Hipster Antitrust and Labor Monopsony: Why the Federal Trade Commission Should Throw a Punch at the UFC

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ABSTRACT: Antitrust enforcement is entering a new age. It has long overlooked labor market monopsonies, instead focusing on product market monopolies. In recent years, though, empirical findings in economics literature uncovered that labor markets are far more concentrated than free-market economists theorized. Accordingly, former President Joe Biden issued a July 2021 executive order directing his administration to devote unprecedented attention to labor market competition. This Note argues that the Federal Trade Commission ("FTC") should bring an enforcement action against the Ultimate Fighting Championship ("UFC") to reform the labor market for mixed martial arts fighters. The UFC acquired monopsony power through a series of anticompetitive mergers, and it maintains its market dominance with exclusionary contracts that prevent competition for fighters' services. The FTC investigated the UFC for antitrust violations twice in the 2010s, but each inquiry yielded no action under lax enforcement regimes. Pursuing a case now would demonstrate the failures of old policy. Monopsony neglect allowed firms to anticompetitively obtain and entrench labor market power. In turn, concentrated economic power suppressed workers' wages far below what they would be in a market where employers compete for workers' labor.

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Introduction

"Dana! Sixty G's, baby!"[1] UFC fans likely recognize this quote: "The Notorious" Conor McGregor wanted to be rewarded after a dominant win in his 2013 UFC debut. He cried out to UFC President Dana White during his post-fight interview, lobbying for a knockout-of-the-night bonus. White obliged, and the UFC paid McGregor $76,000 for his performance: $8,000 in base pay; $8,000 for winning; and $60,000 for earning the knockout-of-the-night honor.[2]

For those who are familiar with McGregor, it is difficult to look back now and separate him from his enormous financial success. But the superstar was on social welfare in Ireland when he made his UFC debut.[3] He spoke candidly

1. UFC Hub, *The Quote That Started Conor McGregor's Career!*, YOUTUBE (Mar. 28, 2022), https://www.youtube.com/watch?v=U4kYnMLfEIc [https://perma.cc/9FMU-GYR3].

2. Alan Draper, *UFC on Fuel TV: Mousasi vs Latifi Fighter Salaries, Attendance & Gate*, SPORTSDAILY (Mar. 24, 2018), https://thesportsdaily.com/news/ufc-on-fuel-tv-mousasi-vs-latifi-fighter-salaries-attendance-gate-fox11 [https://perma.cc/8WXL-DW6N]. It is important to note this is an unofficial (but credible) estimate based off of previously disclosed data from similarly situated fighters. *See id.* Official pay data are rare because the UFC is notoriously secretive about fighter pay. *See* Jonathan Snowden, *The Business of Fighting: A Look Inside the UFC's Top-Secret Fighter Contract*, BLEACHER REP. (May 14, 2013), https://bleacherreport.com/articles/1516575-the-business-of-fighting-a-look-inside-the-ufcs-top-secret-fighter-contract [https://perma.cc/9VWD-LDTY].

3. *See* Scott Davis, *Conor McGregor Collected a $235 Welfare Check One Week Before Becoming a Star in His First UFC Fight*, INSIDER (July 12, 2017, 8:06 AM), https://www.businessinsider.com/conor-mcgregor-welfare-before-first-ufc-fight-2017-7 [https://perma.cc/7KT3-3LGP].

after the fight about how much receiving bonus pay helped his dire situation.[4] And after his second fight—where he won by judges' decision—McGregor said he felt like he lost the bout: "I'm looking to get paid here. We get looked after when we finish.[5] This promotion wants finishes, you know what I mean? . . . I need to put people away. I need them big fights, or I'm going to end up in debt pretty fast."[6]

Fortunately, the icon's meteoric rise in the UFC was wildly lucrative.[7] McGregor topped the Forbes' list as the world's highest-paid athlete in 2021, raking in $180 million (though the vast majority came from selling his whiskey business rather than stepping inside the octagon).[8] "The face of the fight game," as his Instagram bio reads for nearly fifty million followers, is infamously materialistic. McGregor is celebrated for his flashy lifestyle—with a Lamborghini yacht, multi-million dollar watches, and a supercar for every day of the week.[9]

Conor McGregor, though, is an outlier. And while his rise to ultra-wealth is unparalleled among fighters, his humble beginnings are more standard.[10] This kind of story—where skilled laborers at the peak of their profession struggle financially—occurs in the UFC with shocking regularity for a company valued at $12.1 billion.[11] It is not uncommon for UFC fighters to need help

4. *See* ESPN MMA, *McGregor Entertains the Media and Fans After UFC Debut*, FACEBOOK, at 00:14 (Apr. 6, 2020), https://www.facebook.com/ESPNMMA/videos/mcgregor-entertains-the-media-and-fans-after-ufc-debut/631147930797336 [https://perma.cc/ME92-NVZD] (recording McGregor saying "just last week I was collecting the social welfare . . . . I was in [there] saying to them 'I don't know what's going to happen'").

5. By "finish," McGregor means ending the fight with an exciting knockout or submission rather than winning via the judges' scorecards after the bout's time expires. An exciting "finish" can take a fighter's pay, for example, from $8,000 to $76,000 if it earns a bonus like knockout of the night. *See* Draper, *supra* note 2.

6. Karyn Bryant, *UFC Fight Night: Shogun vs Sonnen Post-Fight Press Conference (LIVE!)*, YOUTUBE (Aug. 17, 2013), https://www.youtube.com/watch?v=9H7zuLodfhs&t=2092s [https://perma.cc/47TV-A53B] (starting at 24:15 and quoting McGregor at 34:35–35:26).

7. *See* Joe Pompliano, *How Conor McGregor Made $600 Million in a Sport Notorious for Its Low Pay*, HUDDLE UP (May 31, 2023), https://huddleup.substack.com/p/how-conor-mcgregor-made-600-million [https://perma.cc/E3B8-QWC7].

8. *See* Brett Knight, *The World's 10 Highest-Paid Athletes: Conor McGregor Leads a Group of Sports Stars Unfazed by the Pandemic*, FORBES (May 12, 2021, 6:30 AM), https://www.forbes.com/sites/brettknight/2021/05/12/the-worlds-10-highest-paid-athletes-conor-mcgregor-leads-a-group-of-sports-stars-unfazed-by-the-pandemic [https://perma.cc/9TTK-8CH9].

9. *See, e.g.*, Sunderam Saxena, *5 Coolest Things That Conor McGregor Has Bought*, SPORTSKEEDA (July 23, 2021, 9:57 AM), https://www.sportskeeda.com/mma/5-coolest-conor-mcgregor-buys [https://perma.cc/X8FL-VUVV].

10. *See, e.g.*, Ross Cole, *10 Rags to Riches Fighters Stories in the UFC*, LOWKICK MMA (Nov. 24, 2016), https://www.lowkickmma.com/10-inspiring-rags-to-riches-stories-in-ufc [https://perma.cc/9LDY-CMXR]; *Ngannou's Humble Beginnings Prepared Him for UFC*, ESPN, https://www.espn.com/video/clip/_/id/22371885 [https://perma.cc/DH4A-SG2Y].

11. *See* Michelle Chapman, *UFC, WWE Combine to Form a $21.4 Billion Sports Entertainment Company*, PBS (Apr. 3, 2023, 5:54 PM), https://www.pbs.org/newshour/economy/ufc-wwe-com

covering basic living needs. Dwayne "The Rock" Johnson bought one fighter a house in 2023 because the fighter had been sleeping inside his training facility with only seven dollars to his name.[12] In 2022, another fighter needed Dana White to cover his rent for a year so he could avoid homelessness.[13] Fighters have been outspoken about their low wages for over a decade, explaining that training and travel expenses sometimes even exceed their UFC earnings.[14]

These anecdotes illustrate a broader point: The UFC has a fighter pay issue.[15] The UFC pays fighters less than twenty percent of its revenue while athletes in other elite professional sports leagues receive over half of league revenue.[16] But Dana White says the UFC's compensation model is fair: "Fighters always want to make more money. . . . It's never gonna happen while I'm here. Believe me, these guys get paid what they're supposed to get paid."[17]

The UFC controls about ninety percent of the market for mixed martial arts ("MMA") fighter services.[18] Its market dominance is known as a monopsony—the inverse of its better-known economic counterpart, a

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bine-to-form-a-21-4-billion-sports-entertainment-company [https://perma.cc/SFH8-WDM7] (listing UFC's valuation); *see also* Alexandra Steigrad & Josh Kosman, *UFC Fighters Rage Over Low Pay While Investors Reap Big Dividends*, N.Y. POST (Feb. 28, 2020, 10:38 PM), https://nypost.com/2020/02/28/ufc-fighters-rage-over-low-pay-while-investors-reap-big-dividends [https://perma.cc/4BWC-UYMF] (describing a fighter's outrage hearing Dana White tipped a waitress $10,000—the same amount the UFC paid him—as the fighter worked two part-time jobs on top of fighting).

12. Brett Okamoto, *Dwayne "The Rock" Johnson Buys House for UFC Fighter*, ESPN (Aug. 3, 2023, 10:13 PM), https://www.espn.com/mma/story/_/id/38130516/dwayne-rock-johnson-ufc-themba-gorimbo-new-house [https://perma.cc/SDF4-Z6BC].

13. Farah Hannoun & Ken Hathaway, *Dana White on Taking Care of Joe Pyfer: He Said He Was About to Be Homeless, and 'That Ain't Gonna Happen*,*'* MMAJUNKIE (Sept. 21, 2022, 1:15 PM), https://mmajunkie.usatoday.com/2022/09/ufc-news-dana-white-explains-taking-care-joe-pyfer [https://perma.cc/BQ4G-YTSW].

14. *See, e.g.*, Damon Martin, *John Cholish Explains How Much It Costs to Be a UFC Fighter*, BLEACHER REP. (May 23, 2013), https://bleacherreport.com/articles/1649483-john-cholish-explains-how-much-it-costs-to-be-a-ufc-fighter [https://perma.cc/28PP-LARV]; Ben Kiely, *UFC Star Myles Jury Gives Eye-Opening Breakdown of Fighters' Expenses*, SPORTSJOE (Oct. 27, 2015), https://www.sportsjoe.ie/mma/ufc-star-myles-jury-gives-eye-opening-breakdown-of-fighters-expenses-46301 [https://perma.cc/K987-CPBS].

15. *See, e.g.*, Le v. Zuffa, LLC, No. 15-cv-01045, 2023 WL 5085064, at *25–27, *42–43 (D. Nev. Aug. 9, 2023); Carl J. Gaul IV, Comment, *The Ultimate Fighting Championship and Zuffa: From 'Human Cock-Fighting' to Market Power*, 6 AM. U. BUS. L. REV. 647, 671–75 (2017); Z.G. Harris, *UFC Fighter Pay: What's Wrong with It and How to Solve It*, BLEACHER REP. (July 31, 2013), https://bleacherreport.com/articles/1722953-ufc-fighter-pay-whats-wrong-with-it-and-how-to-solve-it [https://perma.cc/325V-45XS].

16. *Le*, 2023 WL 5085064, at *33–35, *42; *see also* Videotaped Deposition of Alan Manning at 9, *Le*, 2023 WL 5085064 (D. Nev. Aug. 9, 2023) (No. 15-cv-01045), ECF No. 524-12, 2018 WL 7620329 ("The use of wage share as informative about the extent of competition in the labor markets is well attested, especially in the field of sports economics.").

17. GQ Sports, *Dana White Replies to Fans on the Internet | Actually Me | GQ Sports*, YOUTUBE, at 2:40 (Aug. 11, 2022), https://www.youtube.com/watch?v=iAXgjFfQSfw&t=140s [https://perma.cc/WDH3-C47C] (starting at 2:20).

18. *See Le*, 2023 WL 5085064, at *16–19.

monopoly.[19] The more familiar "monopolist" term references one seller among many buyers, whereas a monopsonist is "one who is a *single buyer* for a product or service of many sellers."[20] In a concentrated labor market, a dominant employer is the only buyer of many workers selling their labor.[21] Labor monopsony is problematic because a monopsonist employer disciplines its purchases of labor to drive wages below what they would be if other companies were competing for those employees.[22]

Even though anticompetitive monopsonies have always been illegal, antitrust enforcement has almost exclusively focused on monopolies in product markets.[23] Labor monopsony has received little attention:

> [W]e know that a litigation gap exists: antitrust law neglects labor monopsony . . . .
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> . . . As economic understanding of labor monopsony advances, the law needs to catch up.
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> Legal academics also need to catch up. The imbalance between product-market litigation and labor-market litigation is matched by an imbalance in legal research on product-market antitrust (which is voluminous) and legal research on labor-market antitrust (which is puny).[24]

New policies from the Biden Administration, however, suggest the tide is starting to turn to give monopsony enforcement the attention it has long been without.[25]

This Note argues that the FTC should bring an enforcement action against the UFC to reform the labor market for MMA fighters. Part I discusses the

19. Weyerhaeuser Co. v. Ross–Simmons Hardwood Lumber Co., 549 U.S. 312, 321–22 (2007).

20. *Monopsonist*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/monopsonist [https://perma.cc/ZN85-VFAQ] (emphasis added).

21. *See* Carmen Sanchez Cumming, *Understanding the Economics of Monopsony: How Labor Markets Work Under Imperfect Competition*, WASH. CTR. FOR EQUITABLE GROWTH (Apr. 6, 2022), https://equitablegrowth.org/understanding-the-economics-of-monopsony-how-labor-markets-work-under-imperfect-competition [https://perma.cc/Z6SV-TY4K].

22. *See, e.g.*, Todd v. Exxon Corp., 275 F.3d 191, 206–07 (2d Cir. 2001); Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1037–38, 1040–45 (2019); Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397, 411, 421–22 (2021).

23. *Compare* The Case of Monopolies (1602) 77 Eng. Rep. 1260, 1263 (KB) (recognizing a firm with market power illegally harms employees), *and* Anderson v. Shipowners' Ass'n of the Pac. Coast, 272 U.S. 359, 362 (1926) (holding the Sherman Act applies "in respect of the employment of seamen"), *with* Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1373 (2020) (finding that as of 2020, "the government ha[d] never . . . blocked a merger or even evaluated a merger based on its labor market effects").

24. Marinescu & Posner, *supra* note 23, at 1394.

25. *See infra* Section I.B.2; *see also* Marcia Brown, *The Next Generation of Law Students Is Obsessed with Lina Khan*, POLITICO (Nov. 6, 2023, 5:00 AM), https://www.politico.com/news/magazine/2023/11/06/law-students-antitrust-lina-khan-00124240 [https://perma.cc/NND9-YUK3] (discussing how antitrust enforcers in the Biden Administration are leading "a potential antitrust revolution").

normative origins of antitrust in the United States (i.e., what lawmakers sought to prevent when the law was enacted), how ideology has shaped the enforcement landscape, and the UFC's antitrust battles. Part II surveys new empirical findings in economics literature that show monopsonies are a much bigger problem than free-market theorists anticipated. It also explains how the UFC's anticompetitive conduct surviving two FTC investigations illustrates the failures of previous enforcement regimes. Part III proposes enforcing Section 7 of the Clayton Act and Section 5 of the FTC Act against the UFC. Enforcement would restore competition for fighters' services and send a strong signal to the rest of the economy that antitrust enforcers[26] will protect labor market competition.

I. How Antitrust History Informs Antitrust Today

This Part provides historical context about the origins of antitrust law before describing how jurisprudential developments inform its application today. Section A discusses the purpose of antitrust law by reviewing the type of economic harm the people feared. Section B explains two competing theories of antitrust enforcement. First, it describes a paradigm shift in the 1970s when antitrust law zeroed in on promoting economic efficiency (i.e., consumer welfare[27]). Second, it examines cutting-edge policy from the Biden Administration—often called the "neo-Brandeis" movement or "hipster antitrust."[28] Lastly, Section C looks at the FTC's dropped investigations into the UFC's conduct and private lawsuits against the UFC for monopsonizing the MMA-fighter labor market in violation of Section 2 of the Sherman Act.

A. Normative Origins of Antitrust Law

A crucial part of antitrust law is understanding its underlying objectives. "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give."[29] Since 1602, English common law recognized that a firm with dominant market power ordinarily raises prices for consumers, worsens product quality, and exploits employees.[30]

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26. This Note uses "antitrust enforcers" to reference the federal government's antitrust agencies—the FTC's Bureau of Competition and the U.S. Department of Justice Antitrust Division ("DOJ")—but state governments and private parties may also bring suit to enforce antitrust laws. *See The Enforcers*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers [https://perma.cc/45QR-DH22].

27. *See* Leah Samuel & Fiona Scott Morton, *What Economists Mean When They Say "Consumer Welfare Standard,"* PROMARKET (Feb. 16, 2022), https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-economists [https://perma.cc/JS69-XUDJ].

28. *See* Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 294–95 (2019) (discussing how the term "hipster antitrust" was popularized).

29. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 50 (1978).

30. The Case of Monopolies (1602) 77 Eng. Rep. 1260, 1263 (KB).

The U.S. government's purpose was clear when it enacted antitrust laws: The American people wanted "to contain the concentration of economic power."[31] Senator John Sherman explained the aim of the Sherman Act, the first-ever antitrust statute, in the congressional record:

> The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown . . . out of the concentration of capital into vast combinations to control production and trade and to break down competition.[32]

The statute passed through Congress by a combined vote of 293 to 1.[33] Populism was the driving force behind antitrust legislation; common people wanted government intervention to protect the public's interests from the ails of concentrated markets.[34]

There are three primary antitrust statutes: the Sherman Antitrust Act of 1890,[35] the Clayton Antitrust Act of 1914,[36] and the Federal Trade Commission Act of 1914.[37] Each law was passed at the end of the Gilded Age[38] or in the midst of the Progressive Era.[39]

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31. *See* ELEANOR M. FOX & DANIEL A. CRANE, CASES AND MATERIALS ON U.S. ANTITRUST IN GLOBAL CONTEXT 11 (4th ed. 2020); *accord* Kate M. Conlow, Note, *Feeding the Beast: How Facebook's Monopolization of the Digital Social Advertising Market Harms Consumers and Competition in the Personal Social Networking Market*, 108 IOWA L. REV. 859, 864–68 (2023).

32. 21 CONG. REC. 2460 (1890) (statement of Sen. John Sherman) (advocating for the Sherman Antitrust Act).

33. *See Sherman Anti-Trust Act (1890)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/sherman-anti-trust-act [https://perma.cc/3JDU-CNMG].

34. Sandeep Vaheesan, *The Evolving Populisms of Antitrust*, 93 NEB. L. REV. 370, 372 (2014).

35. 15 U.S.C. §§ 1–38 (2018).

36. *Id.* §§ 12–27.

37. *Id.* §§ 41–58.

38. The Gilded Age refers to the United States from the early 1870s to the late 1890s: The time is well-known for causing "class antagonisms [that] erupted intermittently into broad social upheavals" because of economic inequality. Richard Schneirov, *Thoughts on Periodizing the Gilded Age: Capital Accumulation, Society, and Politics, 1873–1898*, 5 J. GILDED AGE & PROGRESSIVE ERA 189, 191 (2006). Wealthy businessmen like John D. Rockefeller, Cornelius Vanderbilt, Andrew Carnegie, and J.P. Morgan were disparagingly known as "robber barons," people whose riches came from ruthless and immoral business practices, because the country's prosperity was so concentrated in the hands of so few. *See* Robert Reich, *From Robber Barons to Bezos: Is History Repeating Itself?*, ROBERT REICH (Oct. 11, 2023), https://robertreich.org/post/730907453424795648 [https://perma.cc/75AD-JL5Z]. The era is named after a novel by Mark Twain and Charles Dudley Warner that mocked "the opulent tastes and jaded sensibilities of America's wealthy." *See Mark Twain's Most Famous Books*, MARK TWAIN HOUSE & MUSEUM, https://marktwainhouse.org/about/mark-twain/major-works [https://perma.cc/V948-2B56].

39. The Progressive Era refers to the United States from 1900 to the 1920s: a period of sweeping reform premised on a "conviction that the functions of government at [that time were] too restricted and that they must be increased and extended to relieve social and economic distress." David M. Kennedy, *Overview: The Progressive Era*, 37 HISTORIAN 453, 454 (1975); *accord*

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[40] Section 2 of the Sherman Act prohibits monopolizing, attempting to monopolize, or conspiring to monopolize trade.[41] The Clayton Act and FTC Act expanded Congress's mission to prevent anticompetitive markets.[42] "Section 7 of the Clayton Act forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monopoly."[43] The FTC Act, meanwhile, established the Federal Trade Commission, and Section 5 of the FTC Act tasked the agency with bringing enforcement actions against "unfair methods of competition."[44]

One key early enforcer was President Theodore Roosevelt, whose bold agenda earned him the nickname "The Trust Buster."[45] Roosevelt thought "the motto of 'fair play for the workingman and a square deal to every American, whether employer or employee' is as good a one as could possibly be desired."[46] Accordingly, he put great emphasis on controlling corporate concertation by weaponizing antitrust law.[47] Roosevelt scored major victories for the interests of the populace by aggressively confronting anticompetitive practices of wealthy businessmen and their companies.[48] It was a striking departure from weak antitrust enforcement during the first decade of the

Progressive Era to New Era, 1900-1929: Overview, LIBR. CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/progressive-era-to-new-era-1900-1929/overview [https://perma.cc/Q5JD-2X29].

40. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958); *accord* 21 CONG. REC. 2461 (1890) (statement of Sen. John Sherman) (calling the Sherman Act "a remedial statute, a bill of rights, a charter of liberty").

41. *See* 15 U.S.C. §§ 1–2.

42. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 127 (1982).

43. United States v. Falstaff Brewing Corp., 410 U.S. 526, 531 (1973).

44. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/T5BE-SPTF] (quoting 15 U.S.C. § 45); *Our History*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/history [https://perma.cc/5LRH-C3JS].

45. *See The Trust Buster*, USHISTORY.ORG, https://www.ushistory.org/us/43b.asp [https://perma.cc/XAR7-GSTM].

46. *See Letter from Theodore Roosevelt to F. C. Nunemacher*, THEODORE ROOSEVELT CTR., https://www.theodorerooseveltcenter.org/Research/Digital-Library/Record/ImageViewer?libID=o185488 [https://perma.cc/2N8A-G87L].

47. Richard Baker, Carola Frydman & Eric Hilt, *A New Antitrust Under Biden? Lessons From the Presidency of Theodore Roosevelt*, PROMARKET (July 18, 2021), https://www.promarket.org/2021/07/18/biden-antitrust-roosevelt-mckinley-sherman-act [https://perma.cc/NF22-233R] ("Roosevelt used the Sherman Act much more aggressively than his predecessors, initiating three times as many suits as the previous three presidents combined.").

48. *See generally* N. Sec. Co. v. United States, 193 U.S. 197, 449 (1904) (breaking up a railroad trust); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 81–82 (1911) (breaking up an oil trust); United States v. Am. Tobacco Co., 221 U.S. 106, 181–84 (1911) (breaking up a tobacco trust).

Sherman Act.[49] Roosevelt's presidency illustrates how enforcement policies alone spur change in the economy, showing that "[t]radition and norms of enforcement can matter as much, if not more, than what the law says."[50]

Despite the central importance of enforcement, simply bringing an action carries no legal weight. Judicial interpretation is also vital because antitrust statutes are so vague that courts must operationalize legal standards like common law courts.[51] Former Supreme Court Justice Louis Brandeis offered a notable framework, believing courts' role was to advance both economic and noneconomic values through legal standards that stamp out "the curse of bigness."[52]

Justice Brandeis thought antitrust should protect industrial liberty—a broad idea that concentration threatens the common person's ability to fully participate in both markets and democracy by placing excessive power in the hands of an unelected few.[53] "You cannot have true American citizenship, you cannot preserve political liberty, you cannot secure American standards of living unless some degree of industrial liberty accompanies it. And . . . trusts have stabbed industrial liberty in the back," said Justice Brandeis.[54] By his account, antitrust's vision of industrial liberty protects Americans from private coercion—an inability to freely enjoy the benefits of market competition due to an economy dominated by a small number of corporate giants.[55]

A dominant firm does not need to have total control of a market to face antitrust scrutiny. Controlling ninety percent of a market "is enough to constitute a monopoly; it is doubtful whether sixty . . . percent would be enough; and certainly thirty-three [percent] is not."[56] And possessing monopoly or monopsony power is not an inherent violation of law: "[G]rowth or development as a consequence of a superior product, business acumen, or historic accident" is perfectly legal.[57] Antitrust law only prevents the *anticompetitive*

49. William Letwin, *The First Decade of the Sherman Act: Early Administration*, 68 YALE L.J. 464, 495 (1959) (noting "the Sherman Act had gone practically unenforced" and describing legislators' disapproval of antitrust enforcement before President Roosevelt).

50. TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 131 (2018); *accord* Baker et al., *supra* note 47.

51. *See, e.g.*, Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978); Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 531 (1983).

52. Jonathan Sallet, *Louis Brandeis: A Man for This Season*, 16 COLO. TECH. L.J. 365, 367, 371, 379 (2018).

53. *Id.* at 374–75; Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 742 (2017).

54. Statement of Louis Brandeis to S. Comm. (Dec. 14, 1911), *in* THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS 373–74 (1930).

55. *See* WU, *supra* note 50, at 40–41.

56. United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945).

57. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

acquisition or maintenance of market power.[58] For example, in building market share through acquiring business competitors, courts presume that a merger resulting in one firm controlling at least thirty percent of a market is unlawful; the merger "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[59] In general, antitrust law "protect[s] the competitive process for the benefit of [trading partners], not the fortunes of any particular competitor."[60]

B. *CHICAGO SCHOOL VS. HIPSTER ANTITRUST*

This Section analyzes two academic schools of thought: the Chicago School of Economics and the neo-Brandeis movement—which is pejoratively called "hipster antitrust" by critics, though many progressive lawyers facetiously embrace the term.[61] The ideologies disagree about the government's role in the economy and envision very different enforcement regimes. Theories from the Chicago School have been incredibly important in antitrust since the 1970s, but neo-Brandeisian "hipsters" have gained prominence in recent years and may change the status quo to yield more robust antitrust enforcement moving forward.

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58. Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*."); *see also Anticompetitive Practices*, FED. TRADE COMM'N, www.ftc.gov/enforcement/anticompetitive-practices [https://perma.cc/J6C4-6Y5D] (describing anticompetitive practices the FTC polices).

59. United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963); *accord* Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Just., Keynote Address at the Brookings Institution's Center on Regulation and Markets Event "Promoting Competition in Banking": Merger Enforcement Sixty Years After Philadelphia National Bank (June 20, 2023), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution [https://perma.cc/Q6FT-Y4M6] ("*Philadelphia National Bank*'s holdings are still binding. The Supreme Court has not since revisited or criticized these holdings, and the basis for the structural presumption in merger review is even stronger today than it was in 1963 and is cited consistently and authoritatively by courts throughout the country." (footnote omitted)).

60. *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act: Chapter 7*, U.S. DEP'T JUST., ARCHIVES (Mar. 18, 2022), https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-7 [https://perma.cc/J5T9-FMAS]; *accord* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

61. *Compare* Senator Hatch Office (@senorrinhatch), X (Aug. 3, 2017, 4:03 PM), https://twitter.com/senorrinhatch/status/893215862668357633 [https://perma.cc/9VVW-RFZQ] (posting "Just say no.. to #HipsterAntitrust" with a video of Senator Hatch using the term on the Senate floor while arguing "it amounts to little more than pseudo-economic demagoguery and anti-corporate paranoia"), *with* Robinson Meyer, *The Trustbuster*, ATLANTIC, July/Aug. 2018, at 17, 19 (describing FTC Chair Lina Khan "crack[ing] up" and making a joke about the hipster antitrust label).

1. Fighting Out of the Red Corner: The Chicago School of Economics

In 1979, the U.S. Supreme Court proclaimed that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[62] The Court explicitly adopted the view of Robert Bork, the Chicago School's most influential antitrust jurist.[63] Bork made economic efficiency the exclusive policy rationale of antitrust law.[64] Economic efficiency is a term of art; "it means exploiting economic resources in such a way that human satisfaction as measured by aggregate consumer willingness to pay for goods and services is maximized."[65] Believing in market solutions to economic problems, the Chicago School indulges "the strongest presumption that the existing [market] structure is the efficient structure."[66] That is, the Chicago School presumes government intervention via antitrust enforcement is inefficient, and thus rarely useful; the market is self-correcting under free-market, laissez-faire economic theory.[67]

This idea signaled a fundamental shift in the purpose of antitrust doctrine.[68] The law no longer sought to constrain the concentration of economic power, execute populist policy goals, or vindicate industrial liberty.[69] Instead, it now prohibited a narrow scope of business tactics that undermine economic efficiency.[70]

Bork's ideology was built on a contorted view of the antitrust laws' legislative history.[71] According to Bork, "Congress intended the courts to implement (that is, to take into account in the decision of cases) only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction."[72]

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62. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citing BORK, *supra* note 29, at 66).

63. *See id.*; *see also* Dylan Matthews, *'Antitrust Was Defined by Robert Bork. I Cannot Overstate His Influence.,'* WASH. POST (Dec. 20, 2012), https://www.washingtonpost.com/news/wonk/wp/2012/12/20/antitrust-was-defined-by-robert-bork-i-cannot-overstate-his-influence (on file with the *Iowa Law Review*) ("There was no systemic methodology . . . . Bork came around and said that we were protecting inefficient businesses. . . . He created this framework where antitrust should be efficient. He introduced economics into antitrust in a really systematic matter.").

64. *Reiter*, 442 U.S. at 343 (citing BORK, *supra* note 29, at 66); Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 835 (2014).

65. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 4 (1972).

66. JOHN S. MCGEE, *Commentary*, *in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING 101, 104 (Harvey J. Goldschmid, H. Michael Mann & J. Fred Weston eds., 1971).

67. *See* WU, *supra* note 50, at 85.

68. Crane, *supra* note 64, at 835.

69. *Id.* at 844.

70. *See* John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563, 569–81 (2022); *see also* Conlow, *supra* note 31, at 867 (noting the Chicago School's ideology "was always suspiciously in line with the dictates of big business" (quoting WU, *supra* note 50, at 108)).

71. Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 22 (1989).

72. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966).

The congressional record, however, plainly voices other concerns.[73] Professor Herbert Hovenkamp, widely regarded as the most authoritative antitrust scholar,[74] rebuked Bork's mischaracterization of lawmakers' intent: "Bork's analysis of the legislative history was strained, heavily governed by his own ideological agenda . . . . Not a single statement in the legislative history comes close to stating the conclusions that Bork drew."[75] Despite the lack of support for such a reading of the legislative intent, the Supreme Court adopted Bork's singular focus: "[F]loor debates reflect . . . . that Congress designed the Sherman Act as a 'consumer welfare prescription.'"[76]

The consumer welfare standard remains the measuring stick for antitrust violations today.[77] The Chicago School's ideological influence over antitrust persists, even if legal analysis differs from the technical economic regime that Bork advocated for.[78] Bork used the term "consumer welfare," but he really described allocative efficiency—a metric that focuses on maximizing society's wealth as a whole (i.e., *total* welfare).[79] To the Chicago School, companies that cause decreased marketplace competition and higher consumer prices should not always trigger antitrust scrutiny: If the net income from a firm's anticompetitive conduct outweighed consumer harm and deadweight loss,

73. *See, e.g.*, 21 CONG. REC. 2457 (1890) ("If the [concentrated] powers of [a] combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities."); 21 CONG. REC. 2460 (1890) ("The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown . . . out of the concentration of capital."); 21 CONG. REC. 2461 (1890) (calling the Sherman Act "a remedial statute, a bill of rights, a charter of liberty").

74. *See* Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 IOWA L. REV. 2039, 2046–47 (2015) (noting in antitrust cases from 1990 to 2015, "federal courts have cited [Robert] Bork 58 times, [Richard] Posner 31 times, and [Herbert] Hovenkamp 781 times"); Daniel A. Crane, *Antitrust Modesty*, 105 MICH. L. REV. 1193, 1193 (2007) ("Hovenkamp speaks with oracle-like authority on antitrust matters.").

75. Hovenkamp, *supra* note 71, at 22.

76. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citing BORK, *supra* note 29, at 66).

77. *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get, Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? 1, 8–12 (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf [https://perma.cc/6TVH-PPRE] (evaluating various welfare standards to apply in enforcement actions and advocating for Chicago School antitrust policy). *But see* Darren Bush, Mark Glick & Hal Singer, *'Don't Say New Brandeisians': A Reply to Commissioner Christine Wilson*, AM. PROSPECT (May 2, 2022), https://prospect.org/economy/dont-say-new-brandeisians-reply-to-commissioner-christine-wilson [https://perma.cc/AY4E-2BL9] (rebutting Commissioner Wilson's characterization of the consumer welfare standard and the role of antitrust enforcement in labor markets).

78. Newman, *supra* note 70, at 569–81; Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1871 (2020).

79. Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 CORNELL J.L. & PUB. POL'Y 239, 249 (1999); Crane, *supra* note 64, at 845–47.

then antitrust enforcement was thought imprudent because it would disrupt the efficient allocation of resources.[80] Put simply, a monopolist could avoid violating antitrust law if its market exploitation was profitable enough.[81] But the economic calculus is meaningfully different today. The consumer welfare standard now promotes markets where "(1) output . . . is as high as is consistent with sustainable competition, and (2) prices . . . are accordingly as low."[82] Courts find a violation of antitrust law when a firm with dominant market power harms trading partners via reduced output, stifled innovation, raised prices, or depressed wages.[83]

Still, the highly influential Chicago School's "animating principle was to achieve less government involvement in markets."[84] It solidified economic efficiency as antitrust's only normative goal using an ideology that begins with "the strongest presumption" enforcement is inefficient.[85] In the roughly fifty years since this change, many have argued that antitrust law has been unduly limited in a way that frustrates congressional intent.[86]

2. Fighting Out of the Blue Corner: Hipster Antitrust Neo-Brandeisians

Former President Biden's aggressive approach to enforcement sparked a historic pivot in antitrust.[87] It started with a July 2021 executive order: "A fair, open, and competitive marketplace has long been a cornerstone of the American economy, while excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers,

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80. *See* Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995); Skitol, *supra* note 79, at 249.

81. Samuel & Scott Morton, *supra* note 27 ("Using total welfare as a metric in antitrust cases would affirmatively put weight on the benefits to the corporation from its own anticompetitive conduct. Counting producer profits would fly in the face of what most antitrust scholars and practitioners believe antitrust law is supposed to protect against—when firms use anticompetitive strategies to erode consumer welfare, they are illegally transferring wealth and well-being away from their counterparties.").

82. Herbert Hovenkamp, *Antitrust in 2018: The Meaning of Consumer Welfare Now*, PENN WHARTON U. PA. PUB POL'Y INITIATIVE 1 (Sept. 2018), https://repository.upenn.edu/server/api/core/bitstreams/c15011d1-f4d2-4e0a-ae20-9c401cda800b/content [https://perma.cc/4JPD-QDMR].

83. *See id.* at 1–2.

84. Samuel & Scott Morton, *supra* note 27.

85. MCGEE, *supra* note 66, at 104; *accord* Crane, *supra* note 64, at 844.

86. *See, e.g.*, Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979); Lande, *supra* note 42, at 430; Khan, *supra* note 53, at 737–38; MARSHALL STEINBAUM, ERIC HARRIS BERNSTEIN & JOHN STURM, POWERLESS: HOW LAX ANTITRUST AND CONCENTRATED MARKET POWER RIG THE ECONOMY AGAINST AMERICAN WORKERS, CONSUMERS, AND COMMUNITIES 4–5 (2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Powerless-201802.pdf [https://perma.cc/BBV5-2MVL].

87. *See* Steven Hill, *Biden's Antitrust Push*, AM. PURPOSE (July 21, 2023, 9:50 AM), https://www.americanpurpose.com/articles/bidens-antitrust-push [https://perma.cc/KV86-WTDL]; Brown, *supra* note 25.

farmers, small businesses, startups, and consumers."[88] President Biden continued, reasoning that new antitrust policy is necessary because "over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality. Federal Government inaction has contributed to these problems, with workers, farmers, small businesses, and consumers paying the price."[89] The Biden Administration embraced hipster antitrust principles by calling for the DOJ and FTC to break up concentration and promote competition in U.S. markets.[90]

President Biden's neo-Brandeisian appointees ushered in a new era of enforcement.[91] Almost immediately after interventionist Lina Khan became FTC Chair, the Commission issued a policy statement declaring it would exercise its full statutory authority to enforce the antitrust laws.[92] Khan's statement rescinded FTC enforcement policy from 2015, claiming the agency's lax enforcement betrayed its broad congressional directive to police anticompetitive conduct.[93]

The FTC explicitly identified that stronger efforts are needed to promote competition in labor markets.[94] It entered a memorandum of understanding with the U.S. Department of Labor—an agreement formalizing dual-agency

88. Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021).

89. *Id.*

90. *See id.*; Gina Chon, *Breakdown: Antitrust's Hipsters Go Mainstream*, REUTERS (Mar. 10, 2021, 6:24 PM), https://www.reuters.com/article/us-usa-antitrust-breakingviews/breakdown-antitrusts-hipsters-go-mainstream-idUSKBN2B3016 [https://perma.cc/TLH6-D65B].

91. *See* Tara L. Reinhart, Steven C. Sunshine, David P. Wales & Julia K. York, *Lina Khan's Appointment as FTC Chair Reflects Biden Administration's Aggressive Stance on Antitrust Enforcement*, SKADDEN (June 18, 2021), https://www.skadden.com/insights/publications/2021/06/lina-khans-appointment-as-ftc-chair [https://perma.cc/NYD9-T28V] (discussing FTC Chair Lina Khan's appointment); Steve Lohr & Cecilia Kang, *A Star Corporate Lawyer Now Set to Take on Corporate America*, N.Y. TIMES (Oct. 28, 2021), https://www.nytimes.com/2021/10/06/technology/biden-jonathan-kanter-big-tech.html (on file with the *Iowa Law Review*) (discussing Jonathan Kanter's appointment as Assistant Attorney General for the DOJ's Antitrust Division); Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, N.Y. TIMES (Mar. 5, 2021), https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html (on file with the *Iowa Law Review*) (discussing Tim Wu's appointment to the National Economic Council as a special assistant to President Biden).

92. *See* LINA M. KHAN, FED. TRADE COMM'N, STATEMENT ON WITHDRAWAL OF THE STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT 7 (2021), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf [https://perma.cc/2F8M-P9QJ].

93. *Id.* at 1 (claiming old FTC policy "abrogates the Commission's congressionally mandated duty to use its expertise to identify and combat unfair methods of competition"); *accord* Fed. Trade Comm'n v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394–95 (1953) (describing how the FTC Act was designed to have a broader scope than the other antitrust laws).

94. Press Release, Fed. Trade Comm'n, FTC, Department of Labor Partner to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices (Sept. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-department-labor-partner-protect-workers-anticompetitive-unfair-deceptive-practices [https://perma.cc/JR9U-UMLW].

collaboration to strengthen enforcement efforts that protect workers from monopsonists.[95] According to Chair Khan, the partnership "ensure[s] that [the agencies] can work collectively to tackle illegal conduct that suppresses wages, reduces access to good benefits and working conditions, and stifles economic liberty for workers across the economy."[96] The DOJ's Antitrust Division and the National Labor Relations Board entered a similar agreement.[97]

No policy better illustrates enforcers' commitment to promoting labor market competition than the FTC's noncompete ban.[98] The FTC's rule makes it a violation of Section 5 of the FTC Act—an unfair method of competition—for an employment contract to prevent a worker from joining a rival firm after the worker's employment ends.[99] Roughly eighteen percent of employment contracts in the United States contain a noncompete clause, which covers a staggering thirty million workers.[100] Employers justify noncompetes because they protect the firm's trade secrets; they allow the firm to retain employees and recoup training costs; and they prevent theft of the firm's goodwill by an employee who develops a relationship with a customer and takes that customer to a competitor as the employee switches jobs.[101]

But those justifications are routinely unpersuasive in practice.[102] The fast-food chain Jimmy John's, for example, infamously required its entry-level "sandwich artist[s]" to sign noncompetes lasting for two years post-employment that applied to any business making ten percent of its revenue from sandwiches within three miles of any Jimmy John's location.[103] Hipster antitrust now

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95. *Id.*

96. *Id.*

97. Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Justice Department and National Labor Relations Board Announce Partnership to Protect Workers (July 26, 2022), https://www.justice.gov/opa/pr/justice-department-and-national-labor-relations-board-announce-partnership-protect-workers [https://perma.cc/M6Q3-M7DG].

98. *Noncompetes: What You Should Know*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/features/noncompetes [https://perma.cc/8BMA-R94W].

99. *Noncompete Rule*, FED. TRADE COMM'N, https://www.ftc.gov/legal-library/browse/rules/noncompete-rule [https://perma.cc/YN7N-LW33].

100. *Noncompetes: What You Should Know*, *supra* note 98.

101. Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165, 177–81 (2020).

102. *See, e.g.*, Lina Khan (@linakhanFTC), X (Sept. 2, 2024, 3:58 PM), https://twitter.com/linakhanFTC/status/1830711801945690338 [https://perma.cc/HBA7-LF9V]; Lina Khan (@linakhanFTC), X (Sept. 2, 2024, 3:58 PM), https://x.com/linakhanFTC/status/1830711804198101293 [https://perma.cc/C2L4-TPYS] (sharing anecdotes the FTC received from workers during the agency's comment period in the rulemaking process for its noncompete ban).

103. Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFPOST (Apr. 23, 2024), https://www.huffpost.com/entry/jimmy-johns-non-compete_n_5978180 [https://perma.cc/6UWL-K5SV]. To illustrate the absurdity of this clause, imagine this hypothetical: Billy is a high school senior in small-town Iowa who makes sandwiches at Jimmy John's part time. He graduates in May 2025 and moves off to his college town in California. Billy is nervous about the rigors of higher education and decides not to work as a freshman to focus

unburdens tens of millions of workers who faced that barrier to employment mobility—though legal challenges over the FTC's rulemaking authority cast doubt on whether the noncompete ban will ever take effect.[104] Even if it did, though, the rule's sweeping scope would still provide inadequate relief for UFC fighters. It does not cover the kind of concurrent-employment noncompetes that foreclose competition for UFC fighters' labor.[105]

Reforming antitrust law's approach to mergers is also central to neo-Brandeisians.[106] The Celler–Kefauver Anti-Merger Act amended Section 7 of the Clayton Act in 1950 to further crack down on anticompetitive mergers and acquisitions.[107] Antitrust hipsters want to bring interpretation of the Anti-Merger Act closer to its unambiguous legislative intent.[108] Senator Estes Kefauver described why government intervention is necessary to prevent the buildup of behemoth firms that dominate markets:

> The increased concentration of economic power is dooming free enterprise. The present trend of great corporations to increase their economic power is the antithesis of meritorious competitive development . . . . The control of American business is steadily being transferred, I am sorry to have to say, from local communities to a few large cities in which central managers decide the policies and the fate of the far-flung enterprises they control. Millions of people depend helplessly on their judgment. Through monopolistic mergers[,] the people are losing power to direct their own economic welfare.[109]

Still, corporate concentration has grown considerably since the Anti-Merger Act became law in 1950.[110] Weak enforcement is often thought to be a major

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on his classes. But Billy does well in his first year and in the first semester of his second year, too, so Billy feels ready to work again. In February 2027, he gets a job washing dishes at his old freshman dining hall. Unfortunately, one of the 2,600 Jimmy John's stores in America is only a couple of miles off campus. Billy has now broken the law; he can be held liable for breach of contract because the Jimmy John's in small-town Iowa required Billy to covenant not to compete with the firm. *See id.*

104. *See* Ryan LLC v. Fed. Trade Comm'n, No. 24-cv-00986, 2024 WL 3879954, at *14 (N.D. Tex. Aug. 20, 2024) (issuing a nationwide injunction holding the FTC's noncompete ban unlawful). Note, however, that the FTC is likely to appeal this ruling. *See* David E. Schwartz, Parker Rider-Longmaid, Joseph M. Rancour, Tara L. Reinhart & Connor A. Riser, *FTC Noncompete Rule Is Set Aside, but Appeal Is Expected and States May Act*, SKADDEN (Aug. 23, 2024), https://www.skadden.com/insights/publications/2024/08/ftc-noncompete-rule-is-set-aside [https://perma.cc/HG2D-E2GR].

105. *See infra* text accompanying notes 284–88.

106. WU, *supra* note 50, at 127–29.

107. Milton Handler & Stanley D. Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 661–64 (1961).

108. WU, *supra* note 50, at 127–29.

109. 96 CONG. REC. 16452 (1950) (statement of Sen. Estes Kefauver).

110. *See* Spencer Y. Kwon, Yueran Ma & Kaspar Zimmermann, *100 Years of Rising Corporate Concentration* 11–15 (Becker Friedman Inst. for Econ. at Univ. of Chi., Working Paper No. 2023-

contributing factor.[111] And although that argument is subject to debate in the economy as a whole, it is undeniably true for labor market monopsony power.[112]

A massive disparity exists between the number of product market monopoly and labor market monopsony cases: Monopsony litigation is incredibly rare.[113] Scholars found that in 2017, for example, the FTC and DOJ investigated fifty-one product market mergers.[114] But "[i]n stark contrast, the government ha[d] never—not in 2017, not ever—blocked a merger or even evaluated a merger based on its labor market effects."[115] In 2021, President Biden ordered his administration to address the issue by "combat[ing] the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony—especially as these issues arise in labor markets."[116] Evaluating mergers for anticompetitive effects in labor markets is starting to take hold and reinvigorating what has always been true, even if it has gone unenforced: Antitrust law protects workers, too.[117]

Enforcers thrusted anticompetitive labor market mergers into the national spotlight in two important ways. First, the federal government blocked a merger due to its monopsonistic effects for the first time ever in 2022.[118] In *United States v. Bertelsmann SE & Co. KGaA*, the DOJ argued that Penguin Random House acquiring Simon & Schuster—a merger involving two of the five largest U.S. publishing companies—violated Section 7 of the Clayton Act because industry concentration would reduce author pay.[119] The court agreed and

20, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4362319 (on file with the *Iowa Law Review*).

111. *See, e.g.*, STEINBAUM ET AL., *supra* note 86, at 6–9.

112. *See* D. Daniel Sokol & Sean P. Sullivan, *Coordinated Effects and the Half-Truth of the Lax Enforcement Narrative*, CPI ANTITRUST CHRON. 3–7 (July 2023), https://sean-sullivan.com/documents/papers/Sullivan-2023-Coordinated%20effects%20and%20half-truth%20of%20lax%20enforcement.pdf [https://perma.cc/6QFV-TDS3] (analyzing antitrust enforcement generally). *But see* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 549–60, 600–01 (2018) (analyzing labor monopsony specifically); Marinescu & Posner, *supra* note 23, at 1347, 1362, 1373, 1375, 1393–94 (same).

113. Marinescu & Posner, *supra* note 23, at 1347.

114. *Id.* at 1373.

115. *Id.*; *accord* Marinescu & Hovenkamp, *supra* note 22, at 1032.

116. Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021).

117. *See* Press Release, U.S. Dep't of Just., Justice Department Obtains Permanent Injunction Blocking Penguin Random House's Proposed Acquisition of Simon & Schuster (Oct. 31, 2022), https://www.justice.gov/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed [https://perma.cc/WY28-AMUM].

118. *See* Constance Grady, *The Planned Penguin Random House-Simon & Schuster Merger Has Been Struck Down in Court*, VOX (Nov. 1, 2022, 10:57 AM), https://www.vox.com/culture/23316541/publishing-antitrust-lawsuit-merger-department-justice-penguin-random-house-simon-schuster [https://perma.cc/E9XZ-XHTP]; Marinescu & Posner, *supra* note 23, at 1373; Marinescu & Hovenkamp, *supra* note 22, at 1032.

119. Complaint at 16–21, 25, United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1 (D.D.C. 2022) (No. 21-cv-02886).

enjoined the $2.175 billion acquisition.[120] The first-of-its-kind ruling signified a monumental step toward addressing the anticompetitive effects of economic concentration in labor markets.[121]

Second, the DOJ and FTC expanded upon how the agencies will prevent monopsonists from harming workers in the 2023 Merger Guidelines.[122] The guidelines inform the public of "the procedures and enforcement practices the [DOJ] and the [FTC] . . . most often use to investigate whether mergers violate the antitrust laws."[123] They have mentioned buyer-market concerns (e.g., employers as buyers of labor) since 1982, but not a single monopsonistic merger was blocked until 2022.[124] The 2023 Merger Guidelines are the first to explicitly discuss how a merger could harm competition for workers.[125] The Biden Administration made it clear: Enforcement efforts are evolving after empirical findings in economics literature quantified monopsony power's harmful effects on workers.[126]

C. *The UFC's Battles with Antitrust Law*

The FTC investigated the UFC for antitrust violations twice.[127] In 2012, the FTC looked into whether the UFC's acquisition of rival MMA promotion Strikeforce, its top competitor at the time, violated Section 7 of the Clayton Act

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120. *Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d at 11–12.

121. Dan Papscun, *Penguin-Simon Deal Block Spotlights DOJ Antitrust Focus on Labor (1)*, BLOOMBERG L. (Nov. 1, 2022, 3:16 PM), https://news.bloomberglaw.com/antitrust/penguin-simon-deal-block-spotlights-doj-antitrust-focus-on-labor (on file with the *Iowa Law Review*).

122. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES § 2.10, at 26–27 (2023) [hereinafter 2023 MERGER GUIDELINES], https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [https://perma.cc/SCN4-9JWS].

123. *Id.* § 1, at 1.

124. Penn Program on Regulation, *On Mergers and Workers: Labor Market Aspects of the Proposed U.S. Merger Guidelines*, YOUTUBE (Sept. 25, 2023), https://www.youtube.com/watch?v=yTMFMDdbJBg&t=1174s [https://perma.cc/LF7J-C9AG] (starting at 19:34).

125. *Compare* 2023 MERGER GUIDELINES, *supra* note 122, § 2.10, at 26 ("Labor markets are important buyer markets. The same general concerns as in other markets apply to labor markets where employers are the buyers of labor and workers are the sellers. The Agencies will consider whether workers face a risk that the merger may substantially lessen competition for their labor."), *with* Marinescu & Posner, *supra* note 23, at 1373 ("The [2010] *Horizontal Merger Guidelines* do not explicitly contemplate evaluation of mergers based on labor market effects or even mention the problem of labor market monopsony. (However, the *Guidelines* do apply to input markets and therefore in principle to labor markets.)" (footnote omitted)).

126. *Protecting Competition Through Updated Merger Guidelines*, WHITE HOUSE (July 19, 2023), https://bidenwhitehouse.archives.gov/cea/written-materials/2023/07/19/protecting-competition-through-updated-merger-guidelines [https://perma.cc/5H6R-SUS4]; *see infra* Section II.A.

127. Letter from Donald S. Clark, Secretary, Fed. Trade Comm'n, to Stephen Axinn, Counsel for Zuffa LLC (Jan. 25, 2012), https://www.ftc.gov/sites/default/files/documents/closing_letters/zuffa-llc/explosion-entertainment-llc/120125zuffa.pdf [https://perma.cc/C7PW-4GYB]; Letter from Stuart Hirschfeld, Nw. Reg'l Off. Attorney, Fed. Trade Comm'n, to Nicholas Gaglio, Counsel for Zuffa LLC (Nov. 20, 2015), https://finance.yahoo.com/news/ftc-investigation-ufc-business-practices-concludes-no-further-015407783--mma.html [https://perma.cc/SCY4-Z2FZ].

or Section 5 of the FTC Act.[128] Three years later, the Commission scrutinized whether the UFC violated Section 5 of the FTC Act "through use of long-term exclusive contracts or other exclusionary conduct."[129] Each nonpublic investigation ended with the FTC issuing the same no-action letter:

> Upon further review of this matter, it now appears that no further action is warranted by the Commission at this time. Accordingly, the investigation has been closed. This action is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further action as the public interest may require.[130]

Although the UFC has thus far escaped enforcement of the Clayton Act and FTC Act, it has not been able to evade private antitrust litigation.[131]

The UFC was sued twice for allegedly violating Section 2 of the Sherman Act.[132] The two suits—*Le v. Zuffa, LLC* and *Johnson v. Zuffa, LLC*—present substantially similar claims: Each case was brought by UFC fighters who argue the UFC engaged in an anticompetitive scheme to acquire, maintain, and enhance monopsony power.[133] Fighters claim the UFC used its monopsony power to suppress fighter pay below what it would be in a competitive labor market for elite professional MMA fighter services.[134] The distinction between the class actions is that *Le* represents fighters who competed in a UFC event

128. *See* Letter from Donald S. Clark to Stephen Axinn, *supra* note 127; *see also* Leon Horne, *UFC Buys Strikeforce: The Winners and Losers of the Purchase*, BLEACHER REP. (Mar. 12, 2011), https://bleacherreport.com/articles/633843-ufc-buys-strikeforce-the-winners-and-losers-of-the-purchase [https://perma.cc/7HTN-MF7K] (analyzing market conditions after the UFC's acquisition of Strikeforce).

129. Letter from Stuart Hirschfeld to Nicholas Gaglio, *supra* note 127.

130. *Id.*; Letter from Donald S. Clark to Stephen Axinn, *supra* note 127.

131. *See, e.g.*, Consolidated Amended Antitrust Class Action Complaint; Demand for Jury Trial at 1–9, Le v. Zuffa, LLC, No. 15-cv-01045, 2023 WL 5085064 (D. Nev. Aug. 9, 2023), 2015 WL 10008670 [hereinafter *Le* Complaint and Jury Demand]; Antitrust Class Action Complaint at 1–7, Johnson v. Zuffa, LLC, No. 21-cv-01189, 2021 WL 4204430 (D. Nev. June 23, 2021), 2021 WL 4204430 [hereinafter *Johnson* Complaint]; *see also* MMA UNCENSORED, *Fighters Win vs the UFC in Class Action Lawsuit. Judge 'Fast Tracks' Trial and Documents Unsealed*, YOUTUBE (Aug. 23, 2023), https://www.youtube.com/watch?v=wcBSwALvMrE [https://perma.cc/38K5-EB4M] (discussing class-action Sherman Act claims against the UFC with named plaintiff Cung Le and his attorney Rob Maysey).

132. *See, e.g.*, *Le* Complaint and Jury Demand, *supra* note 131, at 1; *Johnson* Complaint, *supra* note 131, at 1.

133. *Le* Complaint and Jury Demand, *supra* note 131, at 33–53; *Johnson* Complaint, *supra* note 131, at 26–41.

134. *Le* Complaint and Jury Demand, *supra* note 131, at 52–53; *Johnson* Complaint, *supra* note 131, at 41–42.

in the United States from December 2010 to June 2017, while *Johnson* does the same from July 2017 onward.[135]

Fighters allege that the UFC "a) used exclusive contracts with specific provisions to retain fighters within the UFC; b) used its market power [as both a monopolist and monopsonist] to render its fighter contracts effectively perpetual, and c) acquired or drove out rival promoters."[136] To compete in the UFC, fighters had to sign exclusionary contracts.[137] The terms included, among others, an exclusivity clause barring fighters from working with other promotions, a right-to-match clause allowing the UFC to retain exclusive rights to a fighter within a year of the fighter's UFC contract expiring simply by matching a rival firm's offer, an exclusive negotiation clause banning fighters from speaking with any promotion other the UFC for thirty-to-ninety days after the fighter's contract ends, and a tolling clause letting the UFC extend a fighter's contract if the fighter refused to perform (e.g., when the fighter declined to compete on short notice as a fill-in because the original fighter got injured during training).[138]

Fighters further allege the UFC's then-parent company, Zuffa, aggressively acquired rival firms: World Fighting Alliance, World Extreme Cagefighting, PRIDE Fighting Championships, and Strikeforce.[139] With fighters from the acquired firms now subject to Zuffa's exclusionary contracts, the UFC cut off rival promotions' access to headliner talent—which generates the lion's share of a promotion's revenue.[140] As a result, no other firms could afford to offer competitive fighter pay.[141] This anticompetitive scheme, according to the plaintiffs, let the UFC pay its fighters considerably less money than it would otherwise need to if it had to compete with other firms.[142]

To certify the fighters' class action in *Le*, the U.S. District Court for the District of Nevada needed to find that the UFC violated antitrust law by a preponderance of the evidence—and it did so.[143] The *Le* case ultimately settled, but the stakes at trial would have been huge. The court found that fighters lost between $811 million and $1.6 billion as a result of the UFC using its anticompetitive monopsony power to suppress wages.[144] And fighters sought

135. *Le*, 2023 WL 5085064, at *1; *Johnson* Complaint, *supra* note 131, at 1.

136. *Le*, 2023 WL 5085064, at *1.

137. *Id.* at *22 ("[T]he Court finds that the combined effect of the contracts' restrictive clauses created a situation where [the UFC] had the sole power to control a fighter's ability to make money for the majority of the average fighter's career. . . . These contracts . . . restricted fighter mobility and allowed [the UFC] to build concentrated power in the market for fighter services.").

138. *Id.* at *6.

139. *Id.* at *25 ("The record establishes that undermining competitors was important to [the UFC's] leadership and an essential part of its strategy to establish market dominance.").

140. *See id.* at *21.

141. *Id.* at *26.

142. *Id.* at *1, *26–27; *see supra* note 16 and accompanying text.

143. *Le*, 2023 WL 5085064, at *27.

144. *Id.* at *42–43.

treble damages, which triple monetary awards for antitrust injuries.[145] If the jury found a Sherman Act violation like the court did, then the UFC could have been liable for up to $4.8 billion in damages.[146]

Trial was initially set to begin for the *Le* class in April 2024, but the parties agreed to settle both class actions—*Le* and *Johnson*—for $335 million with no equitable remedies.[147] That settlement, however, was rejected by the judge as inadequate relief for the absent class members.[148] The parties responded by settling the *Le* case by itself for $375 million, again without equitable remedies.[149] Any hope for injunctive relief against the UFC's anticompetitive behavior remains at least several years away when the *Johnson* case under Section 2 of the Sherman Act concludes.[150]

II. Monopsony Power Is Knocking Out Competition for Labor

Advances in economics literature show that antitrust enforcement has failed to protect labor market competition.[151] The distinction between monopoly and monopsony—whether a market is dominated by one seller or one buyer—is legally insignificant: "The kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization."[152] Antitrust law prohibits the anticompetitive acquisition or maintenance of either form of market power. The U.S. Supreme Court has always taken this position; it affirmed that antitrust protects workers from anticompetitive monopsonies as early as the 1920s[153] and as recently as 2021.[154] And it is an unremarkable concept. Congress explicitly contemplated

145. *Le* Complaint and Jury Demand, *supra* note 131, at 1; *see also* 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained.").

146. *Compare Le*, 2023 WL 5085064, at *42–43 (finding up to $1.6 billion in damages), *with* 15 U.S.C. § 15(a) (tripling antitrust damages, which would turn $1.6 billion into $4.8 billion).

147. Mark Anderson, *UFC Agrees to $335 Million Settlement with Former Fighters Who Filed Antitrust Lawsuits*, Associated Press (Mar. 20, 2024, 6:25 PM), https://apnews.com/article/ufc-settlement-tko-d74b1189e1d484a914db32ec709fb6a8 [https://perma.cc/765M-CXRF].

148. *See* Scott Fontana, *UFC's $335 Million Antitrust Settlement Denied in 'Unusual Step' — with No Explanation*, N.Y. Post (July 31, 2024, 8:31 PM), https://nypost.com/2024/07/31/sports/335-million-ufc-antitrust-settlement-denied-in-unusual-step [https://perma.cc/T5NY-V6PX].

149. TKO Grp. Holdings, Inc., Current Report (Form 8-K) (Sept. 26, 2024).

150. *See* Press Release, UFC, UFC Issues Statement Regarding Development in *Le* and *Johnson* Antitrust Lawsuits (Sept. 26, 2024), https://s202.q4cdn.com/437702206/files/doc_news/2024/09/TKO_UFC-Statement_Revised-Antitrust-Settlement-Agreement_9-26-24_FINAL.pdf [https://perma.cc/V59J-Y7UA] (noting the *Johnson* case, which was filed in 2021, "is in very early stages, and a motion to dismiss the complaint remains pending").

151. Marinescu & Posner, *supra* note 23, at 1362, 1394.

152. Weyerhaeuser Co. v. Ross–Simmons Hardwood Lumber Co., 549 U.S. 312, 322 (2007).

153. Anderson v. Shipowners Ass'n of the Pac. Coast, 272 U.S. 359, 364–65 (1926).

154. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2154 (2021).

such application while passing the first antitrust statute.[155] Even in 1602, English common law recognized that dominant market power "tends to the impoverishment of divers artificers and others, who before, by the labour of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary."[156]

Unfortunately, antitrust enforcers' neglect of labor monopsony has allowed market-dominant firms to illegally suppress wages at an alarming rate.[157] Nonenforcement has made protections from the legislature and judiciary futile—to the detriment of workers.[158] In this Part, Section A explains the pervasiveness of monopsony power, and Section B analyzes how the UFC passing antitrust scrutiny epitomizes enforcers' failure to protect labor market competition.

A. The Newfound Prevalence of Monopsony Power

Free-market economists traditionally assumed labor markets are intrinsically competitive.[159] Employees, it was thought, "have sufficient knowledge of alternative opportunities and . . . move quite readily in the direction of net economic advantage."[160] These assumptions rested on the idea—like the Chicago School's thinking—that labor markets self-correct to naturally create the most efficient allocation of resources.[161] Antitrust law would be mostly unnecessary in theory, then, because competition problems in labor markets should rarely arise.[162] This has been the prevailing view in antitrust since the 1970s, and it is still an entrenched theory today.[163]

155. 21 CONG. REC. 2457 (1890) (claiming anticompetitive market power's "governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition . . . commands the price of labor without fear of strikes, for in its field it allows no competitors.").

156. The Case of Monopolies (1602) 77 Eng. Rep. 1260, 1263 (KB).

157. U.S. DEP'T OF THE TREAS., THE STATE OF LABOR MARKET COMPETITION, at ii, 23–25 (2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf [https://perma.cc/J5VJ-RYCR].

158. *See* Marinescu & Hovenkamp, *supra* note 22, at 1031–33; Marinescu & Posner, *supra* note 23, at 1393–94.

159. *See, e.g.*, J.R. HICKS, THE THEORY OF WAGES 7–9 (2d ed. 1963); GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 19–21 (2d ed. 1971).

160. Clark Kerr, *Labor Markets: Their Character and Consequences*, 40 AM. ECON. REV. 278, 280 (1950).

161. *Id.*; *see supra* text accompanying notes 66–67.

162. *See* Samuel & Scott Morton, *supra* note 27 ("To justify [their] anti-enforcement stance, Chicago School adherents asserted that markets are overwhelmingly self-correcting, an ideological claim founded on neither empirical evidence nor economic theory.").

163. *See* Francine McKenna, *What Made the Chicago School So Influential in Antitrust Policy?*, CHI. BOOTH REV. (Aug. 7, 2023), https://www.chicagobooth.edu/review/what-made-chicago-school-so-influential-antitrust-policy [https://perma.cc/8M52-GXT8] (discussing the rise of the Chicago School); Wright et al., *supra* note 28, at 295–96 (criticizing neo-Brandeis attempts at antitrust reform).

New empirical data show these laissez-faire assumptions are emphatically not true.[164] The Herfindahl–Hirschman Index ("HHI") measures how competitive a market is by quantifying its economic concentration.[165] "HHI is calculated by summing the squares of the market shares of each market participant" and assessed on a scale from zero to ten thousand.[166] A pure monopoly, where no competition exists because one firm has a one hundred percent market share, would have an HHI of ten thousand; a competitive market would have an HHI much closer to zero.[167] Under the 2010 Merger Guidelines (the most recent version before December 2023), a market was "highly concentrated" if its HHI was above 2,500.[168]

Economics research from 2018 uncovered that sixty percent of U.S. labor markets were highly concentrated.[169] A quarter of labor markets did not even have two firms competing for workers.[170] One in five American workers were in a highly concentrated labor market.[171] The average labor market in the United States—with a 4,378 HHI—was well over the threshold for high concentration, and thus had weak levels of market competition.[172] "Only [twenty-nine percent] of markets ha[d] low concentration."[173] These numbers are even more alarming after the 2023 Merger Guidelines reinstated 1,800 as the "highly concentrated" HHI threshold.[174]

Labor market competition issues are far more common than the Chicago School theorized.[175] And even though research shows sixty percent of labor

164. *See, e.g.*, José A. Azar, Ioana Marinescu, Marshall I. Steinbaum & Bledi Taska, *Concentration in US Labor Markets: Evidence from Online Vacancy Data* 13 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24395, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3133344 (on file with the *Iowa Law Review*).

165. *See, e.g.*, Michael Bromberg, *Herfindahl-Hirschman Index (HHI): Definition, Formula, and Example*, INVESTOPEDIA (June 12, 2024), https://www.investopedia.com/terms/h/hhi.asp [https://perma.cc/SV5N-XLAC]; Le v. Zuffa, LLC, No. 15-cv-01045, 2023 WL 5085064, at *26 (D. Nev. Aug. 9, 2023).

166. *See, e.g.*, Fed. Trade Comm'n v. Hackensack Meridian Health, Inc., 30 F.4th 160, 172 (3d Cir. 2022).

167. *Id.*

168. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 5.3, at 19 (2010) [hereinafter 2010 MERGER GUIDELINES], https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 [https://perma.cc/PGN5-ZSAQ].

169. Azar et al., *supra* note 164, at 2.

170. *Id.* at 13.

171. *Id.* at 2.

172. *See id.* at 2, 13.

173. *Id.* at 13.

174. 2010 MERGER GUIDELINES, *supra* note 122, § 5.3, at 19; *see also* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES § 1.5, at 15 (1997), https://www.justice.gov/archives/atr/1997-merger-guidelines [https://perma.cc/V4RR-W835] (using 1,800 as the "highly concentrated" threshold before the 2010 guidelines raised it to 2,500).

175. *Compare* Azar et al., *supra* note 164, at 2, 13 (finding sixty percent of labor markets are highly concentrated), *with* MCGEE, *supra* note 66, at 104 (describing the Chicago School's "strongest presumption that the existing [market] structure is the efficient structure").

markets are highly concentrated, hipster antitrust critics still argue "the provocative claim that antitrust enforcement under the consumer welfare standard has failed" to combat monopsonies suffers from "a lack of any empirical foundation."[176] Critics further claim, "[a]t its core, the Hipster Antitrust movement calls for a total rejection of the commitment to economic methodology and evidence-based policy that lies at the heart of modern antitrust enforcement."[177] These criticisms are flatly inconsistent with advances in economics literature.[178]

David Card won the 2021 Nobel Prize in Economics for "revolution[izing] empirical research in the economic sciences."[179] According to Dr. Card, "the time has come to recognize that many—or even most—firms have some wage-setting power."[180] He argues antitrust policy should facilitate that recognition.[181] It often isn't intrinsically competitive labor markets setting wages like the Chicago School assumed, but monopsonist firms.[182] As a result, market concentration has suppressed wages in the United States about *twenty percent* below competitive levels.[183]

Monopsony power prevents workers from "mov[ing] quite readily in the direction of net economic advantage."[184] In a concentrated labor market, employees lack leverage to negotiate more favorable employment terms; the monopsonist knows that workers cannot credibly threaten to leave and join a competing firm.[185] Because business is motivated by profit maximization,[186] economic theory suggests "[a] classical monopsonist drives wages below the marginal product of labor by restricting employment below its competitive

176. Wright et al., *supra* note 28, at 314.

177. *Id.* at 295.

178. *See, e.g.*, Azar et al., *supra* note 164, at 2, 13; Prager & Schmitt, *supra* note 22, at 411, 423–24; Efraim Benmelech, Nittai K. Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, 57 J. HUM. RES. S200, S203 (2022).

179. *The Prize in Economic Sciences 2021*, NOBEL PRIZE, https://www.nobelprize.org/prizes/economic-sciences/2021/popular-information [https://perma.cc/66Q8-CCCV]; *accord* Edward Lempinen & Yasmin Anwar, *UC Berkeley's David Card Wins 2021 Nobel Prize in Economics*, UC BERKELEY RSCH. (Oct. 11, 2021), https://vcresearch.berkeley.edu/news/uc-berkeleys-david-card-wins-2021-nobel-prize-economics [https://perma.cc/7UVK-YV77].

180. David Card, *Who Set Your Wage?*, 112 AM. ECON. REV. 1075, 1075 (2022).

181. *Id.* at 1086 (citing Suresh Naidu & Eric. A. Posner, *Labor Monopsony and the Limits of the Law*, 57 J. HUM. RES. S284 (2022)).

182. *See id.*

183. *Id.* at 1081; U.S. DEP'T OF THE TREAS., *supra* note 157, at ii.

184. *See* U.S. DEP'T OF THE TREAS., *supra* note 157, at 23–24 (discussing how "[r]ecent research has . . . demonstrated that labor market power *causes* lower wages" and "convincingly establishe[d] a causal link from mergers to increased labor market power"). *Contra* Kerr, *supra* note 160, at 280.

185. Eric Posner, *You Deserve a Bigger Paycheck. Here's How You Might Get It.*, N.Y. TIMES (Sept. 23, 2021), https://www.nytimes.com/2021/09/23/opinion/antitrust-workers-employers.html (on file with the *Iowa Law Review*).

186. *See, e.g.*, Milton Friedman, *A Friedman Doctrine— The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html (on file with the *Iowa Law Review*).

equilibrium level."[187] A dominant firm pays workers less for their productivity while keeping surplus profits for itself, and workers in concentrated labor markets have no practical recourse.[188]

Empirical findings show this type of wage suppression is happening in the American economy: Moving from the twenty-fifth percentile of market concentration to the seventy-fifth percentile correlates to decreased average wages of seventeen percent.[189] Wages stagnate after a merger significantly increases concentration in a market where workers have industry-specific skills.[190] These are the exact kind of market competition issues that antitrust law is supposed to protect.[191] Just as economic concentration creating higher prices for consumers is illegal, so is anticompetitive concentration causing lower wages for workers.[192] Unfortunately, antitrust enforcers have not enforced this established legal principle against monopsonists.[193]

B. Old FTC Policy Enabled the UFC's Anticompetitive Monopsony

In 2001, Dana White and his business partners Frank and Lorenzo Fertitta acquired the UFC for $2 million.[194] Since then, the MMA promotion has enjoyed exponential growth.[195] And growth did not come easy: The company faced stigmatization for being a violent sport, losses of more than $40 million trying to reboot its brand, and regulatory challenges—famously being called "human cockfighting" in a letter that U.S. Senator John McCain sent every

187. Prager & Schmitt, *supra* note 22, at 421 (citing JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 218–28 (2d ed. 1969) (introducing the term "monopsony" to economics academia)).

188. Marinescu & Hovenkamp, *supra* note 22, at 1038.

189. José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, 57 J. HUM. RES. S167, S169, S187 (2022).

190. Prager & Schmitt, *supra* note 22, at 411, 423–24; Benmelech et al., *supra* note 178, at S203.

191. 96 CONG. REC. 16452 (1950) (statement of Sen. Kefauver) (noting "[t]he increased concentration of economic power is dooming free enterprise. . . . [and] is the antithesis of meritorious competitive development" before passing the Celler–Kefauver Anti-Merger Act of 1950); *see also* 2010 MERGER GUIDELINES, *supra* note 168, § 5.3, at 19 ("Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.").

192. Weyerhaeuser Co. v. Ross–Simmons Hardwood Lumber Co., 549 U.S. 312, 322 (2007); *see also* Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 78 (2019) (explaining the consumer welfare principle applies to laborers even though that is not obvious from the name).

193. *See* Marinescu & Posner, *supra* note 23, at 1379, 1393–94; *infra* Section II.B.

194. Arunaditya Aima, *"We Bought the UFC for $2 Million" – Dana White Reveals How He Rescued UFC When It Was in Trouble*, ESSENTIALLYSPORTS (Oct. 2, 2021, 9:37 AM), https://www.essentiallysports.com/ufc-mma-news-we-bought-the-ufc-for-2-million-dana-white-reveals-how-he-rescued-ufc-when-it-was-in-trouble [https://perma.cc/9ERF-JWPG].

195. Chris Isidore, *UFC Owners Turn $2 Million Into $4 Billion*, CNN BUS. (July 11, 2016, 1:57 PM), https://money.cnn.com/2016/07/11/news/companies/ufc-sold [https://perma.cc/89RZ-DUJZ] (discussing the Fertitta brothers selling their stake in the UFC after earning an average annual return of seventy-two percent from 2001 to 2016).

state's governor in an effort to ban MMA.[196] But the UFC overcame every obstacle.[197] It is now wildly successful with a $2.1 billion broadcasting deal with ESPN[198] and $12.1 billion valuation amid its September 2023 initial public offering.[199] Dana White is understandably proud of the UFC's success: "If you look at what we've done with the business in the last twenty-two years, it's incredible. Never been done, ever, the things that we've done in the fight business."[200] Unfortunately, though, much of that unprecedented success came by exploiting fighters via anticompetitive labor market conduct.[201]

The UFC's rise to monopsony epitomizes antitrust enforcers' failure to protect labor market competition.[202] The FTC investigated the UFC for anticompetitive monopsonistic conduct on two separate occasions.[203] Enforcement policies, however, were too weak to thwart antitrust violations, and each nonpublic inquiry yielded no enforcement action.[204]

First, a 2012 investigation into the UFC's acquisition of Strikeforce occurred at a time when "the government ha[d] never . . . blocked a merger or even evaluated a merger based on its labor market effects."[205] Economics literature shows this neglect suppressed wages in the U.S. economy generally, as do factual findings in private litigation against the UFC specifically.[206] Next, there

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196. Rick Maese, *UFC President Dana White Aims His Mixed Martial Arts Empire at World Domination*, WASH. POST (May 21, 2014, 11:34 AM), https://www.washingtonpost.com/sports/othersports/ufc-president-dana-white-aims-his-mixed-martial-arts-empire-at-world-domination/2014/05/21/8fd4f78c-df8e-11e3-9442-54189bf1a809_story.html (on file with the *Iowa Law Review*).

197. *Id.*; Nick Greene, *How John McCain Grew to Tolerate MMA, the Sport He Likened to "Human Cockfighting*,*"* SLATE (Aug. 26, 2018, 5:24 PM), https://slate.com/culture/2018/08/john-mccain-ufc-how-he-grew-to-tolerate-mma-the-sport-he-considered-human-cockfighting.html [https://perma.cc/9VNP-BEKA].

198. *See* Damon Martin, *Ari Emanuel Praises 'Great Relationship' with ESPN but Notes There Are 'A Lot of Buyers' for Next UFC Broadcast Rights Deal*, MMA FIGHTING (Mar. 9, 2023, 11:00 AM), https://www.mmafighting.com/2023/3/9/23631865/ari-emanuel-praises-great-relationship-espn-notes-there-lot-of-buyers-next-ufc-broadcast-rights-deal [https://perma.cc/57GA-A3G2].

199. *See* Chapman, *supra* note 11; *see also* Jack McKessy, *UFC and WWE Merger Is Complete: What We Know So Far About TKO Group Holdings*, USA TODAY (Sept. 12, 2023, 12:30 PM), https://www.usatoday.com/story/sports/mma/2023/09/12/ufc-and-wwe-merge-tko-group-holdings/70831484007 [https://perma.cc/C4RX-C99Z] (describing TKO Group Holdings' IPO).

200. GQ Sports, *supra* note 17 (starting at 2:20).

201. *See* Le v. Zuffa, LLC, No. 15-cv-01045, 2023 WL 5085064, at *1, *22–27, *42–43 (D. Nev. Aug. 9, 2023); *infra* Part III.

202. *See Le*, 2023 WL 5085064, at *17 (finding the UFC is a monopsony in the elite professional MMA labor market); *id.* at *25–27 (finding the UFC engaged in anticompetitive conduct that violates antitrust law).

203. *See generally* Luke Thomas, *Federal Trade Commission Ends Second Investigation of UFC*, MMA FIGHTING (Nov. 24, 2015, 9:39 PM), https://www.mmafighting.com/2015/11/24/9796478/federal-trade-commission-ends-second-investigation-of-ufc [https://perma.cc/V7MW-DV8M].

204. *See id.*

205. Marinescu & Posner, *supra* note 23, at 1373.

206. David W. Berger, Thomas Hasenzagl, Kyle F. Herkenhoff, Simon Mongey & Eric A. Posner, *Merger Guidelines for the Labor Market* 6–10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31147,

was a 2015 inquiry into whether the UFC's exclusionary contracts violated Section 5 of the FTC Act.[207] It occurred near the beginning of a five-year period when, under a 2015 policy statement, the FTC brought just one standalone enforcement action for a Section 5 violation.[208] The UFC escaped public enforcement of the antitrust laws because labor monopsony was overlooked under Section 7 of the Clayton Act in 2012, and Section 5 of the FTC Act was diminished to a tagalong claim for other antitrust violations in 2015. As a result, UFC fighters were harmed by the kind of anticompetitive market dominance that antitrust should prevent.[209]

When the FTC first investigated the UFC in 2012, the UFC argued that it should be allowed to acquire Strikeforce because industry competition was imminent.[210] The UFC listed eighteen MMA promotions as potential or recent market entrants that made antitrust enforcement unnecessary.[211] But of those eighteen promotions, only one still operates in the United States today.[212] The lone remaining promotion, Bellator, was acquired in November 2023 by a market newcomer, Professional Fighters League ("PFL").[213] When Dana White was asked about the PFL–Bellator deal, he mocked its importance to the MMA industry: "One shitty organization that sells no tickets and nobody watches buys another shitty organization that sells no tickets and nobody watches. Sounds like a fucking winner to me, boy! Right? Woo!"[214] White's assessment is tough to argue against: PFL, although marketing itself as "becom[ing] the

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2023), https://www.nber.org/system/files/working_papers/w31147/w31147.pdf [https://perma.cc/ABT8-4XP9] (analyzing the U.S. economy); *Le*, 2023 WL 5085064, at *25–27, *42–43 (analyzing the MMA fighter labor market).

207. *See* Thomas, *supra* note 203.

208. KHAN, *supra* note 92, at 2, 5.

209. *Compare* 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman) (claiming anticompetitive market power's "governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition . . . commands the price of labor without fear of strikes, for in its field it allows no competitors."), *and* 96 CONG. REC. 16452 (1950) (statement of Sen. Kefauver) ("The increased concentration of economic power is dooming free enterprise. . . . [and] is the antithesis of meritorious competitive development"), *with Le*, 2023 WL 5085064, at *43 (finding UFC fighters suffered between $811 million and $1.6 billion in damages from the UFC's anticompetitive monopsony power).

210. Declaration of Hal J. Singer, Ph.D. at 12–16, *Le*, 2023 WL 5085064 (No. 15-cv-01045), ECF No. 914.

211. *Id.*

212. *Id.*

213. *Professional Fighters League Acquires Bellator in Industry Transformative Deal*, PRO. FIGHTERS LEAGUE (Nov. 20, 2023), https://pflmma.com/news/professional-fighters-league-acquires-bellator-in-industry-transformative-deal [https://perma.cc/L2LH-BE6P].

214. The Fight Queen, *Dana White Talks on PFL Buying Bellator - "One Sh***y Organisation Buys Another...,"* YOUTUBE (Dec. 3, 2023), https://www.youtube.com/watch?v=AsA5NGZiHu8 [https://perma.cc/U3ZW-NE97] (starting at 0:30).

industry co-leader,"[215] is valued at just four percent of the UFC.[216] The UFC still faces no real market competition over a decade after its first FTC investigation.

Hipster antitrust policies are starting to fix the monopsony neglect that allowed the UFC to suppress MMA fighters' wages. Importantly, the first-ever merger challenge was brought for anticompetitive monopsonistic effects in 2022, and it won.[217] Case law now explicitly holds that monopsonistic acquisitions that harm workers are illegal: "The 'fundamental purpose' of Section 7 is 'to arrest the trend toward concentration, the tendency to [monopoly or *monopsony*], before the [buyer's or *seller's*] alternatives disappear[] through merger . . . .'"[218] As trite as it sounds, the first step in solving a problem is recognizing there is one. And unlike in 2012 when the UFC acquired Strikeforce and four other competing MMA promoters, anticompetitive monopsonistic mergers are now on antitrust enforcers' radar.

Further, the rejuvenated FTC rescinded weak policy governing Section 5 of the FTC Act.[219] President Biden's interventionist administration recognizes the FTC Act "is one of the Commission's core statutory authorities in competition cases; it is a critical tool that the agency can and must utilize in fulfilling its congressional mandate to condemn unfair methods of competition."[220] Although this Note does not propose a standalone Section 5 claim like the FTC investigated for the UFC's exclusionary contracts in 2015, the cause of action's aggrandized use demonstrates the Commission's renewed commitment to litigating unfair methods of competition.[221] Unlike when the UFC was investigated for the second time, enforcers now recognize that using agencies' full scope of authority best promotes economic efficiency and market competition.[222] As FTC Chair Lina Khan said, "Vigorous antitrust enforcement is critical to the growth and dynamism of our economy, as well as to our shared prosperity and liberty. Recent decades have vividly illustrated how Americans lose out when markets become more consolidated and less competitive. Prices rise, [and] wages fall . . . ."[223]

215. *See Professional Fighters League Acquires Bellator in Industry Transformative Deal*, *supra* note 213.

216. Declaration of Hal J. Singer, Ph.D., *supra* note 210, at 15.

217. United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 56 (D.D.C. 2022).

218. *Id.* at 21–22 (alterations in original) (emphases added) (quoting United States v. Phila. Nat'l Bank, 374 U.S. 321, 367 (1963)).

219. *See generally* KHAN, *supra* note 92.

220. *Id.* at 7.

221. *See FTC Signals Aggressive Antitrust Policy as Part of Government Pro-Enforcement Agenda*, JONES DAY (July 15, 2021), https://www.jonesday.com/en/insights/2021/07/ftc-signals-aggressive-antitrust-policy-as-part-of-government-proenforcement-agenda [https://perma.cc/W68Z-KA8P].

222. *See* Press Release, Fed. Trade Comm'n, FTC Chair Lina M. Khan Testifies Before Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights (Sept. 20, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-chair-lina-m-khan-testifies-senate-judiciary-subcommittee-antitrust-competition-policy-consumer-rights [https://perma.cc/2NU4-VR9D].

223. *Id.*

Still, the UFC's anticompetitive market dominance remains unchecked. It controls roughly ninety percent of the market for MMA fighter services after acquiring most competing firms, and it employs "systemic use of . . . exclusionary contracts and common coercive tactics" that prevent fighters from joining a rival promotion or securing better employment terms with the UFC.[224] Private litigation for monetary damages under the Sherman Act, while important, is insufficient to spark competition moving forward. Government intervention seeking injunctive relief under the Clayton Act and FTC Act is necessary.[225] The FTC should compel the reemergence of firms that were anticompetitively acquired and reform UFC contracts that deprive fighters of the benefits that come from employers competing for their labor.

III. THE FTC SHOULD THROW A PUNCH AT THE UFC'S MONOPSONY

Antitrust prohibits the anticompetitive acquisition or maintenance of a monopsony.[226] The UFC did both. It merged its way to monopsony power by acquiring rival MMA promotions, and it entrenches its dominance by coercing fighters into exclusionary contracts that prevent market competition for fighters' services.[227] Hipster antitrust's revitalized enforcement efforts present an opportunity to revisit and redress these monopsonistic harms.[228] Extreme restorative measures are warranted now that economics literature has shown how concentrated labor markets have become.[229] Drastic action is needed to execute the legislative intent of antitrust law: promoting market competition and preventing an economy dominated by concentration.[230]

This Part first argues the FTC should enforce Section 7 of the Clayton Act against the UFC's anticompetitive acquisitions of rival MMA promotions. It then argues the FTC should enforce Section 5 of the FTC Act against the

224. Le v. Zuffa, LLC, No. 15-cv-01045, 2023 WL 5085064, at *14 (D. Nev. Aug. 9, 2023).

225. *See* Naidu et al., *supra* note 112, at 600–01 ("[S]evere corrective action in labor markets, given their current highly concentrated state, may be called for. . . . Our present business landscape exhibits a number of extremely powerful employers as a result of the neglect of mergers and other anticompetitive behavior in labor markets.").

226. *See, e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 363–64 (1963) (holding a merger where one firm acquires control over at least thirty percent of a market is presumptively unlawful); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 75 (1911) (holding Standard Oil anticompetitively maintained its dominance over the oil market).

227. *See Le*, 2023 WL 5085064, at *22–27.

228. *See* Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131–32 (2018).

229. *See* Naidu et al., *supra* note 112, at 600–01; *see also supra* Section II.A (surveying recent economics research on labor market concentration).

230. 21 CONG. REC. 2460 (1890) (statement of Sen. Sherman) ("The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown . . . out of the concentration of capital into vast combinations to control production and trade and to break down competition."); *see supra* Section I.A.

UFC's exclusionary contracts that restrict fighters' ability to access a competitive labor market.

A. The Clayton Act Claim: Merging to Monopsony

"Section 7 of the Clayton Act forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monop[sony]."[231] The UFC obtained monopsony power through horizontal acquisition—it acquired market dominance by buying out rival firms.[232] Consequently, fighters receive a small fraction of league revenue compared to athletes in other elite sports leagues.[233] UFC fighters suffered wage losses between $811 million and $1.6 billion from December 2010 to June 2017 and had no meaningful recourse thanks to the lack of labor market competition.[234] Divesting the UFC of unlawfully acquired assets (i.e., rival MMA promotions) would restart competition for fighters' services. It would also signal to the rest of the U.S. economy that antitrust enforcers are committed to breaking up anticompetitive labor market concentration.[235]

First, Clayton Act merger analysis must define the relevant market, which consists of both a labor market (in a monopsony case) and a geographic market.[236] The geographic market is the United States because fighters compete all over the country.[237] The labor market is "Elite Professional MMA Fighter services."[238] One way to define a labor market is by analyzing "practical indicia [the] industry or public recogni[zes]."[239] This inquiry examines "the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."[240] Here, elite professional MMA fighters comprise the relevant labor market,

231. United States v. Falstaff Brewing Corp., 410 U.S. 526, 531 (1973); *accord* United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 21–22 (D.D.C. 2022).

232. *Le*, 2023 WL 5085064, at *6–7, *25–27; *see also* George J. Stigler, *Monopoly and Oligopoly by Merger*, 40 AM. ECON. REV. PAPERS & PROC. 23, 27–31 (1950) (discussing economic harms that accompany a firm merging to market power).

233. *Le*, 2023 WL 5085064, at *34–35, *42.

234. *See id.* at *34, *42–43.

235. *See* Lauren Feiner, *FTC Chair Lina Khan Says Agency Won't Back Down in the Face of Intimidation from Big Tech*, CNBC (Jan. 19, 2022, 2:31 PM), https://www.cnbc.com/2022/01/19/ftc-chair-lina-khan-says-agency-wont-back-down-in-the-face-of-intimidation.html [https://perma.cc/LT58-4V6C] (noting the FTC chooses cases, in part, based on the deterrent effect it will have on similar conduct because the under-resourced agency cannot litigate every potential antitrust violation).

236. *E.g.*, *Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d at 23–24.

237. *Le*, 2023 WL 5085064, at *17; *see Le* Complaint and Jury Demand, *supra* note 131, at 28.

238. *Le*, 2023 WL 5085064, at *16.

239. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). *Brown Shoe* is famous for establishing the practical indicia test. But in modern antitrust analysis, expert economists frequently define the relevant market using the hypothetical monopolist (or monopsonist) test ("HMT"). HMT analysis is not conducted in this Note, but it defines the market as described here using *Brown Shoe*. *See Le*, 2023 WL 5085064, at *16 n.25.

240. *Brown Shoe Co.*, 370 U.S. at 325.

which excludes other combat sports—like boxing, jiu-jitsu, wrestling, and others—because MMA uses many martial arts while other combat sports are far more specialized and limited in scope.[241] The labor market also excludes fighters who are not "elite": This limitation captures only fighters who top MMA promotions would realistically consider employing.[242] A professional MMA fighter is "elite" if they compete for any UFC-acquired promotion or are included in the FightMetric database—a third-party company that tracks fighters as "the world's only comprehensive [MMA] statistics and analysis system."[243] These parameters shape the relevant labor market, and this market definition serves as the "analytical tool used to ascertain the 'locus of competition.'"[244]

The next step in a Section 7 case, analyzing the relevant market's structure, "is rooted in empirical evidence indicating that more concentrated markets tend to" harm trading partners.[245] As a result, a merger is presumed to violate the Clayton Act when it gives one firm "an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market."[246] The 2023 Merger Guidelines state: "When a Merger is Part of a Series of Multiple Acquisitions, the [DOJ and FTC] May Examine the Whole Series."[247] "Accordingly, the Agencies will consider individual acquisitions in light of the cumulative effect of related patterns or business strategies."[248]

In the relevant market here, the UFC merged to monopsony.[249] It did not obtain its dominant position in the market legally; instead, the UFC bought competitors to eliminate competition.[250] Between December 2006 and May

241. *Le*, 2023 WL 5085064, at *16; *see also* Sportsbook, *Why MMA Fighters Cannot Compete at a High Level of Boxing*, WORLD BOXING NEWS (Jan. 26, 2023), https://www.worldboxingnews.net/2023/01/26/why-mma-fighters-cannot-compete-at-a-high-level-of-boxing [https://perma.cc/5SE4-VYB2] (describing why boxing is not a reasonably suitable employment alternative for elite MMA fighters); Josh Evanoff, *10 UFC Fighters Who Went into Boxing (& Failed)*, SPORTSTER (Oct. 23, 2021), https://www.thesportster.com/ufc-fighters-went-into-boxing-failed [https://perma.cc/7HFQ-8L3T] (showing how unsuccessful UFC fighters have been trying to compete in boxing).

242. *Le*, 2023 WL 5085064, at *16 n.24.

243. Brent Brookhouse, *Press Release: Fight Metric Becomes Official Stats Provider of UFC*, SBNATION (Sept. 2, 2010, 10:43 AM), https://www.sbnation.com/2010/9/2/2320346/press-release-fight-metric-becomes-official-stats-provider-of-ufc [https://perma.cc/ZC5G-UW9W]; *accord Le*, 2023 WL 5085064, at *16.

244. United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 24 (D.D.C. 2022) (quoting *Brown Shoe Co.*, 370 U.S. at 320–21); *accord* Todd v. Exxon, 275 F.3d 191, 201–02 (2d Cir. 2001).

245. Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2001 (2018); *accord* United States v. Phila. Nat'l Bank, 374 U.S. 321, 362–63 (1963); *see also* Hovenkamp & Shapiro, *supra*, at 2001–13 (discussing "The Economic Case for the Structural Presumption" and "Structure and Presumptions in the Case Law and Guidelines").

246. *Phila. Nat'l Bank*, 374 U.S. at 363.

247. 2023 MERGER GUIDELINES, *supra* note 122, § 2.8, at 23.

248. *Id.*

249. Le v. Zuffa, LLC, No. 15-cv-01045, 2023 WL 5085064, at *25–27 (D. Nev. Aug. 9, 2023).

250. *Id.* at *25 (finding the UFC acquired competing MMA promotions to "consciously eliminate[] would-be rivals to which fighters might otherwise have switched. This conduct

2007, it bought out its three biggest rivals: World Fight Alliance, World Extreme Cagefighting, and PRIDE Fighting Championships.[251] Four years later, the UFC acquired its fiercest competitor in company history, Strikeforce, after that firm expanded into MMA from 2006 to 2011.[252] These four mergers were anticompetitive: The UFC eliminated competition in 2006 and 2007 so it was the only significant firm remaining in the labor market, and it did so again in 2011 after a new entrant found success as an MMA promotion.[253]

"[U]ndermining competitors [through horizontal acquisition] was important to [UFC] leadership and an essential part of its strategy to establish market dominance."[254] Text messages between then-CEO Lorenzo Fertitta and Dana White evinced the company's scheme: "We gotta keep taking these fuckers oxygen till they tap out. We have sacrificed too much to let anyone get traction now," said Fertitta.[255] Dana White even boasted about the UFC's anticompetitive practices.[256] In a now-deleted YouTube video from 2012 (though a picture remains online), White created a tombstone that listed every rival promotion the UFC removed from the market and called himself "The Grim Reaper of MMA."[257]

Ultimately, the UFC's acquisitions left the relevant market with an HHI that "exceeds 8,100" and is "*far above* . . . the threshold for a market to be classified as 'highly concentrated' according to the antitrust agencies' Horizontal Merger Guidelines."[258] The UFC controlled between ninety-four and ninety-nine percent of the relevant market from December 2010 through June

substantially foreclosed competition and had market-wide anticompetitive effects without any recognizable procompetitive benefits.").

251. *Id.* at *6; *see also* Robert Watts, *Who Did the UFC Buy Out? (All UFC Acquisitions)*, GROUNDEDMMA (Mar. 6, 2023), https://groundedmma.com/who-did-ufc-buy-out [https://perma.cc/B64K-FFLA] (discussing each of the UFC's acquisitions of rival MMA promotions).

252. *Le*, 2023 WL 5085064, at *7, *25; *see also* Josh Evanoff, *10 Things UFC Fans Should Know About Strikeforce*, SPORTSTER (Oct. 26, 2021), https://www.thesportster.com/strikeforce-facts-trivia-ufc-fans [https://perma.cc/7JNZ-4AX6] (noting that many MMA legends fought in Strikeforce—Daniel Cormier, Fedor Emelianenko, Ronda Rousey, Frank Shamrock, Luke Rockhold, Nick Diaz, and others).

253. *See Le*, 2023 WL 5085064, at *25–26; Matthew Hemphill, *7 Reasons Why Bellator Will Never Challenge the UFC's Position as Top Promoter*, BLEACHER REP. (Sept. 19, 2011), https://bleacherreport.com/articles/848708-8-reasons-why-bellator-will-never-challenge-the-ufcs-position-as-top-promoter [https://perma.cc/3UC5-L87K].

254. *Le*, 2023 WL 5085064, at *25.

255. *Id.*; *see also* Maurice E. Stucke, *Is Intent Relevant?*, 8 J.L. ECON. & POL'Y 801, 802–03 (2012) ("Many lower courts, scholars, and practitioners recognize that intent evidence is relevant in predicting consequences and interpreting facts. The Supreme Court has long recognized the relevance of the antitrust defendant's intent . . . ." (footnotes omitted)).

256. Oliver Saenz, *Dana White: How the UFC's 'Grim Reaper' Is Killing MMA*, BLEACHER REP. (May 2, 2012), https://bleacherreport.com/articles/1169062-dana-white-the-ufcs-grim-reaper-and-why-hes-killing-mma [https://perma.cc/X9KN-BQ69].

257. *Id.*

258. *Le*, 2023 WL 5085064, at *26.

2017.[259] Wisdom from an infamous memorandum that Judge Learned Hand wrote his law clerks before deciding the landmark antitrust case *United States v. Aluminum Co. of America*[260] applies here: If a Section 7 claim against the UFC failed due to market structure, then "everyone who does not get entangled in the legal niceties, and in the incredible nonsense that has emanated from the Supreme Court, will, quite rightly I think, write us down as asses."[261]

The final step of a prima facie Clayton Act case is showing the merger causes anticompetitive effects in the relevant market.[262] Generally, this is a forward-looking inquiry: "Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipiency. The core question is whether a merger may substantially lessen competition, and [usually] requires a prediction of the merger's impact on competition, present and future."[263]

Here, however, the mergers at issue took place more than a decade ago.[264] Data already show the mergers' unilateral anticompetitive effects in the relevant market.[265] "Unilateral anticompetitive effects" merger analysis asks if eliminating competition between the two merging firms allows the post-merger firm to profitably behave in an anticompetitive fashion—such as suppressing employee pay.[266] Competitive compensation in the relevant market is best measured by revenue share.[267] Strikeforce, for example, paid fighters sixty-three percent of the firm's revenue before it was bought out; by contrast, fighters in the UFC receive nineteen and one-half percent of revenue.[268] After the merger, fighters could no longer leave the UFC to join Strikeforce and receive a higher percentage

259. *Id.* at *17, *31. Recall that HHI is calculated by adding the squares of each competitor's market share and assessed on a scale from zero to ten thousand. *See supra* text accompanying notes 173–75. A ninety-four percent market share equates to a market HHI of at least 8,836 and a ninety-nine percent market share equates to a market HHI of at least 9,801.

260. *See generally* United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

261. Marc Winerman & William E. Kovacic, *Learned Hand,* Alcoa*, and the Reluctant Application of the Sherman Act*, 79 ANTITRUST L.J. 295, 295–96 (2013).

262. *Competitive Effects*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/competitive-effects [https://perma.cc/NTZ5-BWMM].

263. Fed. Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568, 577 (1967).

264. *See Le*, 2023 WL 5085064, at *25.

265. *Cf.* Fed. Trade Comm'n v. Staples, Inc., 970 F. Supp. 1066, 1082–83 (D.D.C. 1997) (using existing data from geographic markets where there was no competition to show a merger eliminating competition in another geographic market would allow the post-merger firm to behave anticompetitively).

266. *See* Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 1960 n.20 (2021) (citing United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 84 n.35 (D.D.C. 2011)).

267. *Le*, 2023 WL 5085064, at *30–34; *see also* Videotaped Deposition of Alan Manning, *supra* note 16, at 9 ("The use of wage share as informative about the extent of competition in the labor markets is well attested, especially in the field of sports economics.").

268. *See Le*, 2023 WL 5085064, at *42; Stephie Haynes, *UFC Fighter Pay Got Worse: Record High Profits, but All-Time Low Fighters' Share for Endeavor*, BLOODY ELBOW, https://bloodyelbow.com/2023/05/24/ufc-finances-lowest-revenue-share [https://perma.cc/V7B6-W822].

of the funds generated from their fights.[269] Using this loss to calculate antitrust injury, UFC fighters suffered up to $1.6 billion in damages.[270]

For the reasons above, this Note contends that the UFC violated Section 7 of the Clayton Act.[271] Bringing this enforcement action would serve two important functions. First, it would remedy a violation of law. Empirical data show antitrust enforcement spurs economic growth in markets by increasing business formation, employment levels, average wages, and revenue share.[272] UFC fighters have advocated for change for over a decade, and it is time for the government to fulfill its responsibility to vigorously enforce the antitrust laws.[273] Second, enforcement would have a massive deterrent effect on the rest of the American economy. The UFC is a high-profile firm already under scrutiny for antitrust wrongdoing, and unwinding consummated mergers is a potent antitrust remedy.[274] This is the type of case the FTC should bring in light of President Biden ordering "[t]he Attorney General, the Chair of the FTC, and the heads of other agencies with authority to enforce the Clayton Act . . . to enforce the antitrust laws fairly and vigorously."[275] Breaking up the UFC would revitalize monopsony enforcement by illustrating the past failures of antitrust policy and charting a new path forward.

B. The FTC Act Claim: Contracts Foreclosing Competition

This Note previously discussed the FTC's sweeping ban on noncompete agreements in employment contracts.[276] But even that revolutionary proposal, if it takes effect, would provide inadequate relief for UFC fighters. It only voids post-employment noncompetes; the ban does "not apply to concurrent-employment restraints (i.e., restrictions on what the worker may do during

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269. *Le*, 2023 WL 5085064, at *24.

270. *Id.* at *42–43.

271. Analyzing potential defenses the UFC may raise, an integral part of any antitrust litigation, is beyond the scope of this Note. However, the U.S. District Court for the District of Nevada found the UFC's acquisitions "had market-wide anticompetitive effects without any recognizable procompetitive benefits" and the UFC "created an artificial barrier to entry for competitors" through its anticompetitive conduct. *Id.* at *21, *25.

272. Tania Babina, Simcha Barkai, Jessica Jeffers, Ezra Karger & Ekaterina Volkova, *Antitrust Enforcement Increases Economic Activity* 5–6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31597, 2023), https://www.nber.org/system/files/working_papers/w31597/w31597.pdf [https://perma.cc/XT8C-QNRH].

273. *See, e.g.*, John Barr & Josh Gross, *UFC Fighters Say Low Pay Simply Brutal*, ESPN (Jan. 11, 2012, 7:28 PM), https://www.espn.com/espn/otl/story/_/page/UFCpay/ufc-fighters-say-low-pay-most-painful-hit-all [https://perma.cc/MF45-PMFM]; MMA Uncensored, *Cung Le Rips Dana White & UFC for Fighter Pay*, YOUTUBE (July 30, 2020), https://www.youtube.com/watch?v=nKSQ9SsoBIU [https://perma.cc/G4JG-XVVG].

274. *See* Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 1961–63 (2020).

275. Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36991 (July 9, 2021).

276. *See supra* notes 98–104 and accompanying text.

the worker's employment)."[277] So only portions of UFC's exclusionary contracts would be unenforceable—like the exclusive negotiation clause that bans a fighter from dealing with competitors for one-to-three months after their contract ends and the right-to-match clause that allows the UFC "to retain a fighter by matching [a] competitor's terms" for a year after the fighter's contract ends.[278] The UFC's main exclusion clause remains valid, which "requires a fighter to fight exclusively for Zuffa and prohibits a fighter from working with other MMA promoters" during their UFC contract (i.e., a concurrent-employment restraint that is not covered by the FTC's proposed noncompete ban).[279] This Section argues that this remaining concurrent-employment restrictive covenant in the UFC's employment contracts violates antitrust law.

Section 5 of the FTC Act declares that "unfair methods of competition" are illegal.[280] The FTC uses the statute to prevent actors from engaging in conduct that precludes marketplace competition on the merits.[281] The Commission evaluates two criteria under Section 5: whether "the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature" and whether "the conduct must tend to negatively affect competitive conditions[, which] . . . may include, for example, conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm" trading partners.[282]

The UFC engaged in unfair methods of competition by signing over ninety percent of elite professional MMA fighters to long-term exclusive contracts that do not allow fighters to work for other promotions.[283] A firm "already enjoying a substantial monop[sony] . . . violates the [antitrust laws] . . . when it uses its monop[sony] to destroy threatened competition" through exclusive dealing.[284] The average length of a fighter's career is roughly five or six fights over a span of thirty-one to forty-one months, and the average length that the UFC subjects a fighter to its exclusivity clause is roughly thirty-seven months.[285] Thus, many fighters go their entire career with a contractual obligation not to compete for any firm except the UFC.

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277. Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38361 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

278. Le v. Zuffa, LLC, No. 15-cv-01045, 2023 WL 5085064, at *6 (D. Nev. Aug. 9, 2023).

279. *Id.*

280. 15 U.S.C. § 45(a)(1).

281. *See* FED. TRADE COMM'N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT 8–10 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [https://perma.cc/42YJ-QYYT].

282. *Id.* at 9 (footnote omitted).

283. *See Le*, 2023 WL 5085064, at *6, *17, *22, *27.

284. Lorain J. Co. v. United States, 342 U.S. 143, 154 (1951).

285. *Le*, 2023 WL 5085064, at *25.

The UFC's "exclusionary contracts limit the ability for new entrants to obtain the essential input—fighter services—for the business."[286] The firm "use[s] a variety of ruthless coercive techniques to prevent fighters from" leaving for another firm[287] and weaponizes its market power to sign fighters to exclusive, low-quality deals.[288] For example, UFC matchmaker Joe Silva admits he would "lowball[] [fighters] on purpose the first offer knowing they would turn it down."[289] Silva was known for then telling fighters, "if you don't like the first fight I offer you, you're sure as shit not going to like the second one."[290]

These tactics are exploitative and foreclose opportunities for market competitors. Fighters know they must acquiesce and accept the UFC's terms.[291] As one fighter put it, "There's nowhere else to go . . . . Strikeforce [doesn't] exist anymore. Pride [doesn't] exist anymore. And I [have] no way of saying no."[292]

The UFC maintains its monopsony power in the exact anticompetitive manner that economic theory predicts a monopsonist would: suppressing its purchases of labor to capture surplus profits itself.[293] It bought out rival firms to dominate the market, and now it secures exclusive rights to fighters' labor

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286. *Id.* at *20.

287. *Id.* at *23.

288. *See id.* at *24; *see also* Marc Raimondi, *Francis Ngannou on UFC Exit: 'In that Contract, I'm Not Free,'* ESPN (Jan. 17, 2023, 7:02 PM), https://www.espn.com/mma/story/_/id/35468383/francis-ngannou-ufc-exit-contract-not-free [https://perma.cc/XB5R-E7QG] (discussing how the UFC refused to negotiate with then-heavyweight champion Francis Ngannou on company-wide improvements in fighters' working conditions and quoting Ngannou say he was leaving the company because "[i]n that contract, I have no rights[.] I have no power. I hand over all the power to [the UFC], and I've seen in the past how [the UFC] can utilize that power.").

289. *Le*, 2023 WL 5085064, at *24.

290. *Id.* (emphasis omitted). Silva would offer even more undesirable terms if a fighter turned down his initial offer; subsequent offers would be for even lower pay or against a tough, relatively unknown fighter.

291. *Id.*; *see also* Barr & Gross, *supra* note 273 (quoting anonymous fighters who declined to comment on fighter pay because it would be "[c]areer suicide").

292. *Le*, 2023 WL 5085064, at *24.

293. *See id.* at *23–25; *see also* Steven Marrocco, *'F*** that Punk': Unsealed Docs Reveal Dana White's Reaction to Jon Jones Money Demands*, MMA FIGHTING (Jan. 14, 2024, 9:00 AM), https://www.mmafighting.com/2024/1/14/24036199/f-that-punk-unsealed-docs-reveal-dana-whites-reaction-to-jon-jones-money-demands [https://perma.cc/E5WT-6Z9L] (quoting text messages between UFC executives where Dana White responds to Jon Jones—who many believe is the greatest UFC fighter ever—negotiating for higher pay by saying, "F[uck] that punk . . . . He needs to know we don't need him, or he will f[uck] us over more than he already does."). *Compare Le*, 2023 WL 5085064, at *23–25 (describing the deliberate coercive nature of the UFC's contract offers to fighters) *with* Prager & Schmitt, *supra* note 22, at 421 (explaining that "[a] classical monopsonist employer. . . restrict[s] employment below its competitive equilibrium level"), *and* Marinescu & Hovenkamp, *supra* note 22, at 1038 (describing how a monopsonist captures surplus profits by suppressing worker pay below competitive levels).

with deals that pay far below competitive levels.[294] In sum, the UFC deprives fighters of the benefits that result from labor market competition.[295]

The FTC should sue to reform the UFC's exclusionary contracts. In contrast to the UFC, elite professional boxing exemplifies what a competitive market looks like.[296] Although MMA and boxing are separate sports that constitute different labor markets, their business models are sufficiently analogous for boxing to serve as a guide; contests in each sport are run by a promoter who organizes bouts between the athletes.[297] The key difference, though, is that boxers enjoy numerous promoters competing to sign them.[298] Unsurprisingly, boxers are paid a much higher share of promotions' revenue than MMA fighters who are dominated by one monopsonist employer.[299] If fighters were not bound by the UFC's exclusion clause and other promotions were not illegally taken off the market through the UFC's anticompetitive acquisitions, then market wages would inevitably rise as promotions competed to sign fighters.

By enforcing the Clayton Act and FTC Act against the UFC, the FTC would restart labor market competition in elite professional MMA. Reforming exclusionary contracts and divesting the UFC of unlawfully acquired rival firms would allow fighters to benefit from a market that is not dominated by concentrated power. Potential employers would reenter the market, and fighters could pit promotions against one another to secure better working conditions. The Biden Administration ordered that more robust antitrust enforcement is a priority, particularly in labor markets.[300] Neo-Brandeisian enforcers, then, should capitalize on this opportunity to cement monopsony enforcement as a cornerstone of antitrust law moving forward.

CONCLUSION

Hipster antitrust is taking labor market competition policy mainstream. The UFC embodies why it is necessary: Old enforcement regimes failed to address anticompetitive business practices that harm American workers. Dominant firms have merged their way to labor market power and maintained their monopsonies by restricting employees' access to would-be rival employers. New findings in economics literature show how common these market failures

294. *See Le*, 2023 WL 5085064, at *23–27.

295. *See id.*

296. *See id.* at *35.

297. *See id.*

298. *Id.* at *35 n.46.

299. *Id.*; *see also* John S. Nash, *MMA vs Boxing Finances: Why Can't Jon Jones Make as Much as Deontay Wilder?*, BLOODY ELBOW, https://bloodyelbow.com/2021/04/06/mma-vs-boxing-finances-why-cant-jon-jones-make-as-much-as-deontay-wilder [https://perma.cc/R75K-HU73] (showing how dismissive the UFC is when fighters try to negotiate pay using boxers as benchmarks, despite the UFC being far more profitable than any boxing promotion).

300. Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021).

are—contrary to conventional laissez-faire theory that assumes labor markets are inherently competitive.

The FTC should revisit its investigations into the UFC for anticompetitive conduct. The agency would not only provide fighters overdue equitable remedies by enforcing the Clayton Act and FTC Act, but it would also deter the rest of the economy from anticompetitive monopsonistic practices. The neo-Brandeis movement is revitalizing antitrust enforcement, and these new policies are necessary to execute the purpose of the antitrust laws and reverse the trend of concentration dominating America's labor markets. Hipster antitrust is starting to enforce what has been neglected for over a century: Antitrust law protects workers, too.