent of their -- it's going to be the greater of your -- 50 percent of your salary or your annual salary or the median income for a household of four during the prohibition period, and so you can think of that as a penalty that the firm would have to pay.

Enforcement of that, I'm not sure. I haven't

seen evidence of, like, how -- do firms abide or don't abide by that, but that's what happens, a penalty, and I think that -- I know that -- Illinois didn't pass them, right? Yeah.

FEMALE AUDIENCE MEMBER: I think the new Washington state law enforce penalties for illegal use, so use now barred by the new law. (Off mic).

MR. STARR: That's right, yeah. So Washington does allow some penalty. Does Massachusetts, too?

MALE AUDIENCE MEMBER: No, but Maine does.

MR. STARR: Maine does, okay, yeah. I'm so glad you guys are here.

MR. MCADAMS: Okay. Well, I think we are out of time. I just want to say thank you again to our wonderful panel. We are going to break until 2:45, after which we will hear from -- oh, there's one more question. Sorry.

FEMALE AUDIENCE MEMBER: That was my actual question, but it wasn't if you read the next line, where it's talking about garden leave, so I'm from Massachusetts, and so my question was if there's no penalties, who are -- unenforceable, so like, for example, I applied for a nonexempt job this summer, and there was no garden leave. First of all, I was supposed to be exempt altogether. No garden leave, but

two years, 100 miles, and when I tried to negotiate, I was told best of luck, when it should have been exempt altogether.

Two other jobs, the same thing. I was supposed to be inside sales; they were calling me outside sales. And then the third one was with a recruiter, and basically they told me these recruiters said we don't know anything about this new law and were surprised that we haven't been told anything about this new law. So -- and from talking with a lot of people, the ten days is never followed. I've never heard of anyone who has a ten-day (inaudible), and I have worked in an industry that non-competes were very persuasive -- or used all the time because it was a (inaudible), a fierce competition. So I can tell you that there's no teeth to that law, and no one's following it from my experience.

MR. MCADAMS: Thank you for that.

All right, we are going to break and reconvene at 2:45. Thanks.

(Applause.)

REMARKS: NOAH JOSHUA PHILLIPS

COMMISSIONER PHILLIPS: Good afternoon, everyone. It's great to be here. I'm Noah Phillips. I'm a Commissioner here at the FTC. Today's workshop is a great example of one of our agency's most important functions, and that is convening experts to inform policymaking about competition and consumer protection issues with an impact on the American economy. It's great to see familiar faces. I think Orly -- oh, Orly Lobel is in the back now, and Evan Starr, who is somewhere here, and to learn from them and all of the rest of the incredible group that's been gathered here today, and with that in mind, thanks to Sarah and Bilal and the rest of the staff for putting together a really interesting day.

This workshop comes at a critical time. America has a labor mobility problem. Over the past several decades, American workers have been increasingly unlikely to move to new places or start new jobs or even to switch jobs in the same location. The New York Times' Sabrina Tavernise recently reported, citing data from the Census Bureau, that Americans are moving at the lowest rate since the Government started keeping track, and that's in the 1940s. It's not the seventies, but the 1940s. In a

world of declining transportation and communication costs, where moving ought to be easier, those are surprising and I think troubling results.

Labor mobility is good for the economy. It helps businesses by allowing labor to allocate itself more efficiently. As David Schleicher describes in his article, "Stuck," it allows the federal economic policies that we choose, whatever they are, to work better, and critically, as we've heard today, labor mobility helps workers. Evidence shows that people get bigger raises when they switch jobs than when they stay where they are. But labor mobility isn't just about leaving for the job you want tomorrow; it's about making the job that you have today better.

A.O. Hirschman described three responses that employees can have to declining working conditions: exit, voice, and loyalty. When you can exit a job, you have greater leverage to improve the terms of your employment. It is, therefore, unsurprising that scholars point to declining labor mobility as a culprit in slow wage growth.

The story of declining labor mobility is a very complex one, but the non-compete clauses that we're discussing today are, I believe, a part of it. As we at this agency well know, competition matters a great

deal, and labor markets are no exception to that. The more mobile workers are, the more firms effectively compete for their labor. Policies that favor labor mobility increase that competition, and practices that inhibit it, including non-competes, reduce it and prevent work from getting where it needs to go.

Over the past several years, empirical research by Professor Starr, Professor Williams, and others has advanced our understanding of the prevalence and potential effects of non-compete clauses. We do not know if non-competes have been increasing in frequency, but they are certainly more ubiquitous than many of us thought, and they appear in contexts where the traditional justifications for non-competes are not obvious; for example, some 12 percent of workers earning less than $40,000 a year or seasonal Amazon warehouse workers. They also appear where they are not allowed or are not enforced, and all of that concerns me.

At the same time, as we've heard today, non-competes can serve good purposes, incentivizing investment in workers and protecting trade secrets, worthy goals in our increasingly knowledge-based economy. Evidence on the effects of non-competes seems to tell both sides of the story, indicating harms to

workers, but also benefits in some contexts.

Today, federal and state legislators, Republicans and Democrats alike, are grappling with how to address non-compete agreements. I was honored in October to testify before the House Subcommittee on Antitrust about competition in labor markets, and I focused on the role of non-competes. Above all, I hope today's workshop informs that policymaking process.

Do non-competes present a policy problem? If so, is law enforcement or changing the law the way to address it? Federal or state law? Are there grounds for blanket prohibition? Or how and where should the law demarcate legality and illegality, or tip the scales to legal presumptions? Would disclosure requirements increase the likelihood that workers share in the benefits that non-competes can foster? We have already heard some really interesting testimony bearing on some of these questions.

While legislators consider these questions, some stakeholders are pushing for the FTC itself to address non-competes through a rulemaking. We heard some of those calls this morning. We heard a little less, however, about the legal basis for doing so. This is a real issue that gives me, someone who is concerned about non-competes, pause and about which I

want to learn more. To the extent the rulemaking in question regards unfair methods of competition, how we proceed may implicate not only the law of non-compete clauses but also more fundamental questions about the Constitution and its separation of powers.

The FTC has issued a competition rule just once in its history, in the 1960s. That rule, which was never enforced and was withdrawn in the 1990s, proscribed conduct more or less barred by the Robinson-Patman Act. To reach non-competes, by contrast, we would have to rely, on the competition rule side, for the first time solely on the FTC Act's prohibition of unfair methods of competition. That broad language raises the specter of the Nondelegation Doctrine, which requires Congress to provide an intelligible principle to guide an agency to which it has delegated legislative discretion.

As Justice Gorsuch wrote in his recent dissent in Gundy vs. United States, enforcing the Constitution's separation of powers to prohibit unconstitutional delegations of legislative power is "about respecting the people's sovereign choice to vest the legislative power in Congress alone. It's about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule

of law."

Justice Gorsuch cited the Schechter Poultry case in which the Supreme Court struck down Congress' delegation under the National Industrial Recovery Act, the New Deal law that gave the President authority to approve -- wait for it - "codes of fair competition," almost the exact wording at issue here. Justice Cardoza dubbed this "delegation running riot."

In Schechter Poultry, the Court explicitly distinguishes the NIRA from the FTC Act. But the key distinction that saved the FTC was its adjudicative process in which the Commission, acting as a "quasi-judicial body," determines what are unfair methods of competition in particular instances upon evidence in light of particular competitive conditions via a process of formal complaint, fair notice and hearing, and findings supported by evidence, all subject to judicial review. That is different from rulemaking.

Nondelegation concerns may also be exacerbated by other factors here, including the lack of clarity in the rulemaking authority, the traditional commitment of the issue to the states, the fact that neither the FTC nor any court has found non-competes to violate the FTC Act's prohibition against unfair methods of

competition, and the lack of a good historical precedent. All of that concerns me as well, and I hope to hear more.

Today's proceedings, as I said earlier, have been great in general, and I look forward to hearing what the upcoming presenters have to say on all of these important questions, as well as to reviewing comments that are submitted.

So with all of that said, I do want to introduce our next speaker -- where's Aaron? -- Aaron Nielson. Aaron is a Professor at Brigham Young Law School where he focuses on administrative law, civil procedure, federal courts, and antitrust. Before joining Brigham Young, Aaron was a partner at Kirkland & Ellis, where he remains Of Counsel.

So, Aaron, thanks very much.

(Applause.)

FEDERAL RULEMAKING PROCESS:
KEY PRINCIPLES AND CONSIDERATIONS

MR. NIELSON: Do I have the clicker? All right. While we're waiting for the clicker, I'll tell a story. Why not? I've got the room.

So when I was a brand new law student, the very first job I ever had was here at the Federal Trade Commission. I worked in the Office of Policy Planning, and I never thought the day would come when I would get to sit up here at this very formidable table. So I'm glad to be here. I'm honored to be here. Thank you so much.

How does this clicker work, just -- okay, there we go. Awesome.

All right. So here it is. I came back not in a capacity as an antitrust expert, but I'm here to speak about administrative law and in particular, rulemaking. So we've heard all day all sorts of substantive content about whether non-competes are good or bad or when they're good and when they're bad. All of that is not what I'm here to talk about. I'm here to talk about the procedures that the FTC would use to do a rulemaking. So this is for any type of rulemaking. I am content-neutral. I am here as a strict proceduralist, so let's talk procedure.

With that, here's the basics. I wasn't sure what the screen would be. Maybe the bigger is better than the small here. These are the steps you have to go through in any agency to do a rulemaking. Thankfully, at least in terms of simplicity, the FTC's a little bit different. The FTC, as an independent agency, does not have the same interface with the White House, OMB, as some of the other agencies, but there are still a whole bunch of steps, and we're going to talk about those steps today so you get a feel for what it do would take to a rulemaking on non-competes, and it's actually fairly complicated.

So let's start here. One of the first things you need to know is what law authorizes rulemaking. So you need to go find the relevant statute. Now, not all agencies have rulemaking power. Sometimes they have rulemaking power for certain things and not for other things. So a good threshold question you always want to know is, under what statute am I regulating and do I have rulemaking power and, if so, subject to what conditions?

So I went back and said, well, what are the FTC's rulemaking powers? Well, the FTC, thankfully -- I am not going to go through this entire thing -- but thankfully the FTC has a webpage that says, "Here's our

rulemaking authority," and we are going to skim here to the parts that really matter for purposes here, and that is in the original FTC Act, there was an authority to make rules. That's under Rule 6, Section 6, and it's the authority to make rules.

And in the 1970s, there was a case that said that authority includes not just the power to make procedural rules for the agency, it also includes the power to make substantive rules. So that case, 1973, National Petroleum Refiners Association, is one of the big cases in administrative law in general and a big case, in particular, for the Federal Trade Commission.

But here's where it gets a little bit more complicated. Following that case, the FTC, through some adventures in the 1970s that did not have a good political outcome in terms of the Hill, received a bunch of restrictions on the agency's power to make rules when it comes to consumer protection, and that's what we're going to talk a little bit first. So I wasn't sure where this would be, but the green is the regular rulemaking, and the yellow is going to be what's called Magnuson-Moss rulemaking. So here we go.

I'm going to borrow a lot here from an article written by Jeff Lubbers. Jeff is an Administrative Law Professor at American. He knows as much about

rulemaking as anybody alive, and he has studied this issue at length. This was recently in an issue of the George Washington Law Review, and he went through all of the steps of Magnuson-Moss rulemaking, or Mag-Moss rulemaking for short. So anyone who's thinking about how this works, I recommend, go look at the article. It's really helpful, and he goes through empirically and shows all of the pieces.

Here's a whole bunch of steps that Magnuson-Moss requires which are different from ordinary rulemaking under the Administrative Procedure Act, and we're going to spend a little bit of time going through the various steps of rulemaking under Mag-Moss. So here we go.

Before you ever do anything with Mag-Moss, you will do an advance notice of proposed rulemaking. So we have got two future things. We have a rulemaking. Before we get to a rulemaking, we have a notice of proposed rulemaking. Before we get to a notice of proposed rulemaking, you need an advance notice of proposed rulemaking. That is a notice of what you are going to do. You are going to put it in the Federal Register, it's going to have a description of what you are trying to accomplish and why you are going to accomplish it.

And then you send it over to the Senate, and it will go to certain committees of the Senate. So they have to have a heads-up before you do anything in the consumer protection space, you're letting the Senate know. This is not typical. This is not how most agencies operate. It is how the FTC operates when it comes to consumer protection.

So start doing your homework now if that's the plan, because you need to have a pretty good -- you need to see the end before you get started in ways that are not necessarily the same with other agencies.

Second, you need a detailed notice of proposed rulemaking. All agencies under the APA do a notice of proposed rulemaking. The FTC's requirements are particularly specific. So you're going to say with particularity the text of the rule, including any alternatives which the Commission proposes to promulgate, and the reason for the proposed rule. So you need to not have just a general sense of what you might do and then get comments and then figure out what it is.

No, no, no, no, no. You need specificity, particularity, in what the proposal is going to be. Again, that means start doing your homework, because you're not going to have the ability to necessarily

change what you end up with. So you have to have the work done early and, you'll see, comprehensively.

Next, a preliminary regulatory analysis. Again, you're going to have to go through a concise statement of the need for and the objectives of the proposed rule, a description of any reasonable alternatives to the rule, and a preliminary analysis of the projected benefits and adverse costs or economic effects of the rule. So, in other words, you're going to do a cost-benefit analysis. So there's a lot of economists in the building. This is the sort of thing that they do, but be ready for that, because that's part of the Mag-Moss process.

Next, an oral hearing. This is very, very unusual. One of the things that I study is formal rulemaking. It's called the Yeti of administrative law. That is what Justice Thomas called it because it's essentially disappeared from the administrative process. Not so at the FTC.

At the same time where most other agencies do not have to have oral cross examination and hearings of that sort, at the FTC -- they re-added it to the FTC. So the FTC is different from most agencies in that respect, which means that if you're going to have one of these things, there will be a hearing, and they

will have the experts and they'll testify, and the other side will have the opportunity to cross examine, all in oral, all in person, not just written comments, but it's an actual hearing process, complete with the cross examination.

Next -- and this is for the staff -- you will have a staff report with a hearing officer. So the staff will do a detailed comprehensive report about what they've learned from the comments and the hearing, recommending why they are going to do something, why they are not going to do something. And then the hearing officer, which is going to be there when they have the cross examination and whatnot, is going to write a detailed report about what is going on here, why they think regulation makes sense, and so on and so on, that's going to end up going to the Commission. So -- and you are going to have publication in the Federal Register notice seeking comments, at least 60 days on the staff report and the hearing officer's report as well.

There's more. Next, communication with outside parties and Commissioners. I thought this was very interesting. Notice of meetings with outside parties must be included on the FTC's weekly calendar and "a verbatim record or summary of any such meeting or of

any communication relating to any such meeting shall be kept, made available to the public, and included in the rulemaking record. Communications between officers, employees, and agents of the FTC with any investigative responsibility relating to any rulemaking proceeding within any operating bureau of the Commission and Commissioners or their personal staff must be made available to the public and included in the rulemaking record."

So if the Commissioners are involved in this process, make sure that that ends up in the administrative record. This is a closed record type of proceeding. That is not the way that a lot of rulemaking works. A lot of rulemaking, you have the public record, but if, say, you know, one of the heads of the agency is curious or wants to talk to staff and figure out what's going on, that doesn't end up necessarily in the record.

Not so with Mag-Moss. With Mag-Moss, that is going to be in the record. So, you know, if you're working from the staff, you're doing that, make sure all that information makes it into the record.

Why do they have this? Well, this way -- I mean, just to go back for the theory, is you want to make sure -- you know, the theory is that -- what's

coming out of the process isn't tainted by outside influences. Everybody knows who's saying what to whom, and it's going to be based a lot on the record that comes through through the cross examination and the hearing officer kind of process. This is a much more formal type process of regulation.

Then you will have a final regulatory analysis, which is similar to the preliminary regulatory analysis but the final version of it. They will go through with a statement of need, a description of any alternatives to the final rule if they were considered, an analysis of the projected benefits and costs, an explanation for the rule, and a summary of any significant issues raised by the comments.

So all of these things are going to go into the record, and it is going to take a lot of work to do it, but people will be able to look at exactly why the agency did this, did they consider this, did they consider that, here's a comment, what's your response to all of the comments.

You will have a statement of basis and purpose of the rule, and then there's special provisions for judicial review that come under Magnuson-Moss as well, including that the facts will be reviewed for substantial evidence, not ordinary arbitrary and

capricious review, so it's the heightened -- arguably heightened standard. We'll talk about whether it's really heightened or not, but arguably a heightened standard of review of your factual conclusions that are reached, whereas in the ordinary APA process, it's if they're arbitrary and capricious, and here they have to be supported by substantial evidence.

All right. So where does this lead? This leads to what Professor Lubbers calls "mossification." In admin law, that's like the funniest joke. Welcome to my world. But the idea being that it's actually really, really hard for the FTC to use Mag-Moss to make rules. So what Professor Lubbers did is he went back and he looked at all of the rulemakings that have been done under Mag-Moss to figure out how long it really takes, and since Mag-Moss was amended in the early eighties, there's only been really one rule done. But there was a space when they were doing rules, and the average time worked out to be a little bit over five years, including some rules that they just never finished because it took just a very long time. Whereas if you look at some of the others, Professor Lubbers said it looks like they're closer to three years, and there's some others where the FTC has discrete rulemaking power, they could do it in less than one

year. So Mag-Moss slows things down.

Up here, the remarks -- this is from former Chairman Leibowitz who went through and complained in a speech about Mag-Moss makes it so hard to do the consumer protection type regulations through the process. Professor Lubbers just takes the position that they should amend this, Congress should change this, this is just too complicated. Those are bigger questions that we can talk about, whether that makes sense or whether it doesn't. I'm one of the few folks who is on record saying that I think there's some value in cross examination in the rulemaking context. I might be the only one, but that's the theory.

So some of you at this point are saying, Mag-Moss, is there a way we can not do Mag-Moss? Is there an alternate type of rulemaking that we can do here that avoids, you know, a five-year process? And this is where I think things get particularly interesting. Is it always required? And the argument is maybe we can just do this under ordinary APA rulemaking.

So if you look at the statute that has Mag-Moss, it says that all of that Mag-Moss stuff I was talking about applies in the consumer protection space, but it says nothing, leaves open what you do about

competition issues. It leaves the law as it found it. So the question is, does the law as it exists before Mag-Moss allow the agency to do regular APA rulemaking for competition law?

So now we're going to go back and we're going to look at National Petroleum Refiners, the 1973 case from the D.C. Circuit, which said that the agency does have substantive rulemaking authority. As we heard before my remarks, the FTC has only done one competition rulemaking ever. That was in the sixties and was not enforced. The 1970s, one was both consumer protection and competition, and since then, the agency has not promulgated a competition rule.

So I'm looking at the FTC Treatise to say, well, what's the state of the law on this question? And I thought it was interesting. The treatise says, "If, however, the FTC does promulgate rules in this area" -- in other words, in competition -- "it will amount to nothing less than a legal revolution. It will mean a determination before adjudication, whether a particular act covered by the rule constitutes an unfair method of competition under Section 5. Debate in legal journals on both sides of this to topic has been fierce. The stakes are enormous. Nothing less than a bypassing of traditional adjudicative and

legislative process to allow the Commission to find unfair methods of competition for American industry."

Fast forward, "A question that is sure to inspire future litigation is whether the FTC presently has the power to promulgate rules with the force and effect of law, which proscribe acts which are solely unfair methods of competition without being unfair or deceptive acts or practices."

So I'm, like, well, I guess I don't know the answer. I would have thought that we had a clear answer as to whether or not the agency has the power. We don't. Now, here's the thing. If you read National Petroleum Refiners, it says that the FTC does. It's a 1973 case from the D.C. Circuit. So the question is -- and the FTC points to it, says we've got it. They have not used it.

So I went back and said, well, does the FTC really have that power? In other words, what would a court today say if they had to look at the question anew, because presumably if the agency was to promulgate a rule, they would do so, and presumably it would be subject to challenge -- somebody would challenge it. Where does that case end up? And that, I'm not sure. That's other folks out there thinking about this, you know, three steps ahead, saying, where

would I seek judicial review of this rule?

It's possible they seek review in the D.C. Circuit, and the D.C. Circuit would say, well, we have a 1973 case, we're bound by it. So let's assume that's the fact pattern. And, you know, probably it doesn't go to the Supreme Court, because the Supreme Court doesn't take very many cases, you know, 70 cases a year, but let's assume that it did. Let's assume that National Petroleum Refiners question ends up in front of the Supreme Court. Would today's Supreme Court look at the question the same way that the 1973 D.C. Circuit did?

I went back and I read the opinion. It was written by Judge Skelly Wright. It was joined by Judge Bazelon and Judge Spottswood Robinson, all very talented judges. Their method of interpretation is not the same as Justice Neil Gorsuch. As I'm reading through, they say, about a particular canon of construction, well, these canons, we don't use the canons of construction. Oh, well, okay. Well, that's interesting.

Or they say -- though they do focus on the text, because there is a good textual argument, but they say, well, the fact that the FTC has -- and I'm paraphrasing here, obviously -- the fact that the FTC -- has disavowed the power to do this, that's actually

not that important, because that's not what really defines an agency's authority, even though they've -- for a long time, they have disavowed the power.

I'm reading, well, wait a minute, there was a case in the Supreme Court, called Brown & Williamson, which actually was tremendously important, that the agency did not purport to have the power, and then they changed their mind, and so on and so on. I'm not here to make a final legal conclusion on this. I'm just saying that there is litigation risk.

Now, let's assume that the case doesn't end up in the D.C. Circuit. Let's say it ends up in the Fifth Circuit or the Eleventh Circuit. I'm not sure how that plays out, but I think that there would be real litigation here for the folks who are thinking about how that works. But let's assume now -- let's assume that it's fine. Let's assume that National Petroleum Refiners is good law and the agency does have authority to make rules for unfair competition under the ordinary APA process and not under Mag-Moss. Well, what is that going to entail?

Well, on paper, it looks like it's going to be pretty easy. You read the text of the APA -- that's the original text of the APA -- and this 553, which is informal rulemaking, it's super, super short, and I can

even get rid of some of this text because it actually wouldn't come up. This is what it would be. This is what the APA says you need.

It says you need a general notice, including a statement of the time, place, and nature of a public rulemaking proceeding if you're going to have one; a reference to the authority; and either the terms or substance of the proposal or description; and then the procedure is, after notice for any exception, the agency shall afford interested parties an opportunity to participate through submission of written materials. They don't have to allow oral examination or anything of that sort. And then in the final rule, it just says a concise, general statement of their basis and purpose.

So I went through all of those steps for Mag-Moss. Almost none of those steps appear in this section of 553. So you might be thinking, well, if we are in the 553 space, it actually isn't going to be all that complicated, because I'm just reading the text. It's really easy. No, things have become much, much more complicated than a quick glance at 553 might suggest, and some of those procedures that are associated with Mag-Moss are nonetheless also applied in ordinary APA rulemaking.

All right, here we go. So go back to this chart. One of the big conversations in administrative law is about ossification -- hence the "mossification" joke -- which is it looks like rulemaking should be quick and easy, but nonetheless, it has become slow and hard, and what are some of the things that have come up? There's the Portland Cement Doctrine, which we will talk about. There's the Material Comments Doctrine, which we will talk about. There's logical outgrowth and then there's hard-look review. Let's go through and see how these work.

Portland Cement. Portland Cement was decided in the D.C. Circuit also in 1973. 1973 was a busy time in the D.C. Circuit, but here's the rule which is now very much still in force. "It is not consonant with the purposes of a rulemaking proceeding to promulgate rules on the basis of inadequate data or on data that, to a critical degree, is known only to the agency."

In other words, before you can go with a rulemaking process, if the agency has data, it has to turn it over, and the reason for this is actually pretty common sensical. It's hard for the regulated world or the public to know what the agency might do unless you know the basis of the data that the agency would use to do that. So how can you tell if the

agency's being arbitrary or not unless they turn it over? So this is like -- often thought of like a good government kind of thing, that rulemaking doesn't make sense unless the agency turns it over.

A few years ago -- I guess a few years ago, ten years ago now -- then Judge Kavanaugh on the D.C. Circuit said, how does this actually sync up with the text of the APA? Like, whether it's good policy or not, how does it make sense textually with 553? And the Court said essentially, look, it's stare decisis. We've done this for 50 years, and that's probably where it would be.

The Supreme Court has not ever adopted this issue. Most other courts I believe -- though we have Dick Pierce here who will tell me if I'm wrong -- have adopted something like the Portland Cement Doctrine, but that's very much part of the process. So if the agency has data on, say -- to go back -- non-competes, that would be part of the rulemaking process. You have to turn over all of that data, turn over your information, turn over your studies, to be part of the comment process.

Next, Logical Outgrowth Doctrine. This is the D.C. Circuit version. This has been adopted by the Supreme Court. What logical outgrowth says is the

proposed rule and the final rule have to be a logical outgrowth from what you proposed to what you ended up with. In other words, if you say in a proposed rule we want to do X, Y, Z to non-competes, you can't end up with W in the final rule.

And the reason for this also is because folks filing comments need to have a fair shot to know what the agency is thinking so they can file informed comments. If they end up with something completely different, the theory is that the comment process just doesn't make any sense anymore. You have nullified the comment process.

Again, this makes a lot of good common sense, kind of good government sense. It makes things more complicated. It means that your ability as a regulator, you have to do your work up front, at least to a pretty good degree, because if you change too much in the final thing, a reviewing court might very well say that's not a logical outgrowth. A regular person could not anticipate where you ended up from where you started. Go back and do it again. That makes a lot of work up front in the process, because otherwise, you might end up in a place where they say people just didn't know enough to file intelligent comments.

Next, the Material Comments Doctrine. An

agency must respond to those comments which, if true, would require a change in the proposed rule. So you're going to get a bunch of comments if you do a rulemaking, especially in a rulemaking of significance, lots and lots of comments through. Now, some of these comments are not going to be material comments. They are just going to be, like, I agree with such -- with X, Y, Z, or something like that, or sometimes, you know, they do studies about, like, just like profane comments that come across the wire, things of that sort.

You can get those out, and machine learning can help, whatever, but you are going to have some comments by smart folks, especially on a very kind of highly data-specific kind of thing, where they say, this is how it works here. Have you thought about this? Have you thought about this? Have you thought about my industry? Have you thought about my industry? And there will be a whole bunch of different comments.

To the extent that they're material -- in other words, that they actually are, you know, pertinent to the conversation -- the agency who's doing the rulemaking has to respond and explain why they did what they did in response to these comments. That can be quite long. On some of the big rules, you know, I

spent -- we spent as much time or more time than anything else responding to those comments because it's a huge part of the process.

And then finally you get to court, and you are going to have hard-look review. Now, there's questions, how hard is hard-look review? Is it really hard or whatever? But the State Farm standard is, have you considered all the kind of important parts of the problem? And if you've considered the important parts of the problem, you are going to be okay, you are not going to be arbitrary and capricious, but if there are important things you haven't thought about or things that Congress told you to think about that you haven't thought about, well, go back and do it again.

Now, you would think hard-look review wouldn't be that time-consuming. Some folks say this is actually the hardest part, because you have to reverse-engineer and say, well, what might somebody challenge in court, and then put it all in from the outset. So you have thought through all of the problems, so by the time you finally get to court, you're bulletproof and you don't have to worry about it. You know, that also adds to the time.

All of this leads to a fight, and it's in the literature, people -- smart people are fighting about

just how ossified the process is. You know, the Yackees, they did a study where they said it's actually not all that bad; people can do it pretty fast. Dick Pierce, who we're going to hear from in a little bit, says, No, no, no, no, you're looking at the wrong thing. You're only looking at the small rules. The big rules really are ossified, they take a long time to do, especially if you consider all of the time that comes before the notice of proposed rulemaking, which is hard to measure, because you don't know how long they've been working on it, but there's a whole bunch of work that goes into that process.

You know, I don't know who's right on the empirics of the fight, but that is the fight, is rulemaking under the ordinary APA. Is it fast and easy or is it not? Most people would say that for the more significant rules, it's not that easy. It takes some time, takes a lot of work whether or not OIRA or whether or not OMB is involved.

Now, for what it's worth, some of you are saying, well, why would anybody ever do a rulemaking? One nice thing about a rule is this very onerous process, the mere fact that it's hard gives regulations stickiness. If it's hard to make a rule, that means it's hard to unmake a rule. That means you

lock it in, and people can then plan their affairs around it.

If we had an alternate universe where you could do a rulemaking instantaneously, well, that would be all well and good, except for a lot of people would say, well, if you can do it in five minutes, you can undo it in five minutes, and it changes the dynamics of how people arrange their economic affairs.

If you have stickiness, people can make a plan and say, well, this isn't going to go away, because they just spent three years doing this thing. Now I need to plan my business accordingly. The problem, of course, though, is there might be too much stickiness. Stickiness makes a lot of sense for rules, say, where you want to have long-term incentives to invest in certain types of things. If it's going to take ten years to recoup the investment in a power plant, you don't want to change the rule in five years, for instance. Stickiness doesn't make sense in other sorts of conduct, arguably, where it's more of a "I just want this to stop kind of right away." You know, take that as for what it's worth.

The last thought here is some people will say -- and we will hear, I think, maybe a little bit about this on our panel -- well, if rulemaking is so

hard, can we do something quicker? How about we use a guidance document or something like that to try to tell people what we think without having to go through all of this procedural process?

And there I will say, you know, the FTC is an independent agency, it is not bound, but you should be aware that there's been a couple of major Executive Orders recently that frown upon using guidance documents in that way or to make big, major policy changes via adjudication as opposed to rulemaking, but that's kind of the lay of the land, and with that, you are now ready to go. You are all good administrative lawyers, and that is it in exactly 30 minutes. There you are. Thank you.

(Applause.)

PANEL 3: SHOULD THE FTC INITIATE A RULEMAKING REGARDING NON-COMPETE CLAUSES

(Pause.)

MR. MOORE: Good afternoon, everyone. This is the final panel of the day on FTC rulemaking. Before I introduce our distinguished group of panelists, I want to remind all the folks in the room that if you'd like to ask a question, we will be passing around question cards so that you can write your question down and they will be passed up to the moderators, and we'll ask those questions. It's important for us to do it that way so that the folks who are watching on the web can hear and understand what the questions are and then also understand what the responses to those questions are.

So my name is Derek Moore. I'm an attorney advisor in the Office of Policy Planning here at the FTC. And my co-moderator is Kenny Wright, who is legal counsel in the FTC's Office of General Counsel.

We have biographies of all our panelists that contain more information than I'm about to give, so I will just identify them and let you know their current positions. So to Kenny's left we have Sally Katzen, who is Professor of Practice and Distinguished Scholar in Residence at the NYU School of Law.

Next to her is Kristen Limarzi, who is a partner at Gibson, Dunn.

Next to Kristen is Aaron, who was introduced just a few moments ago.

And next to Aaron is Richard Pierce, who is the Lyle T. Alverson Professor of Law at the George Washington Law School.

And finally, to Dick's left, we have Howard Shelanski, who is a Professor at the Georgetown University Law Center and also a partner at the Davis Polk law firm.

The way we are going to structure our panel is to go right into Q&A and dispense with opening statements. So I will turn it to Kenny to begin the Q&A.

MR. WRIGHT: And we'll just pick up from Professor Aaron Nielson's great presentation with a threshold question about issues agencies should consider. So as Aaron mentioned, Congress has granted the FTC a broad range of tools to carry out its dual mandates to address unfair methods of competition and unfair or deceptive acts or practices, including enforcement and rulemaking authority, as well as the authority to conduct policy studies.

In choosing among these tools, what factors

should the FTC consider, and is one approach better-suited to address an issue like non-compete agreements or can these various tools work hand in hand?

And we can start with Sally and just move right down the group of panelists.

MS. KATZEN: Having originally suggested that we dispense with opening comments, I now would like to change gears and comment a little bit on the opening statement of Aaron's, which was very good and very informative. But it may have caused some people in the audience to think what the -- are we doing here? And this is crazy. And I would like to say, it's not as bad as he made it appear, in many respects.

Part of it is that while Mag-Moss is slightly insane, and I'm not quite sure why it remains viable, a lot of the pieces of that do exist in 553 rulemaking. This is what he described as the easy stuff, the thing that looks so simple. But he then said, well, it's not so simple, after all, because it has these other complications, Portland Cement, logical outgrowth. We can discuss each and every one of them as we go along.

But for the most part, what's in rulemaking generally is virtually the same, whether it's Mag-Moss

or whether it's 553. The agency bears a very heavy burden of documenting what it wants to do, why it wants to do that, on what basis it's thinking of doing that, and that all has to go in the record.

If you listen to his presentation, you might think that it's unsurmountable. Let me tell you that there are many agencies in this town that do it every day and that there are lots of rules that come out, big major important rules that are issued every single day. Following all of these rules, it does take time. It is a burden that the agencies should willingly go through because you don't want to establish a rule which has the force and effect of law unless it's well-founded. But it's not, I would say, something that is so overwhelming that it's almost impossible to get through. And I just wanted to make clear on that one point.

The other one point that I do want to mention is he had a wonderful chart where he had two Xs on OIRA review. OIRA is the Office of Information of Regulatory Affairs at OMB, the Office of Management and Budget. And Howard was one of the more recent administrators of OIRA and I was also an administrator of OIRA back in the '90s.

At the current time, OIRA review is limited

to executive branch agencies, EPA, Department of Labor, Department of Transportation, Department of Commerce, Department of Agriculture, Department of Interior, those guys, not the FTC or the SEC or FCC, the independent regulatory commissions. That is in flux now, I would say, and, given that rulemaking goes on for a period of time, is something that you all should think about over time.

Last year, the Trump Administration hit a shot across the bow, I think would be the way of describing it, in a guidance on implementing the Congressional Review Act, which is a whole other problem you don't want to think about. They said that independent regulatory commissions have to submit their rules to OIRA to determine whether or not they're significant, whether or not they're major, whether or not they trip certain scales. That was a baby step.

I can tell you that the Trump Administration is currently exploring whether or not it wants to require independent regulatory commissions to submit their rules to OIRA the way executive branch agencies do. It is not a question of whether; it's a question of when this requirement would be imposed.

I think it's very clear that if President

Trump is reelected, it will happen in November or December of 2020 or January of 2021. It will happen. And this is something that should be factored in, that OIRA review is probably something that will occur at some point. So that piece, I think, is also something I wanted to comment on.

I forgot your question, but maybe somebody else should answer it.

MR. WRIGHT: Actually, this brings up a good point because we had discussed whether we would have opening statements. So why don't I offer a chance for everyone who is here to respond to Professor Nielson's presentation or give any other opening thoughts you may have, and then we'll double back and start with our threshold questions.

MS. LIMARZI: You're changing the rules of the game on me.

MR. WRIGHT: I know.

MS. LIMARZI: Well, I guess I'm coming at this from not being an ad law professor like everybody else here, and I think the presentation about the administrative law requirements was really well taken and I agree with Sally that the real question is, what is the nature of the record. And I think what the FTC needs to confront is what is the best way to develop

that record. How do you sort of establish that evidence?

And I think some of the theme of the earlier panels is we don't know as much as we would like to know. That certainly seemed to be the theme of the economist panel, right. There's a long list of things they would like to study, data they would like to have, and a somewhat more modest list of actual conclusions that we can draw in a way that would really support robust rulemaking.

I think there are those who suggest that, because this is a sort of novel area, that enforcement is the way to develop that record. But I think, to my mind, the challenge to think about rulemaking in this area is less about the novelty of this issue and more about the nuance of it, because that the practice is novel shouldn't be a hurdle to regulating it, right? We do that all the time. Where the harm from some sort of practice is clear and we can identify a reasonably clear rule that would address the problem, we can move quite quickly. You can establish that record; I think you can overcome the hurdles. I'm more optimistic about that along the lines of what Sally was suggesting.

And, of course, even if you thought novelty

was a hurdle to regulation, these aren't novel, right? I mean, non-compete agreements have been around since, I don't know, the guilds. This is not new conduct. The problem is not that they're new, but that they are, I think it's acknowledged, at least in certain circumstances, useful, and in some other circumstances, potentially more circumstances, depending on who you are, problematic, and the effects are situational and they depend on a number of different factors.

And so I think the challenge in regulating in this area is when do we understand enough about the potential harms and the potential benefits of the practice to write something that actually makes sense, that actually draws that line. And you might be able to develop that understanding through enforcement, but you might be able to develop that understanding through other means. And I thought Bill Kovacic's comment this morning that the states are a really huge repository of learning and information in this space was well taken. There's a lot more experience there and some potential for some natural experiments, although a number of limitations on that as well. So I think there are other ways to develop that record, but I'm not sure that we've done it yet.

I think the other thing for the FTC to think about is whether or not a national standard is really beneficial here, and I guess I have two thoughts about that.

The first is that there seems to be a great variety in state law, and even in enforcement of that law, right, sort of both what's on the books, but then also how much of an enforcement priority this really is for state attorneys general, and that suggests a sort of lack of -- you know, in many contexts, that would suggest a lack of national consensus that ought to give a federal regulator some pause. There are plenty of areas of law that we consider properly regulated state by state. So it's not crazy to think that this is something about which states should primarily concern themselves.

So I think, in other words, like, is the variation of state law a feature or a bug? And I guess my second thought on that leans on the bug side of that equation, which is if you could develop a sensible nationwide rule, there is a benefit, potentially a huge benefit, to workers who are subject to abusive non-compete agreements.

There's also a real benefit to employers in certainty and predictability, and I think we're going

to talk later about preemption issues, but I think that's really true if the FTC rule preempts state rules and what you establish is a single national standard that's transparent and known to workers and to employers. Obviously, if it's just another standard layered on top of, then I think you're going to get into criticisms about the costs outweighing the benefits.

I'll stop there.

MR. PIERCE: So I've never conducted a rulemaking, but I've done two things. One is I've studied in considerable detail the way that the EPA issues rules, and they're the pros. They're the ones who do it every day. I mean, they're responsible for more rules, I think, than all of the other agencies combined.

MS. KATZEN: Not so, no.

MR. PIERCE: Well, a whole lot of them. Hundreds.

MS. KATZEN: Look at HHS.

MR. PIERCE: Oh, HHS, I'm sorry. Yeah, yeah, yeah.

MS. KATZEN: Yeah.

MS. KATZEN: Yeah.

MR. PIERCE: Well, in any event, I've looked

a lot at that process, and I've also played a variety of roles -- lawyer, legal consultant and economic consultant -- in assisting clients who didn't like proposed rules. So in terms of the EPA experience, Wendy Wagner, who is a very good scholar at the University of Texas, has done kind of the definitive study of 90 EPA rulemakings and she concluded that the average EPA rulemaking took approximately five years.

So we're not talking about a short process. It is certainly possible to do it in less time than that if you are willing to put tremendous resources into it and necessarily reallocating resources from other functions in order to get it done quickly. That's the way. If an agency is told by the President, for instance, I want this done in a hurry, well, you can do it in a hurry, you just bring people in from a whole lot of other things. I don't know whether FTC is willing to do that in this case.

Another really important variable is whether there is somebody, some firm, or usually it's a trade association that has a combination of resources and incentive to participate actively, shall we say, in the rulemaking. If somebody comes to me and says, I want to participate in this rulemaking and I ask what's your budget and they say $100,000, I say, yeah,

sure, I can drop them a line and tell them why you dislike it and they'll throw it away and it will have no effect whatsoever.

If they come to me and say, I'd really like to -- I'd like to make it as hard as possible for this agency to issue this rule, require them to expend a lot of resources, force them to make some changes that I want them to make in the meantime, and say, and your budget is $10 million. Well, if I can't use -- if I can't make it last at least five years using standard 553 procedures, I should be sued for malpractice.

By the way, I've got the empirics today, I have at least a 30 percent shot of getting it overturned in court at the end of that five-year process and Magnuson-Moss. Well, I'm too old to handle a case like that without -- I mean, my life expires long before that rulemaking ever gets done, I can assure you of that.

So that's a very important variable and I frankly don't know whether there is a firm or more likely a trade association or maybe multiple trade associations that would have that kind of incentive to put a lot of resources into trying to make it hard to issue a rule. But in any event, even if it's not -- even in the best of circumstances, as Aaron's

excellent presentation showed, this is a hard slog. It takes years.

During that period of time, new data -- sources of data analysis become available, and you can't use them because of the Portland Cement doctrine. New leadership takes over an agency and they want to do things a little bit different, and you can't change because that would jeopardize you under the adequately foreshadowed doctrine and require an enormous burden of explaining why you're making the change. So it's a real hard -- so that's why my proposed alternative for this context is issue a general statement of policy.

Now, what I have in mind is a long general statement of policy that says something like, we at the FTC believe that the vast majority of non-compete clauses in contracts are violations of the law, and I would cite both the Sherman Act, which doesn't allow the -- provide the FTC with the power to issue rules but certainly allows them to issue policy statements, and the FTC Act, and then go into great length on why you're doing it and on what kind of extraordinary evidence it would take to rebut the presumption that it's unlawful and to make it clear you plan to go out and hammer people when you catch them doing things

that are inconsistent with the policy that you have just announced.

So a big advantage of that is there are no applicable mandatory procedures. You can use any damn procedures you want. There's a good chance you can persuade a court that the policy statement isn't even reviewable. There's mixed case law in that. But a lot of the cases that say, ah, no, we don't think this is reviewable at all, it doesn't qualify as final agency action. And even if somebody can get judicial review, it's much easier to satisfy a court in that circumstance because you don't have this elaborate record of these typically -- well, and some of the EPA rulemakings you're talking about, one of them was seven million comments and a statement of basis and purpose in one of them that was 2200 pages long.

So you don't have that kind of record. It's much easier to defend an action just by providing some plausible reason for what you did even if they can get it to court. So it has enormous advantages there.

What other effects can it have? Well, it can't have a legally binding effect. That's -- as a matter of law, it can't. A rule can and a policy statement can't. It has one legal effect though

that's nontrivial. It provides notice to any firm that acts in a manner contrary to a statement of policy as to what your policy and statutory interpretation is. And that eliminates one argument that you can be sure that every individual firm will make if you try and go after them. It's nice to knock out an argument.

The other effect that it has is it -- another effect is to enlist involuntarily the support of thousands of lawyers in private practice. Because any competent CEO is going to go to the in-house counsel or outside counsel and say, hey, is this lawful. And in the memo that you write on that, you'll talk about state law and you will also say there's this federal agency you may never have heard of and they say this is illegal unless you -- and they say they're going to go after you. Now, some firms will go ahead and do it anyway. But a lot of firms won't. A lot of firms will say, oh, do we really want to do that, I don't think so.

But I would supplement that policy statement with some selective individual case enforcement actions. I'd pick situations where the adverse effect of the non-compete is real obvious and easy to establish and where there is no justification, no plausible justification. I'd bring half a dozen of

those, I'd win those, and then those lawyers that are sending all of those memos to the CEOs will be adding, and by the way, they mean it. They do nail people and they win. Okay?

So the combination of the policy statement and half a dozen victories in these carefully selected individual cases, I think, will get you a long distance. And it's a lot easier shorter route than trying to go down the rulemaking -- I don't think you've got the evidentiary support at this point. And if somebody -- I don't do private consulting for a fee anymore, but if somebody offered me the opportunity based on what I heard today, I got tons of ammunition I can use to make it really hard on the agency to issue a rule. And I'm helpless when it comes to a policy statement.

So that's my pitch.

MR. WRIGHT: Now, Howard, if you wanted to respond at all.

MR. SHELANSKI: Well, just a couple of very quick points. The agency obviously has a lot of experience doing guidelines. And those guidelines are very helpful to industry, they're very helpful to the practicing bar. You can imagine a policy statement or some kind of guidelines on non-competes that could be

extremely helpful.

Obviously, there has to be a process that proceeds that and I think that the process of fact gathering and analysis that workshops like today can kick off are really valuable. I think that the enforcement mechanism is a very imperfect, clunky, and slow way to gather the empirical data that would lead to guidelines or that would lead to a rulemaking. You're going to have a selection bias where you enforce and you're just not going to understand -- you know, you may get the tip of the iceberg. You're not going to see what the effects are of the vast bulk of the practice that you're getting at through enforcement.

So as we have seen throughout today, there is other work that is emerging all the time. There is a robust amount of empirical work that is going on out there about the effects of non-compete. And although there's a lot of ambiguity in that, I do think that we're starting to get some definition about the conditions under which non-competes can be beneficial and the conditions under which they're harmful and will have negative effects.

I think as we learn more you could get towards a policy statement or guidelines that

establish some rules for the road. And I think the real value of those is, people sincerely trying to stay on the right side of the law will look at those and say, let's make sure our non-competes are going to the right kind of employees, for the right purposes, and the right circumstances. Because I think if you can, you know -- and if we don't, and this is Dick's very important notice point, maybe we'll get a light shined on us.

And I will tell you that all of the stuff that comes out of the agencies, for example now on no-poach agreements. No-poach agreements are standard kinds of things during a merger due diligence and merger negotiation process. Everybody suddenly is very nervous about even a very limited no-poach in that context not because there's a rule, but because there have been statements out of the agency that, hey, we're starting to look here. So the first question you get is, how far can we go with this before we get a light shined on us. I would venture to say MFN clauses, very similar kind of thing. So I do think that a lot can be done short of rulemaking.

Whether you want to do rulemaking or not -- and this gets to the question you actually led us off with -- is when we get that learning underway and we

learn enough, I think the question about rulemaking versus adjudication is really this. How much of a particular kind of conduct can we say is presumptively harmful and how much is contingent on case-specific facts? If most of the impact is going to depend on the case-specific facts, rulemaking is going to be of limited effect because you're going to have to have a whole proceeding on deciding whether or not the rule applies, which is not going to look a lot different from enforcement.

On the other hand, if you can find subcategories of non-competes or of any kind of conduct that really is almost always going to be anticompetitive, then you can say at least in this area, we're going to put that in the per se no or presumptively no basket. Other kinds of facts when they're present will be in a different basket and either will go through -- it won't be subject to the rule or will get different treatment under the rule.

But I think that the learning that one needs before one even initiates rulemaking is to know is there any area in which the effects aren't going to be mostly driven by case-specific factors. Because if so, I think the difference between rule and adjudication becomes very slim and it's probably not

worth the candle to go through all of the rulemaking.

Just one point on rulemaking, rulemaking can be very tough, can be very cumbersome. I'm now thinking that the office that Sally and I ran was the Ossification of Information of Regulatory Affairs Office. We were often accused of that. I think we were regulatory quality control and all for the better. I truly believe that.

But I will just give two examples. When Congress passed the Telecom Act of 1996, that was a daunting task for the Federal Communications Commission. Daunting. And I, just fresh out of clerking and working at the law firm of what was then Kellogg, Huber & Hansen, was hellbent on tying that process up forever. Congress gave the FCC a 180-day deadline for passing a really elaborate set of regulations on unbundling local telephone networks, pricing the access, all kinds of stuff. By gosh, they hit that deadline and those rules went into effect even while they were being fought up and down the Supreme Court in at least half a dozen different cases.

Another example is in June of 2013, President Obama went to Georgetown University and said, I direct the EPA to enact regulations that will

cut CO2 emissions from power plants, a really tall order especially because he didn't have an EPA administrator at the time. She was, I think, nominated.

And Gina McCarthy came in maybe September, October, I don't remember exactly, and she got that final rule done inside of two years. And there were billions of dollars arrayed against her efforts to do that. And, fortunately, OIRA was there to help speed things along and really get it done right and they got the thing done in two years.

But the point is that where it's important, I think these processes can move very effectively. But that doesn't mean you don't have to allocate a lot of resources, that doesn't mean it isn't difficult. So I would say in terms of whether or not the tool of rulemaking or the tool of adjudication should be used really depends on how much lift you're going to get out of what you can specify ex-ante, how much behavioral change you can effectuate by virtue of what you put in the rule.

MR. WRIGHT: And I'd like to give Sally a chance to address this question, but before you do, I'd like to sort of flag it in a way to say that if you were -- since you've worked at OIRA, you've been

giving agencies a helping hand in crafting rules that will survive judicial review and sort of work effectively in the market. If you look at the FTC's tool kit, what kind of resources would you look at in terms of marshaling in terms of making sure that we effectively use all of our tools and the ways in which our tools may help with rulemaking? As people have said previously, enforcement can inform rulemaking, policy studies can inform rulemaking. What should we be looking about in looking at the tool kit?

MS. KATZEN: Well, I think that's a good question and the answer is more than one. There is no single lane. I think you can do two things. You can walk and chew gum at the same time. Although some people -- never mind.

Part of the process is gathering information. Part of the process is sending a signal. And that's what we heard from both Dick and Howard is you want to tell the world this is something of concern and send the signal that you're serious about it. You can do that through guidelines, you can do that through an advanced notice of proposed rulemaking even under Mag-Moss, where you say we've got this issue, we've got these data, we are trying to figure out how to proceed.

We can identify -- and based on today's discussion which was phenomenally interesting and informative, we know that there's a difference between low-wage workers and CEOs. And I think almost everybody who addressed the issue thought that with respect to the low-wage workers there was very little benefit and a great deal of cost involved. You can send that signal now and say that in that area, you're looking for a per se rule and you're looking for guidance as to what the parameters should be, what the measures should be. And you can say that with respect to the upper end of the scale, the CEOs, there are other considerations and you want to learn more about what goes into it. So requests for information can work hand in glove with signals that this is not good.

The other thing that was so interesting about the earlier discussion was that workers in jurisdictions where they were nonenforceable were nonetheless -- they didn't know the law as one of the panelists said. They were impressed with the fact that it was in their agreement and they better not do it. Raising the bar of education is a very important tool that the FTC has had and has used successfully in the past. And that can be coupled with starting a rulemaking, starting guidelines, starting informing.

And all of that will lead to your getting more information and, therefore, be in a better position to do the kinds of things you want.

MR. SHELANSKI: If I could just add something really quick to that.

MR. WRIGHT: Oh, sure.

MR. SHELANSKI: You know, we've talked about the disadvantage that the agency might have with Mag-Moss. The agency has two really big advantages. One is you have statutory authority to conduct studies, which is a really nice thing and not every agency has that.

The other thing you learn when you do regulation and you review regulations in the Federal Government is how poor the infrastructure is at a lot of agencies for actually doing the analysis and the fact-finding that is necessary. The EPA was a big exception as Dick said. And what has happened at the EPA in terms of the dismantling of the scientific and economic expertise is tragic and worse.

I will say the FTC has the Bureau of Economics. And if I may say so, I don't think there is a better organization in the entire Federal Government, in any government of the world, for undertaking analysis, research, factual development

that would support competition or consumer protection rulemaking. So I would take advantage of those 80-plus extraordinarily capable people to conduct the studies that you have statutory authority to do. And I think that's an advantage that the FTC has that is quite unique.

MR. WRIGHT: Do you want to go ahead?

MS. LIMARZI: Just one quick point. There is a lot of good information being shared. One quick thing on guidelines, and I think I absolutely agree you can proceed on multiple fronts. And I think Howard made some good points about some of the salutary effects that guidelines can have. But I want to be realistic about what they're going to actually do in the market and in the legal community.

If the FTC issues guidelines that say, we think under Section 1 of Sherman Act, non-competes are presumptively unlawful, that is a credibility-robbing thing to do because it's not true, right? I mean, we heard today -- Eric Posner said he read the 24 or so cases on this and the plaintiff never wins. The non-competes are almost invariably a vertical agreement. The Supreme Court could not be clearer about how Section 1 looks at vertical agreements, and it's not with a presumption of illegality.

And so if you say these are presumptively unlawful, we intend to proceed into the market and enforce on that basis, I think you're going to run into a brick wall. Now, that's not to say that shining a light on them by highlighting the problems and the circumstances in which they have positive societal benefits and circumstances in which they clearly don't have positive societal benefits, I think there could be huge advantage to that. But I think you need to be realistic about the fact that I think if the FTC came out and said that, it wouldn't necessarily change the way that -- I mean, I'm thinking about it from a private practitioner perspective.

I would never tell someone that the FTC is going to be effective in bringing a per se suit against a non-compete, I mean, even if you put it on your website tomorrow. And I just want to -- a little bit of a caution on that.

MS. KATZEN: I don't think I was saying say per se.

MS. LIMARZI: No, no, no, I know.

MS. KATZEN: Okay.

MS. LIMARZI: And mostly I'm just thinking about the sort of presumptively putting out something

that says -- either shifts the burden or appears to deviate from what is already existing antitrust principles. And that's why I think, you know, we're talking a lot about kind of how you would fashion a rule to get at these problems and then we're talking a lot about the procedure that you might do to write them and to enact them.

But I think there's a more fundamental or existential question, which is, where are you grounding them? Because if you have decided that the non-competes are anticompetitive, but somehow not reachable by the antitrust laws, why are they not reachable by the antitrust laws? And if they're not, fine. It would acknowledge that Section 5 goes beyond the antitrust laws, although how far and in what direction is somewhat of a mystery. But let's figure out what that is and maybe that's where you ground this.

But saying these are anticompetitive, but for some reason the antitrust laws are inadequate to get at that, I worry that you -- or that a suit under the antitrust laws, we could not establish with the sufficient economic rigor to prevail in an antitrust suit on this basis. So we're going to do an end run around that. I think it undermines the antitrust

laws.

I think the agency would be much more effective and much more principled by identifying a related -- obviously related concern, that the FTC is empowered to reach and to address, and to say this is the problem we're addressing. This is not a problem of market-wide competition failure. We know it's not that because we can't prove that. That's what all of this case law tells us. But it is a problem that it contributes to wage stagnation or it is a problem that it contributes to labor mobility. And those are concerns that are within the ambit of the FTC. They're within our power to regulate and so we're going to regulate them for that purpose and then build the record that supports that.

MR. WRIGHT: So Kristen had perfectly anticipated my followup question, but I was also going to ask Aaron to weigh in on that as well because you had mentioned an increased skepticism of the use of guidance by agencies. And so to the extent that the FTC was considering this proposal from Professor Pierce, one option would be to issue an interpretive rule or an enforcement policy statement or a hybrid document with some other form of guidance. Do you have any reactions to that proposal as well?

MR. NIELSON: Sure. But I think if I get a chance, I will say this: One of the most intimidating things you can imagine is teaching 75 years of administrative law to the author of the treatise and two OIRA administrators and a roomful of FTC experts. So I think a little bit of nuance was lost in what I was trying to say. I wasn't trying to say that rulemaking is too hard so never do it. No, no, no, no. I think that that's -- it's an empirical question about how hard it really is. I suspect I am probably closer to Sally than I am to Dick on that particular question.

And that goes to the point I want to make, which is rulemaking is a very good thing in the sense that it gets public participation. It's prospective, which means people have time to prepare their lives around the rule. If you're having a big policy change based on an adjudication, that's retroactive. That means the law was unclear at the time when I did this thing and now I am being punished for having done something.

Rulemaking is prospective. Everyone has a chance to prepare. You get the comments from everybody. You get all the possible views coming in. So I'm a big fan of rulemaking, especially compared to

adjudication. I think rulemaking makes a lot of sense.

I think the worst of all of the possibilities is how about we're not going to necessarily do it by rulemaking and we're not going to do like small little adjudications; we're going to issue a policy statement and then we're going to try to have you change your behavior that way, because it is true you don't have to go through all of those procedures. But I think there is a lot of value in those procedures. I think those procedures is how you get the input from the public. I think those procedures is how to make sure that you're doing the quality kind of control that you like.

So I heard Howard talk about the role of OIRA. I'm a big fan of OIRA as well. So I suspect between Sally there, I would say, yeah, it would be great if we put these things, in terms of policy, put them over in OIRA review because I think OIRA would make it even better.

So when you go and say, I want to do a policy statement, you're cutting out all of those kind of quality checks along the way. And to the extent that you are encouraging behavior, but you don't necessarily have the quality checks in place to

make sure you're doing it in the right way, you might end up having kind of perversing consequences I don't think anybody would want.

So I would say, no, rulemaking is certainly something that you can do and there's a lot of good reasons to do it.

MS. KATZEN: Thank you.

MR. WRIGHT: So we have a question from the audience on this topic of guidance documents. So it insightfully notes that guidance documents may be subject to submission to Congress under the Congressional Review Act and that's recently clarified by an Executive Order by the Trump Administration as well. So the question notes that that may suggest that poorly predicated guidance documents could even be struck down and that Professor Paul Arkin has argued there may be a private right of action under the CRA.

So do all have any thoughts on the sort of CRA implications of guidance documents?

MS. KATZEN: Oh, God.

MS. LIMARZI: Sally has thoughts.

MS. KATZEN: Sally has thoughts. One, when CRA was negotiating, being negotiated in 1995, I actually was representing the administration. And there was no thought that it applied to guidance. And

all of this recent legislative history from GAO and now from the administration in the document that you referenced is remarkable is the only word I could use. And if you read through what was intended in CRA, it was full rulemakings, and even though definition was to 553(1), it was not intended to be that way.

Having said that, it is now being interpreted to apply. If you're going to look at CRA, you have to look at 801(b)(2)(1), I think it is, that says if there is a motion of disapproval, then the agency is not permitted to redo that, anything substantially similar. And that means that the agency could never do anything in that area absent an affirmative grant of authority by the Congress to have the agency redo that issue.

That was a point that was put into the document, into the Act, so that the agency couldn't just take out a couple of commas and send it back, and substantially similar was designed to be substantially similar. It has been interpreted to be anything in the ballpark.

And so if you did go through guidance and if guidance is reviewed under CRA and if, under CRA, there's a motion for disapproval by both houses and by the President, so it doesn't have any kind of

problems, then the agency would be precluded from doing anything at all ever again until there was an affirmative grant of authority by the Congress.

I know that's very complicated, but you raised the issue. I didn't. I would say that that's the least problem with guidance. I think a more important problem with guidance is whether you have sacrificed, what Aaron correctly identified, is all the benefits of rulemaking, of the gathering of information, the educating of the agency, the letting people think through what should be done in a way that is informative and that is participatory so that those regulated entities will feel they have some buy-in and understand what has happened.

And logical outgrowth is not necessarily detrimental because you can write a notice of proposed rulemaking that gives seven or eight different outs. You give a lot of different possibilities and you say you're also considering this, that, and the next thing. And there's a way to protect against the logical outgrowth doctrine.

But there are so many benefits, as Aaron said, of a regulatory proceeding that to go the guidance route, forget CRA. You should all forget CRA anyway, but you can forget it for this purpose

I think.

MR. PIERCE: To cover just to be sure, I'd recommend you send it over to the Hill. Nobody's going to do anything with it. There's no way in hell this is going to be the subject of a CRA. So send it over, it will get thrown into the trash, and that's that. So I think that's all I want to say about CRA.

But there's a number of other things I want to say. I actually disagree with Kristen. I think it's very risky to go, at least on a standalone basis, with Section 5 of the FTC Act. The courts are really quite leery of that for understandable reasons. It's so open-ended that they tend to -- their initial thinking about anything that's coming under Section 5 is hmmm, hmmm, real reason for skepticism.

I would go strictly under Sherman. And I think you can do it -- a nice starting point, it would have to be a long document with a lot of explanation and it would have to tie in with doctrine and Supreme Court opinions. My starting point would be California Dental Association and the four-step decision-making process that the Court outlined that's appropriate in some circumstances. I would argue this is one of those circumstances and then I'd go through that four-step process and show how it would support a

rebuttable presumption, not a per se prohibition, but a rebuttable presumption.

Then I would go with Howard's point and I'd have the really outstanding researchers at this agency do lots and lots of work to fill the holes that now exist in the research base and you plug those into your document, along with the doctrinal analysis, and then you make it clear that one of the things you're saying is a violation of the law, and you will go after, is somebody putting a non-compete clause in a contract where they know it's not enforceable. I mean, I think that's a piece of cake to make the case that those are unlawful. And that seems to be the biggest hole in the state proceedings.

And I'm not worried about the effect of the half a dozen cases where individuals have tried this in individual cases, because they didn't have the expertise, they didn't have the record, they didn't have -- so I think this agency has the capability to do a policy statement that would be effective. I'd grant that rulemaking has a lot of advantages, but, wow, three years, five years, seven years, I don't -- you know, Wendy Wagner concluded that it took EPA an average of a little over two years just to draft a notice of proposed rulemaking.

MR. MOORE: We've been talking about rulemaking in the abstract or rulemaking versus adjudication in the abstract, and I'd like to move on to some specific proposals that we heard earlier today. And I'm going to reverse the order. So Howard will go first and Sally will go last. We'll go down the table this way.

We've listed several in our preparation materials, but I'm going to focus on just a few to start out with and then we'll move on to the others.

So the basic question is, are there clear benefits or drawbacks to the approaches that I'm going to propose and what would the evidentiary requirements be to support a proposed rule? And remember that if we're going to adopt a rule, it would be a rule declaring something illegal or presumptively illegal under Section 5 and not under the Sherman Act.

So the first possibility would be an outright ban labeling non-compete agreements as an unfair method of competition writ large. And this is what the Open Market Institute and several other cosigners have petitioned that we do. And related to that, or a subset of that, would be a prohibition against non-compete agreements for a subset of workers.

Earlier today, we heard a lot of evidence suggesting that non-compete agreements are particularly harmful to low-wage workers. And identifying what a low-wage worker is could be a challenge and potentially could identify a target if we say low wages, X dollars an hour or Y dollars a year.

So I'll throw that down to Howard and then we'll move on down the line.

MR. SHELANSKI: Yeah, I mean, so I think an outright ban, no surprise that I'm going to say I think it's deeply problematic and would be opposed to it. I think you could come down to a universe of workers for whom it's appropriate. For me, it's more an issue of low skill rather than low wage because the primary justification for non-competes is investment in human capital.

You've got other ways of protecting against others kinds of things and if there is no investment in human capital, what's the purpose of a non-compete? It's to shift the ex-post bargaining relationship. It's not to do anything valuable. If one could sufficiently delineate that group of workers, I don't think you would necessarily do harm. But I think that delineation is extraordinarily difficult.

So I would say there is a -- you run a real risk of shifting training costs on to workers if you misspecify that line, because if I can't have a non-compete agreement in certain segments, I might not invest in training.

Let's take a really simple example. Tech firms in Silicon Valley that tend to have, several-month training periods for their new software engineers. That's almost all investment at that front end. If they can then put themselves up for auction, you could imagine that some of that training would not occur. And so what would happen is the costs of finding that training would be shifted onto the workers themselves. It would be less well tailored. I think you have huge inefficiencies and barriers to enter into the labor force all around.

So you need to make sure you get that line right and that's what I don't like about a per se ban. And even the corollary proposals for subsets, I'm sure we could find some subset where most people in the room would agree and others would agree, okay, you're not doing any harm by a per se ban there. But that seems also a big risk for future policy.

If you set the bar so high, if you will, for finding a non-compete to be illegal, then is every

other non-compete in every other context so fact-dependent that you couldn't have a rule? So I would stay away from per se rulemaking.

MR. MOORE: Any thoughts, Dick?

MR. PIERCE: I would just have one point that really follows on a point that Aaron made in his presentation about stickiness. Stickiness certainly can be an advantage, as somebody who has not been fond of the things that this administration has been trying to do in rulemaking. I'm kind of happy about stickiness at the moment. But stickiness also means you can't make an amendment without going through this same process.

So you better be pretty sure you know what you want before you issue the notice of proposed rulemaking, because it's hard to make changes after you issue the notice, between the time you issue the notice and the time you issue the final rule, because of all the doctrines that the courts then apply. And once you issue that final rule, the only way you can change it, the only way you can amend it is by going through that same process. So if you, again, set the bar real low, as Howard pointed out, well, then you've got a hell of a problem of, again, a very long resource-intensive process to change the bar.

If you go the policy statement route, you have to go through procedures. Still, it's hard work, but you choose the procedures and it gives you a lot more flexibility. It is less sticky. That can be both an advantage and a disadvantage.

MR. MOORE: Aaron, any thoughts?

MR. NIELSON: Yeah, I'll do it really fast. I confess, like I said, that I came in here as a proceduralist and the specifics of this entire debate is edifying. I learned a lot today. But I don't claim expertise. But I will say this: Just as a matter of judicial review, it will be hard to defend a per se rule because, boy, you could come up with all sorts of things that look pretty arbitrary and capricious because there are certain situations where it obviously makes a lot of good economic sense for you to have them. That's why the Commonwealth has had it for centuries, certain doctrines, and other ones where you say, that's harder to defend.

So if you just take a bright line, unless it's so narrow like Howard is saying, it's just going to be arbitrary and capricious, then a court is going to say, well, wait a minute, did you think through all the hard aspects of the problem? Well, if so, what's your response to the comments? And they would say,

no.

So I think that would be a really hard one unless it's a very, very narrow per se rule. And at that point, it's beyond my expertise.

MS. LIMARZI: Well, I tend to agree with what's been said. I definitely agree with the sense that really it would be incredibly difficult to justify a complete per se ban and even a ban at a wage threshold. In addition to it being difficult to figure out what that might be, I think Howard and others have made a good point, which is it's not a very good approximation for the problem we're trying to solve. It would be very rough justice to set some sort of a dollar, a wage threshold. And I think that makes it incredibly vulnerable to judicial review.

I'll toss out something, an alternative, which is in much the way that a wage threshold isn't very tailored to the problem we're trying to solve, I was interested in some of the learning that came out of the earlier panels, especially the panel with the economists, that disclosure and the time at which the non-compete is shared and the extent to which there's negotiation and consideration, has a huge impact on the effects of the non-compete, on the worker.

And so if we think that non-competes are justified in circumstances in which there is some consideration or there is some level of negotiation or at least it's on the front end, so we know that it's not necessarily going to shift that training cost problem that Howard was mentioning, if that's really the issue, then maybe you want a rule that is aimed at that, that requires disclosure or -- I mean, one of the economists said today it has to be a line item in the contract? Right?

You get this wage if you don't sign the non-compete and this wage if you do sign the non-compete. I don't know how realistic that is, but that's at least trying to address the problem or a lot of the problems that I think have been identified through the day.

MS. KATZEN: I'm with Kristen on the latter points. We heard a lot about transparency and disclosure, and maybe even compensation for signing. The timing of the revelation is very important. There are some that -- a few where you learn about a non-compete clause before they sign the contract; there are some who learn about it when they sign the contract; there are some who learn about it after they sign the contract; and there are some who don't learn

about it until they're about to leave and that's the first time.

So we also did not hear a lot in the last panel about the presence or absence of trade secrets, the thing that you're worried about the employee taking forward. And what I hear is the possibility of writing a menu of things that are relevant to evaluating the legitimacy of a non-compete agreement. And that these are different categories. You can check some of the boxes or none of the boxes and have the consequences flow from that.

I'm less concerned about distinguishing between low-wage workers. The story of a janitor having a non-compete? I mean, what are we talking about? How much training goes into justification for that?

I understand that as you move up through middle management, let alone senior management, that there are difficulties in drawing lines. But I think putting the compensation, whether it's an hourly worker or less than $40,000 a year annual compensation, as one of the criteria on the menu, seems to me to be completely legitimate and I would not get shell-shocked by the fact that somebody might have some discrepancies, particularly if we are not

saying per se. Particularly if we're saying these are the factors that would go into the consideration. Then I think your menu serves that purpose.

MR. MOORE: So I'm going to jump ahead just a little bit based in part on some of the responses that we just heard. So as we all know, the Commission has distinct mandates to address unfair methods of competition on the one hand and unfair or deceptive acts and practices on the other hand. Both categories are under Section 5 of the FTC Act. And Aaron ably described the different or at least the plausibly different approaches or procedural requirements that the FTC must follow to pursue a rule under unfair methods of competition versus UDAP, unfair or deceptive acts and practices.

And some of the issues that we've been discussing related to the problems associated with non-compete agreements sound more like unfair or deceptive acts and practices. And when the remedy is a notice requirement, that, to me, sounds very clearly like a consumer protection issue rather than an antitrust or market power issue.

And thinking about the different procedures that we would have to follow, we need to anticipate at least the possibility that if we follow ordinary APA

notice-and-comment rulemaking and we import some consumer protection principles into our analysis, a court might come back and say you should have followed Mag-Moss.

So the question for the panel generally is, are consumer protection-oriented principles a better fit for the concerns that we have related to non-compete agreements, putting aside the procedural requirements, just noticing or noting that they are different, or is this a market power problem?

And I'll throw it down to Howard.

MR. SHELANSKI: You know, so this is a tricky problem because I think in some way the UDAP issue here is empirically and intellectually easier than the competition issue. But it unfortunately matches up with the more cumbersome regulatory process, which is too bad because if you could do APA for UDAP, you might have at least something you could do here that's very useful.

Workers going into the employment process or into the hiring process have heterogeneous opportunities and, therefore, will be extracting different levels of surplus from the package they are offered by an employer. Some people might want the job so badly and find so much benefit to the job, that

they wouldn't need a different wage to accept a non-compete clause. Other people might have a broader array of opportunities and be very close to the threshold and a non-compete clause could get them to turn the job down.

So I think notice to me seems easy. It's hard to even think of a justification for not letting the employee know ahead of time, except for gaining ex-post bargaining power over that employee. So I would see for lots of reasons, you know, empirically, analytically, just basic ethics, a fairly easy rule there that says you've got to give the person ten days or whatever it is. And by the way, if you don't observe it, that's just going to be lying about the benefits of your supposed vitamins or something like that.

We're going to come after you through BCP and, you're to have an action against you and only we're going to have a rule that is the baseline as opposed to, a broader sort of, common law type approach. Unfortunately, you have to go through all of this Mag-Moss process to get there and you could imagine lots of avenues on which that would be attacked.

So I do think that notice is easy. It's

somewhat distinct from the competition problem though, right? Because whether or not -- and this is what will be very difficult. It gets a little bit to the point that Kristen made earlier. It's very possible that a small employer that ties up six employees in a non-compete has zero effect on the market.

So if you're going to go into a rule of reason kind of antitrust box, you know, what's the effect, and you're going to get into this balancing and they're going to claim they're doing lots of training and things like that. So I think the consumer protection side is this or the UDAP side of this is, in a way, somewhat easier.

I would just add something else. It seems to me that there are three things that matter here, right? Like in my own view, termination for other than cause, you could have a rule that says, well, if it's termination for other than cause, the non-compete is invalid. Okay, you could make that argument. Does that fit into sort of a UDAP framework to have at-will termination, really anti-employee arbitration provision and a non-compete all together? Do we have to read the contract as a whole? Is it an unfair contract, or can we just go after the non-compete?

So I would say there are two separate rules

-- I would actually consider doing the rules separately. I don't think you have to have just one rule. You might want to take the easier-to-defend UDAP rule and carve it out and do it under the more cumbersome Mag-Moss only because you might have a stronger case for it and actually survive Mag-Moss.

And then I would do the competition rule, recognizing that it is not yet clear whether you can do that under APA, although as Aaron's really clear presentation indicated, there's at least some support for that, although I suspect Justice Gorsuch might today have a somewhat different view than what the DC Circuit had in the 1970s. But I would carve them out so at the very least the notice provision would survive even if your competition rule, if you chose to do one, would not succeed. But notice seems to me like a very good place to start.

MR. PIERCE: Let me just express my complete agreement with Aaron's analysis of the extraordinary fragility of the FTC position that National Petroleum Refiners is going to protect them. I teach National Petroleum Refiners every year and I teach it as an object lesson in what no modern court would ever do today. The reasoning is, by today's standards, preposterous. I mean, people who don't know, I knew

J. Skelly Wright quite well and J. Skelly Wright got on the DC Circuit because he was on the District Court in the Fifth Circuit and people hated him so much that they pleaded with the President to get him the hell out of the Fifth Circuit. The President said, oh, okay, I'll put him on the DC Circuit.

MS. KATZEN: Excuse me, personal privilege. I clerked for J. Skelly Wright, number one.

(Laughter.)

MS. KATZEN: And number two, Kennedy brought him up because they were burning crosses on his lawn because he moved to desegregate the buses in New Orleans.

MR. PIERCE: So the interpretive method that was used in that case was fairly commonly used on the DC Circuit at that time. There is no Justice today, not just Gorsuch but Kagan, Breyer, there is no Justice today that would use -- the reasoning is basically -- the case against was the placement of the context in which that power to issue rules appears in the statute makes it pretty apparent that it applies only to rules of procedure, which makes sense for an agency that was believed to have only the power to only adjudicate cases.

You've got the problem that on eight

different occasions the Federal Trade Commission had testified before Congress that it did not give them the power to issue anything but procedural rules. That had been the position of the FTC from 1914 until 1967 when, for the first time, it said, oh, now we think it, okay. Then reasoning of the court is basically, rulemaking is wonderful, without the power to make rules, an agency really can't do an effective job. I agree completely with that.

But then the conclusion is, therefore, we conclude they have rulemaking power. That, by today's standards, is laughable. I teach it as an illustration of something no modern court would do.

MR. NIELSON: I don't know what to say.

(Laughter.)

MR. NIELSON: It's nice to have, like I said, the author of the treatise agree with my very tentative views.

(Laughter.)

MR. NIELSON: Yeah, I mean, I will say this. Obviously, there are very smart lawyers at the FTC who can judge litigation risk. I'm not sure if the litigation risk is 100 percent, which I might be hearing over here that you will definitely lose if you take the view that you have APA powers for competition

rules and you don't have to go through Mag-Moss. I'm not sure that -- and you can do substantive rules. I'm not sure that you will lose. You do have a case -- the text of the rule of six is you have the authority to issue rules. I would have to look more at what the briefing is, but I would say that there is litigation risk.

But that goes back to the point which is if you're going to take the litigation risk, make sure that you have something that you need that risk for. And it seems to me there are some situations that maybe are consumer protection, as I get -- and competition, as I hear the discussion, but there are some that certainly are not, and that goes back to Kristen's point where you say it's like a small shop, what's the market power here?

So if you're going to be really aggressive on your legal theory, you need to be very, very certain on your factual theory. And if you are aggressive on both, that is not a good place to be. I would recommend -- I understand you have good lawyers that can do that analysis themselves. So that suggests that the consumer protection route makes more sense. And if you are going to do the consumer protection route, it seems to me that you would want

to pick something narrow or narrower because if you are going to go through the massive Mag-Moss process it is easier the more targeted your goal is.

Now, what exactly that is I don't have the substantive expertise, but just reasoning for first principles, pick something narrow that's effective. It's easier to do the Mag-Moss process and you are not going to put yourself in a situation where you're defending a very aggressive theory on very bad facts.

MS. LIMARZI: What is that trial lawyer's aphorism? When the facts are on your side, pound the facts, and when the law is on your side, pound the law, and when neither are on your side, pound the table. I think you're saying the FTC shouldn't be in the pound-the-table situation. Ditto.

(Laughter.)

MS. KATZEN: And I agree with Howard.

MR. MOORE: Okay. One last rule formulation question.

MS. KATZEN: Well, one other thing actually.

MR. MOORE: Go ahead.

MS. KATZEN: One other thing, actually. The FTC ought to consider going back to Congress and revisiting Mag-Moss. It's an anachronism. If Dick Pierce can make fun of decisions in the '70s because

they don't exist in real time, maybe it's worth at least raising with friends on the Hill, if you have any, that this whole process doesn't make a lot of sense.

MR. SHELANSKI: So, Sally, great suggestion. Go ahead, try.

(Laughter.)

MS. KATZEN: Maybe after the election.

MR. SHELANSKI: I'll just point out that everything that -- that every reg reform bill that I've seen since the great Heidi Heitkamp left the Senate has gone in the direction of taking APA rulemaking towards Mag-Moss rulemaking. And I like Jim Lankford very much. He's a very good person, a sincere guy who's working hard on this. I like Rob Portman very much, a sincere guy working very hard on this. They are not going to be intuitively friendly to peeling back procedure.

MS. KATZEN: Agree. That doesn't mean you don't start the conversation.

MR. SHELANSKI: Oh, I started it a few years ago --

MS. KATZEN: So did I.

MR. SHELANSKI: -- trying to fight back against these reg reform bills, the great battler, the

great battlers were Heidi Heitkamp and Claire McCaskill. Neither is there anymore to do that battle. They were the ones who were willing to come a little to the center and you're not going to get a meaningful conversation between Senator Blumenthal and Senator Lankford on regulatory reform. So I just don't know what sort of the avenue is.

MS. KATZEN: Agree, but I don't think we should assume that the current status remains forever or God help us.

MR. WRIGHT: As a followup to that, the FTC has been granted APA rulemaking authority for targeted rulemakings in a number of areas like COPPA and the Telemarketing Sales Rule and issues like that. Since we're discussing Congress, do either of you have a view on whether or not that is a potential route that, given facts and the sort of groundswell of concern around NCAs, that that would be a potential route?

MS. KATZEN: Can we agree on that, Howard?

MR. SHELANSKI: Yeah. Oh, yeah.

MR. KATZEN: All right.

MR. MOORE: Okay. One final rule formulation question, and this relates to Kristen's comment earlier that we can't write a policy statement

that says the Sherman Act, says non-compete agreements are governed by the per se rule when the court decisions are fairly clear that they're not governed by the per se rule. However, Section 5 of the FTC Act has much less law that we can follow, so we perhaps have more degrees of freedom in that avenue.

So the rule here is, non-compete agreements, rather than being banned or declared per se illegal, are deemed presumptively unfair or presumptively an unfair method of competition which would effectively require the proponent or the defender of the non-compete agreement to bear the burden to justify its use.

I'm curious what the panel thinks about that approach and what sort of evidence we would need to present to support such a rule. Presumably, we would be able to say the CEO example is not excluded by this sort of rule because it allows for a defense.

So we'll start with Howard.

MR. SHELANSKI: Look, I think legally that's probably supportable, especially if the relief is injunctive, which is what can you do, because that's going to spark a little bit less concern. People will give it a try; they'll get slapped down. So I think that's probably legally supportable.

What kind of evidence would you want? I think I'd just go back to saying you would want to know that there is enough of a field of activity in which you could make that statement and have it be empirically accurate. Look, the last panel and, you know, people here at the agency, and there's a lot of literature out there of people who are looking at this empirical question. The results, as we know, are somewhat ambiguous, but they may be strong enough in a large enough zone of activity to have a rule like that, and I think that sparks less backlash.

I think you have the authority under Section 5, as I read the very limited precedent under Section 5. I also think it would give you -- you know, if you built enough of a record, you would get enough stickiness because you don't get the private rights of action that follow on something that's not under the Sherman Act and the relief would be injunctive and it could be a good mechanism for giving guidance to workers and the agency alike.

MR. PIERCE: One of the advantages of the policy statement approach, and I'm going to ride that horse continuously, is you can rely on both statutes and every authority you've got because you can't issue a rule under the Sherman Act. That's too bad. I wish

you could, but you can't. And I think you're going to have to use Mag-Moss under -- none of that applies to -- you can issue a policy statement where you're saying we conclude that this is presumptively a violation of both, okay?

And then you're going to have a couple hundred of pages of explanation and you're going to go through the case law that applies under the Sherman Act and all the evidence that you can amass in the form of studies and findings from studies and the case law such as it exists under Section 5. And why not use both? You can use both with the policy statement approach.

MR. MOORE: Aaron?

MR. NIELSON: So on the specific contents, I confess that I don't have a lot of expertise about what that would do. I mean, I will push back a little bit again on regulation by guidance document. I don't think that's how government ought to behave. It is true that it's easy. But if you are using nonbinding law to bind, I think that we've gone off the rails a little.

So again, the executive orders don't apply to the FTC, but I think the principles in them are sound. If that's not good enough for you, I would say

you can look at the Administrative Conference. We've also done a lot of work over at ACUS on this, which I think frowns upon regulation by guidance.

MR. SHELANSKI: Can I just draw a distinction that I think is really important here, though? I agree completely that agencies whose only enforcement authority comes by virtue of their regulations shouldn't short-circuit that through guidance, and it's a battle OIRA fights year in and year out.

On the other hand, when the agency has specific statutory enforcement authority and the guidance is how we are going to exercise our statutory enforcement authority, I think that's very different from regulation by guidance. That's information or notification to the public of how we will use our statutory enforcement authority. So it's not circumventing the statute, which is what I worry more with the executive branch agencies. But it just a distinction that I think that's relevant to the FTC.

MR. NIELSON: That's right. If I could have just one quick response.

So the question is if you're going to do this guidance document that says your enforcement

policy, it better be the enforcement policy and not threat of in terrorem, like we don't want you to do things, but we're not actually going to do it. We're just -- then it starts to look more like the other.

MR. SHELANSKI: Fair point.

MR. PIERCE: That's why I would supplement that with half a dozen cases where the targets are very well chosen of the -- what's the name of that sandwich company again?

MR. MOORE: Jimmy Johns.

MR. PIERCE: And the janitorial service. I mean, my God, you bring those cases and nail them to the wall, and then that memo from the lawyer to the CEO is going to say, these people are serious, they've already hammered a bunch of people, and you're off and running.

MR. MOORE: Kristen and Sally, any thoughts on a rule that creates a presumption rather than a ban?

MS. LIMARZI: Well, I agree with Howard. I think you need the record that is sufficiently robust to say that you can make that claim, that they are in the vast majority of cases or the vast majority of these circumstances that we're enumerating here problematic. And I'm not sure based on the economic

literature that we heard about in the prior panel that we're there yet.

I wish that the state experience provided more of a natural experiment, but the state laws are changing regularly, right? There's a whole bunch of new states who have adjusted their laws with respect to this. So that may provide some natural experiments that would give us the sort of information that we might want to flesh that out.

MS. KATZEN: Broken record. I agree with Howard both times he's spoken since I did.

MR. SHELANSKI: This is a record.

MR. WRIGHT: So OIRA administrators always agree. Is that the rule?

(Laughter.)

MR. PIERCE: No.

MR. SHELANSKI: Just for the record, I have been informed, I am the only OIRA administrator to testify against extending OIRA's review to independent agencies. So we've disagreed on that one for years.

(Laughter.)

MS. KATZEN: We do. Disagree.

MR. WRIGHT: So I guess I will take it up a level of generality away from a specific rule formulation and ask, Congress has established the FTC

as an expert administrative agency to protect consumers and competition.

If the FTC were to issue a legislative or interpretive rule to address non-compete agreements, what level of deference should the agency anticipate receiving for its interpretation of either Section 5 or the other antitrust laws it administers and what factors would a court consider in assessing the appropriate level of deference; for example, the FTC's shared enforcement authority with the Department of Justice, the nature of Section 5's broad mandate to address unfair and deceptive acts or practices and unfair methods of competition, the level of evidence that the agency marshaled, or other factors?

And if I could make it a little bit more complicated --

MS. KATZEN: Start with Aaron with that.

MR. WRIGHT: -- I would like to flag something that Commissioner Phillips said in his remarks. If you could also maybe think about the nondelegation doctrine that he raised in conjunction with this.

MS. KATZEN: Where are you starting?

MR. WRIGHT: You can start with deference.

MS. KATZEN: Oh, okay, deference. If you do

a full rulemaking and you have the proper procedures and you've documented the materials, you are entitled to Chevron deference, which is pretty powerful. There is a rumor afoot that that may not be long lived and that the current court now may have a majority to get rid of Chevron deference. With respect but not deference, I don't think you can really get rid of Chevron deference because I think most generalist courts are going to look to the expert agency and credit what it has done, to a certain amount, whatever name it chooses to use for that doctrine.

If you use the Pierce route, no deference at all, as he admitted when he was describing this, because you haven't had the necessary procedures under Mead and all the other stuff to give you the background for that. So it's depending on whether you meet the standards and you have supported what you're going to do.

As to the nondelegation doctrine, I'm not quite sure where this has come from. It has been around for 220 years of which it had one good year, two cases. Schechter Poultry being one of them and I think Panama was the other. But the courts have said consistently that as long as there is an intelligible principle that the agencies can proceed. It's gotten

a lot of press in the last couple of years and Gorsuch I think is one of those who has said that it needs rethinking. Thomas before him had said it needs rethinking.

And this may be the consequence of having a court that shifts and shifts and shifts, to the right, right, right. That we'll go back to the 1930s and have substantive due process and other things that we thought had been resolved in the area of constitutional law. I'm always amazed of what comes up and the nondelegation doctrine is one that has caught me completely flatfooted.

MR. PIERCE: So let me start with the nondelegation doctrine because I -- there are now five Justices who are on record as saying they are open to the possibility of figuring out a new way of applying it. And I'm not a fan of that, but that is the reality. If they were to do that, I would think that Section 5 of the FTC Act would be a pretty good starting point.

What is far more likely, though, is the attitude that courts have, I think, always had towards Section 5. It's just so open-ended that they're skeptical and they want to kind of figure out ways of channeling it.

And on the deference point, I'll give you a little bit of background there. I now believe that degrees of deference in which, you know, Chevron versus Seminole Rock -- you know how many law professors have gotten tenure by writing an article about Chevron versus -- oh, God, it goes on and on. There's thousands of pages of debate about something that I've concluded isn't terribly important.

A little background there, right after the court decided Chevron, I started a debate with a good friend who taught at Harvard named Steve Breyer. He said this is a horrible opinion; we should stick to what we've always done; this is a terrible, simplistic approach. And I said, oh, no, Steve, there's just all these advantages. So about five years ago, I told him, I give up, I think you're probably right, it's too simplistic.

And what the court has done in the meantime in Kisor, which is actually an Auer case, but it's referred to as the Chevronization of Auer, is they have qualified Chevron to such a point where it is concurring opinion. The Chief Justice said, I don't see any damn difference between what these four Justices want and these four Justices want. So I don't think that's terribly important.

What any court is going to look at is the underlying evidentiary basis for whatever the action is -- does it fit with the statute. Whatever the statutory authority is does it seem to fit this or is the agency trying to stretch too far and whether the agency complied with the procedures required to take the action. Any court that's going to look at that, they're never -- no court is going to ignore what an agency said because they know the agency put a lot of effort into it and the agency knows more about the subject matter than they do.

But they are always going to look at those three and I don't think it makes a hell of a lot of difference whether you label that under one doctrine or another doctrine.

MS. LIMARZI: I think if I were trying to write the argument for why the Commission wouldn't get Chevron deference on the rule that you described, I would focus on the fact that deference is much, much less, the Supreme Court has said, when an agency is changing policy on which people have detrimentally relied.

And here the FTC would be writing on a backdrop not necessarily of agency policy, but decades of federal and state antitrust law that don't treat

the non-compete agreements in this fashion, as well as federal and state, state constitutions, common law, state statutes, contract law, which are all over the map, not necessarily uniform in the way that -- none of which contemplate the sort of brighter line rules that you're talking about.

Now, the response might be, if I were the agency, let's shift over, the response might be it's not a change in any of that policy because we are not passing this rule as an antitrust matter. We are not passing this rule as a contract matter or a state constitutional matter. This is under our Section 5 authority to define unfair methods of competition. And then I think you run into the question that Commissioner Phillips raised, which is, what is that, how well defined is that, and if it's totally unbounded or undefined, then have you sort of gone beyond what is contemplated.

If you can articulate what Section 5 reaches, that is, what is an unfair method of competition, what is the category of things that are an unfair method of competition but are not an antitrust violation, and you have some conception of what that is that you can articulate and then this fits within it, that would be one thing. But I

haven't heard that yet. So I think it would be to the Commission's benefit to think about that predicate question.

MR. NIELSON: So I speak with some trepidation because I may be mistaken. It was my understanding that it is very much an open question where the FTC would receive Chevron deference for an interpretation of Section 5. My understanding -- again I could be wrong, was that in the '80s in one of the dentist cases, was it Indiana Dentist or California Dentist -- one of the dentist --

MR. SHELANSKI: California.

MR. NIELSON: California. I think 1986 or something, the court did not afford Chevron and they said, but we'll give some deference or respectful consideration or something of that effect to the considered views of the agency. But that goes to Dick's point.

Does the label matter? I'm not sure. But I just think -- I believe that's still very much an open question whether you would receive Chevron deference. They would give some -- look, to the extent that you have good analysis and that you've done the homework, obviously that gets more respect because courts can tell that you've done the work, even under Skidmore.

At this point, when we start saying Skidmore and Seminole Rock, I see eyes glaze over. But this is real law that I'm saying. They would obviously give respectful consideration.

As to the question about the nondelegation, I don't anticipate the first case in 70, 85 years, to strike something down on nondelegation grounds being the Section 5 of the FTC. That strikes me as unlikely. But there is another way, and I think Dick alludes to it.

What courts will often do for very amorphous delegations is they will try find limiting constructions for them. So they try to anchor, for instance, Section 5 to the interpretations of the Sherman Act. So you have some -- maybe some wiggle room around the margins, but it's not just an open invitation to doing anything you want. And they'll do that as a matter of ordinary statutory interpretation. Say, no, we'll interpret Section 5 not to be as broad as the text might suggest. In that sense, I think that there is a role of nondelegation even if it's not a nondelegation case.

That said, you know, we live in times where folks are looking for that case to take to the Justices, because you have an invitation from 5,

including Justice Kavanaugh, a couple of months ago. So if they can find that case, I just don't think that this would be that case. That just strikes me as unlikely just in my sense of the legal world.

MR. PIERCE: Let me just bring to everybody's attention three cases that are working their way through and at least the lawyers expect to take them to the Supreme Court in the near future that are going to be interesting applications of all of this. Two of them are nondelegation doctrine cases. One of them is being argued before the Federal Circuit panel next week, and Alan Morrison, my good friend, plans to take it to the Supreme Court if he loses there, which he most certainly will. And that involves his argument that Section 232 of the Trade Expansion Act of 1962 violates the nondelegation doctrine. That's the statute under which the President in a single day, three times, changed the tariffs applicable to products that come from Turkey.

Another one that's pending and working its way up, I think will get to the Supreme Court eventually is a nondelegation challenge to the 1976 National Emergencies Act provision that without any boundaries at all seems to confer on the President the powers that President Trump exercised to reallocate

funding to fund the wall. That's going to be an interesting case and it's going to be interesting to see whether any of the conservatives bite there or whether some of the liberals perhaps join them in an opinion. And then there's a whole series of Chevron cases that are arising out of the immigration context where I've been filing lots of amicus briefs.

And what Attorney General Sessions did in case after case was he just -- he would take like five cases away from the Board of Immigration Appeals and say, I'm going to decide these myself. He has that power; there's no doubt about that. But then he'd issue this opinion that just said, well, we used to say this and now we say that, and that's the law, Chevron. And the Circuit Court said that we were right when we said what we said in the past. That's no longer the law. Citing Brand X.

And he would just go through a dozen of the things that the agency had said in the past, half of them upheld by Circuit Courts, and just Chevron and Brand X all of them away. It's going to be interesting to see how the Justices respond to the arguments about what Chevron means in the context of all of those Attorney General decisions in the immigration context.

MR. SHELANSKI: Yeah, I mean, the only thing I would say is I do think the nondelegation sentiment is growing and the implication for Chevron is I think there remains substantial sympathy for the exercise of agency expertise when the topic or the subject of regulation is reasonably clearly covered by the statute.

I think where Chevron is weakening is in the deference to the agency on the interpretation of the statutory authority. And I think that there is increasing impatience among some newly appointed Circuit Judges, some recently appointed Supreme Court Justices, for these very broad statutes that allow these agencies to then make decisions about what their authority can cover. So I think that is really the zone of reduced deference that I'm seeing.

So when it comes to Section 5, I think the focus of the case would be, is it a reasonable interpretation of your authority that you can go after non-competes through a rule? I think you're likely to get standard kind of scrutiny of your record about whether your rule is well justified by the record. Whether the sentiment against delegation is strong enough to have them say we're not going to bother to issue a limiting interpretation, as Aaron suggested

they would -- and that is what they do most of the time -- I mean they might say at a certain point this is a really broad statute, Section 5.

There is precedent saying that your authority under Section 5 is broader than the antitrust laws, but doesn't say how broad. Congress never had the authority to grant you this authority. So they could say Section 5 is done and that could be a way that they put down a marker on nondelegation. And the quality of your rule will never be reached or discussed. It will end up not being a fight about your interpretation of Section 5, it will end up not being a fight about the validity of the rule. Then I'll give you the nightmare scenario.

MS. LIMARZI: That wasn't the nightmare scenario?

MR. SHELANSKI: Oh, no. Well, the nightmare scenario is you're up there defending your rule and the solicitor general calls you and says, I've decided to go ask the Supreme Court to overrule the statute, to say the statute is unconstitutional. So in a deregulatory, née antiregulatory kind of environment, nondelegation could come in and totally shift. Now, whether Section 5 is the right candidate for it, I kind of share Aaron's skepticism, but it could happen.

MR. WRIGHT: Well, on that happy note, as was discussed in earlier panels, non-compete agreements are currently subject to a patchwork of state regulation and requirements, so the FTC has previously issued rules pursuant to the FTC Act and other enabling statutes that preempt inconsistent state laws. Does rulemaking present potential benefits for establishing a nationwide standard to govern non-compete agreements and what issues should the FTC consider in assessing whether state law preemption is appropriate if it undertakes rulemaking in this area?

And so I will throw that out to -- we can start with Sally and Aaron or anyone can jump in. Actually, Kristen alluded to this a little bit earlier. So if you'd like to jump in as well.

MS. LIMARZI: Well, I'm not going to try to answer the preemption question. I will leave that to Sally and Aaron and others. The only thought I had about it is -- and elsewhere in the outline, I don't think we've talked about kind of cost-benefit and all the trappings of that that you would need to establish for the rule.

And I do think this preemption question is tied into that because if you are actually preempting

state law and establishing a single national standard that employers could follow and that, you know, national employers could follow, I think you have a much easier time making the argument that there is some salutary benefit in terms of efficiency. If you're layering this on top of the existing patchwork of state and it's just one other slightly different rule, I think that gets a lot harder. But I will leave it to Sally for the hard one.

MS. KATZEN: So much is in flux and preemption is one of them. It had been traditional to think about it in terms of states could do more, but could not do less. In other words, the federal, the national rule was the floor, and then states could do more. That used to be what was the lore, if not the law, of preemption. That, too, has been challenged recently. The whole debate in the environmental area with whether California can set a higher standard with respect to automobile emissions, for example, is one where there are serious challenges to that principle.

This is a harder area to apply that general principle to because of the complete patchwork and what is the floor that you're looking for? What is the minimal level? I'm not sure not only how this

would play out, but how it would be perceived by the courts. I tend to think that if the FTC were to do a rulemaking and were to focus on national trends and include in the data that were examined companies that had facilities or offices in multiple states, that an argument could be made, and based on documented evidence that there was a purpose for a single national level or at least again, a floor, that you could proceed.

I think it would be a difficult analytical and a difficult data process. But I tend to think, given the old-fashioned way I think of things, that it might prevail.

MR. NIELSON: So just a couple of thoughts. One thought is -- and this is not a legal thought; it is just I guess a practical thought -- and that is as I hear the economists speak about these, it seems like there are certain types of non-competes that are more defensible than others. How are they distributed geographically, the groupings of where those are useful and where they are not?

So there is some danger that you will pick a nationally uniform standard, but actually it will be a good fit for some places and a bad fit for others. That just adds another level of complexity to how you

would actually do that rule. Because it might very well end up that we have a bright line rule that is a very poor fit for again -- I'm just completely spit-balling it here -- like the oil fields in North Dakota might actually just be a different type of market than what's happening in California. So that adds just another level of complexity on the analytical side to make sure that you get the right rule.

Just as a legal like black letter admin law, yes, it's generally thought the agencies have the power to issue preemptive rules because legislative rules is essentially the statute. There is some pushback as to whether that's okay. Analytically, it gets hard when you start talking about Chevron in that context or another forms of deference because usually you need a clear expression of legislative authority to preempt because of the canons in favor of nonpreemption. But if you already have that, then you don't really need Chevron anymore. And that's where it gets a little bit complicated.

So I think prudentially the question is, does it make sense to have a national rule? Legally, you could probably do it, but I think it would depend on how you do it and it can get messy kind of fast and

some courts might be wary unless you had pretty strong preemption authority that they would find inferred preemption authority.

MR. PIERCE: I would urge the Commission to start by looking at the DC Circuit's opinion in the latest net neutrality battle. As I suspect you all know that net neutrality is, in a sense, the poster child for Chevron deference, and it was the context in which the Supreme Court issued the Brand X opinion because the FCC has changed its position on net neutrality four times.

And every time, the Court has said, hmm, okay, but it takes about 100 pages, the last one, but, all right, Chevron, Brand X, yeah, you can do it, but they added this time that it doesn't preempt states from regulating internet access. You think about that and you say, well, that's nuts. Whether you're for or against net neutrality, the idea that it will have 50 legal regimes applicable to the internet is -- so FCC then said, oh, dear. They said that it doesn't preempt.

But the Court actually provided a kind of a road map to how FCC could preempt it and FCC now has taken another action in which it has explicitly found that there's a conflict between its no net neutrality

rule that applies nationally and any rule, like California already has one, that would mandate net neutrality within a state. And we'll see how that works. But that opinion of the DC Circuit is a good illustration of how much more effort you have to take in order to go over the preemption hurdle, even if you cross all of the other hurdles.

MR. SHELANSKI: I don't have anything to add.

MR. MOORE: So I want to ask a few questions from the audience and remind everyone in the audience that if you have additional questions, flag someone and write them down on a note card. So this is a question for the panel, volunteers, whomever is interested can go first.

So the question is, could the FTC justify a rule on the following grounds: The rule does not go beyond our enforcement authority at all; we are doing a rule solely for the practical reason that non-competes are so ubiquitous that no realistic number of cases would deter them? Any takers?

MS. LIMARZI: What does that mean, no realistic number of cases would deter them? Like enforcement is impossible or inefficient?

MR. MOORE: It's not impossible, but

insufficient given our remedies, that non-competes are ubiquitous, they're everywhere, all sorts of employers use them, and an injunction employer by employer is not realistic to solve the problem. So it's incumbent upon us to do rulemaking or to attempt some sort of market-wide solution.

MS. LIMARZI: I think there's -- so that seems like two of what are at least three essential steps, right? They're everywhere and we don't have the resources to enforce them. The middle part is they're problematic in these circumstances, right? And we have established that with sufficient confidence, that we've fashioned such and such rule that responds to that, right?

MR. SHELANSKI: I'm not really sure how a rule solves that problem. I mean, that seems like the grounds for legislation with a private right of action.

MR. MOORE: That actually bleeds into another audience question which is near and dear to my heart as an attorney in the Office of Policy Planning, where it is often suggested by private parties and other entities from government that we use our 6(b) subpoena authority to study this and that. And the idea is that the tool is available and everybody wants

to use it. And so this relates to Section 5 being fairly open-ended and, therefore, a potentially useful tool to get at a number of issues.

So the question is, stepping back from what the rules should say or what the rules could -- what rule could be defended in court, is the FTC the right entity to be trying to solve this problem? Might Congress be a better avenue or a more appropriate place to address these sorts of questions, or even another agency like perhaps the Department of Labor or perhaps the National Labor Relations Board, or some arm of the Department of Labor, given that the interests that are being sought to protect here are workers' interests? And sometimes workers' interests don't necessarily jibe with competition.

MR. NIELSON: I'll take one stab at it. I mean, I always want Congress to be the one to act. A lot of these problems about legal authority, all of that stuff would fall away if Congress decided that it was the thing that it wanted to act on. So yeah, I mean, assuming that the policy is correct, then I certainly think it would be wonderful if Congress was the entity to do that. I don't think that's likely we're going to get that legislation.

MR. SHELANSKI: I would just ask where

they're going to get the basis for their legislation.

MS. KATZEN: From the FTC.

MR. SHELANSKI: So that's -- I agree with Sally.

MS. KATZEN: You do the study. You amass the information. You compile the extent to which it's pervasive, the various forms in which it takes, and the consequences on labor relations, on barriers to entry, on new -- we heard in the last panel, new firms coming up, and you provide all that information to Congress and say, here.

MR. MOORE: What about the issue of whether the Federal Trade Commission as opposed to a government agency that is specifically entrusted with thinking about and protecting workers, being the entity that ought to be thinking about these sorts of issues?

And, Howard, this goes to your earlier statement about the Bureau of Economics being 80-something very talented economists, who mostly study industrial organization economics and not necessarily labor economics.

MR. SHELANSKI: Yeah. So, I mean, there's no reason it has to be -- you know, you could put together a group of folks from CEA, BE, the Department

of Labor -- look, the Bureau of Labor Statistics has historically been just a first-rate operation. You've got the folks at ERS, at Department of Agriculture on agricultural work. I mean, there are a lot of places where you have repositories of knowledge and expertise that would be relevant to the stakeholders here.

So, you know, industrial organization, microeconomics, I think that the bargaining issues and the econometrics are very much in the skill set of BE, even if the specific subject matter is not one that they're as attuned to. So to me, it's a question of capacity. And I just don't know that -- if the Department of Labor has people to contribute, I don't think it has to be one agency. But I certainly don't think it should just be the congressional hearing process. That would be the input -- because you're going to get a lot of anecdotes, a lot of stories. But you're not going to get the kind of really serious analysis that would come out of statisticians and economists.

Again, if I had to pick one entity, I would pick BE for lots of reasons. I mean, it's not because I spent three years very happily at BE. It's because I've spent a lot of time working with the expert capacity at all of the other agencies that you've

mentioned. And, look, there are some fabulous people at those agencies, at every single one of them, today and always have been. I don't see the concentration of expertise and focus and balancing of the interests that I would anticipate would happen here. I mean, DOJ has a great group of economists, too. Not as good, but they're very good, very good. Almost as good.

MS. LIMARZI: Would you say, Howard, that a joint -- I mean, if you're following the model Sally laid out, right, which is you do all of the -- the expert agencies do all of the analysis, hand the data to Congress and say craft legislation, is that analysis better by virtue of being a joint venture? That is taking the extraordinary skills of BE, but also some of the sort of specific knowledge areas of Bureau of Labor Statistics or Ag or do you get a more robust and, therefore, potentially more effective presentation to make to Congress?

MR. SHELANSKI: I think you do. And who would mediate that and assemble it, you know, whether it's CBO or whether it's, you know, Congressional Research Service, or who it is. But, I mean, I do think there's so much expertise that could be marshaled. And, you know, I'm with Aaron, with

something like this, there's real virtue to having Congress put in place the relevant legislation rather than making an agency on questionable authority try to leverage all of that.

But we all know how hard it -- look, you know, President Obama did not want to do the Clean Power Plan Rule. He wanted Congress to legislate serious climate change legislation. It didn't happen. He fell back on regulations. So would Congress view this as something significant enough? We actually may be at a moment where it is. But I don't know.

MR. MOORE: So this last question -- I think we just have time for one more -- is for the antitrust lawyers or the antitrust experts on the panel and it's about rules versus standards in antitrust. And I'm going to make an assertion that you should feel free to disagree with. So the assertion is modern antitrust jurisprudence over the last 40 years, courts have determined in a number of cases that practices previously considered unlawful per se should be governed by the rule of reason. A few examples would be vertical territorial restrictions, resale price maintenance, and others.

Would competition rulemaking generally run counter to that trend? And would that potentially

cause some sort of problem in judicial review?

MR. PIERCE: My answer is yes, but as you guys note from the excellent workshops that you've run on vertical issues, there's a whole lot of work that's been done that suggests that somebody's got to persuade the courts to be more receptive to arguments that say that this kind of vertical restraint or that kind of vertical restraint is extremely problematic. So I think that's -- it will be a battle in this context or any other, but I think it's a battle that this agency's got to take on.

MR. SHELANSKI: Look, I think for the rule to be meaningful -- so you could just move into an agency and away from courts the fact-finding and enforcement decision under the same effective standard. So if the rule is going to actually do something that is regulatory and actually cover in a more prescriptive way a field of activity, it would have to counter the trend of moving towards more case-specific fact-bound rule of reason inquiry. And I think that otherwise it's just shifting the locus of where that analysis happens. So the answer is yes, if the rulemaking is going to be meaningful, it would be contrary to that trend.

MR. MOORE: Do you think that's a problem,

though?

MR. SHELANSKI: Look, I don't have time for the full answer on that. The answer is not necessarily. There are some things that -- the thing that originally motivated the adjudicative model and that would make it look very attractive for antitrust, leads over time to systematic shifts in doctrine that actually can -- you can see ways that iteratively over time it makes it harder to bring cases.

To the extent that rulemaking could be a corrective reset of the doctrinal baseline that holds more firmly, that is stickier, it could really have some advantages. But let's not forget the decades of deep experience and learning with the difficulties of getting the rule right and of implementing the rule properly. Regulation can always look like the thing that's greener on the other side of the fence. It has its own serious difficulties. So I think you would want to pick very carefully the areas that you did use regulation to correct that drifting doctrinal baseline.

MR. MOORE: Kristen?

MS. LIMARZI: Yeah. I sort of alluded to this earlier, but this is where I feel like our conversation today merges with a sort of more

existential question for the FTC about the scope of Section 5.

And so let me back up to the shift from a rules-based approach to a standards-based approach. To a certain extent, we have shifted in competition law over the last 50 years as a result of increased economic rigor, right? We have moved away from, not entirely, but a lot of that shift has come from -- we moved away from the -- you know, the SCP, the structure, conduct, performance paradigm.

We have a much better understanding now of the harms of potential anticompetitive conduct, but also the contexts in which they're justified or potentially procompetitive. We are much better at drawing those lines in the antitrust context and we have honed that spear and we've honed that spear through demanding economic rigor in antitrust analysis.

So I think if you say that you can't bring -- and I think there is a lot of consensus -- not entirely, but a lot of consensus that it would be incredibly difficult to bring an antitrust action, an actual Section 1 action on noncompete agreements. Hasn't been done successfully by private plaintiffs. It hasn't -- the agencies haven't attempted it.

And so I think you need to think about why that's not -- why would that not be successful. Is it not successful because we cannot establish the sort of competitive effects with the economic rigor that the antitrust laws now demand? And if that's true, I don't think the answer is to say, well, in this instance, we're just going to forget about the spear we've honed and we're going to go back to the club. And, you know, never mind. Or do you want to say this is not -- this is a different animal?

This is not competitive effects in the way that we have thought about them and in the way that the Sherman Act addresses them. The problems we're seeing here are different. They're not not problems. They're serious problems and we have serious concerns about them. But they are something different and that's why we're going to use our Section 5 authority, which we've acknowledged is broader than the antitrust laws to get at that.

And it's kind of a broken record, but, again, I think it's about thinking about what is that Section 5 authority, what is the content of that, and grounding a rules-based approach in a Section 5 authority, and then there is less tension with the trend towards standards-based approaches under the

antitrust laws.

MR. MOORE: Thank you for that. And with that, we are at the end of our two hours. And I would like to invite you guys to give the panelists a round of applause. We asked a lot of them.

(Applause.)

MS. MACKEY: So I get to give our closing remarks today. I have always found that the best closing remarks are often the briefest. So I will keep this short because it has been a long day. I think we have all learned so much from all of our panelists that we started with at 8:30 this morning and moved through today. And I thank all of them for their very thoughtful perspectives, the time that they spent today, and the time that they have spent in developing what they were going to say today. That is a true gift to the FTC and to anybody who watches this. So thank you very much. We are in your debt.

I want to remind everyone that the public comment period is open until February 10th. We want to learn from you, too. So you have time. Please look at the record. The transcript will be up very soon, as will the video. You can go back and cite to the transcript. It can help you refresh your memory on what we heard and learned today.

And to all of those who came in person and for those who are watching, thank you so much for your time. Everybody have a great evening and we are done.

(Applause.)

(Hearing concluded at 5:28 p.m.)

CERTIFICATE OF REPORTER

I, Janet Evans-Watkins, do hereby certify that the foregoing proceedings were digitally recorded by me and reduced to typewriting under my supervision; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, not financially or otherwise interested in the outcome in the action.

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