PREPARED STATEMENT OF

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of the

FEDERAL TRADE COMMISSION

on

ANTITRUST AND ECONOMIC OPPORTUNITY: COMPETITION IN LABOR MARKETS

Before the

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW

JUDICIARY COMMITTEE

U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

OCTOBER 29, 2019

[*] This written statement, my oral testimony, and my responses to questions reflect my views and do not necessarily reflect the views of the Commission or any individual Commissioner.

Chairman Cicilline, Ranking Member Sensenbrenner, Members of the Subcommittee, thank you for the opportunity to appear before you today. I commend you for convening this hearing to discuss policy issues that bear directly on a pressing problem facing American workers.

America has a labor mobility problem. For the past several decades, workers in America have been increasingly *un*likely to move to new places and start new jobs,[1] or even to switch jobs in the same location.[2] That is not what we might expect, since the costs of transportation have declined and the costs of communication reduced essentially to zero.

This decline in American labor mobility is bad for workers, and the country as a whole. When Americans can move, they can adjust to changing economic or life circumstances—the prospect of opening a business, getting a better job at a new company, or moving to help a sick parent or a child with a new baby, if they can find work. Labor mobility isn't just about leaving for the job you want tomorrow—it's about making the job you have today better. When you can leave a job, you have greater leverage to improve conditions, including to demand a higher wage.

When workers cannot move, they have less leverage; so it is not surprising that scholars point to declining labor mobility as a culprit in slow wage growth.[3] One important solution is

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[1] Steven J. Davis & John Haltiwanger, *Labor Market Fluidity and Economic Performance* (Nat'l Bureau of Econ. Research, Working Paper No. 20479, Dec. 2014), https://www.nber.org/papers/w20479; Ryan Nunn, *Americans Aren't Moving to Economic Opportunity*, THE HAMILTON PROJECT: BLOG (Nov. 19, 2018), https://www.hamiltonproject.org/blog/americans_arent_moving_to_economic_opportunity.

[2] David W. Perkins, *Declining Dynamism in the U.S. Labor Market*, CONG. RESEARCH SERV. INSIGHTS (June 15, 2016), https://fas.org/sgp/crs/misc/IN10506.pdf (showing "churn" rates are in long-term decline).

[3] Alan Krueger, Opening Remarks at the Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century, No. 3: Multi-Sided Platforms, Labor Markets, and Potential Competition (Oct. 16, 2018), https://www ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century. People already working in an industry protected by occupational licensing regulations will typically earn higher wages. *See e.g.*, Ryan Nunn, *How Occupational Licensing Matters for Wages and Careers*, THE HAMILTON PROJECT (Mar. 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_3152018_how_occupational_licensing_matters_for_wages_and_careers.pdf. However,

competition—the more options workers have, the more firms effectively compete for their labor. Policies that favor labor mobility increase that competition; policies that inhibit it—including occupational licensing, no-poach agreements, and non-compete agreements ("non-competes")—reduce it.

Labor mobility stokes commerce and innovation. It reduces inequality, as people who are less well-off can move to areas where the benefits of economic growth are being shared more broadly. It's worth noting: evidence shows that people get bigger raises when they switch jobs than they do when they stay where they are.[4] And, as Yale Law School professor David Schleicher describes in his article "Stuck!", labor mobility allows the federal economic policies we choose—whatever they are—to work better, as it brings our national economy together.[5] This isn't about labor versus capital, splitting the pie a different way. It's about matching workers with employers, increasing the productivity of businesses, empowering workers, and growing the pie for everyone.

All of that is why I am so eager to testify today about occupational licensing, no-poach agreements, and non-competes, the risks they pose, and how the FTC is approaching them.

Occupational licensing

All of us are familiar with professions that require licenses, like medicine and law. And licensing has a role to play in protecting health and safety. But studies suggest some 25-30% of the U.S. workforce is now employed in occupations requiring a license—often in areas like hair-

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all those who are unable to enter the field are hurt. Non-compete agreements also result in reduced wages. *See* Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements* (Sept. 10, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452240.

[4] Bourree Lam, *The Special Few Who Are Getting Raises in this Economy*, THE ATLANTIC (Feb. 8, 2016), https://www.theatlantic.com/business/archive/2016/02/job-switchers-raise/460044/.

[5] *See generally* David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 1 (2017).

braiding or makeup application, where the need for licensing is less apparent.[6] Like the guilds of old, licensing regimes can impede competition and keep people from pursuing the work they want. Morris Kleiner and Alan Krueger estimated they reduced employment by nearly *three million* jobs, and cost consumers over $200 billion.[7] That may be good for incumbents[8], who are shielded from competition,[9] and those who make money off licensing, like for-profit and other occupational schools,[10] but it's bad for consumers,[11] raising prices, dampening innovation, and making markets less responsive to consumer demand. It is also bad for workers, especially the most vulnerable: the marginal worker, the young person who wants to start their career, the service-member or their spouse. Occupational licensing leaves these workers stuck.[12]

Part of the problem is that states empower members of professions to erect barriers around themselves: the fox guarding the henhouse.[13] When the North Carolina Board of Dental Examiners tried to ban low-cost teeth-whitening services sold at drugstores, the Federal Trade

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[6] U.S. DEP'T OF THE TREASURY, COUNCIL OF ECON. ADVISORS & DEP'T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS 6 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf; Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. 173 (2013); Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 2 (2010).

[7] Morris M. Kleiner, Alan B. Krueger & Alex Mas, *A Proposal to Encourage States to Rationalize Occupational Licensing Practices: A Proposal to the Brookings Institution Hamilton Project* (Apr. 1, 2011), https://www.hhh.umn.edu/file/9441/download; *see also* Morris M. Kleiner & Evan J. Soltas, *A Welfare Analysis of Occupational Licensing in US States* (Nat'l Bureau of Econ. Research, Working Paper No. 26383, Oct. 2019), https://www.nber.org/papers/w26383.pdf.

[8] U.S. DEP'T OF THE TREASURY, COUNCIL OF ECON. ADVISORS & DEP'T OF LABOR, *supra* note 6 at 12.

[9] Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSP. 189, 192 (2000) ("The most generally held view on the economics of occupational licensing is that it restricts the supply of labor to the occupation and thereby drives up the price of labor as well as of services rendered."); *see also* Carolyn Cox & Susan Foster, Bureau of Econ., *Fed. Trade Comm'n, The Costs and Benefits of Occupational Regulation* 21-36 (1990), http://www.ramblemuse.com/articles/cox_foster.pdf.

[10] U.S. DEP'T OF THE TREASURY, COUNCIL OF ECON. ADVISORS & DEP'T OF LABOR*, supra* note 6, at 12.

[11] *Id*. at 14.

[12] Schleicher, *supra* note 5, at 117-122.

[13] *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1114 (2015).

Commission pushed back on antitrust grounds.[14] The Supreme Court agreed, holding that "state action immunity" only applies to state professional boards where there is (i) a clear state policy to displace competition; and (ii) active state supervision.[15] Our competition advocacy continues today, for example in an amicus brief filed this month with DOJ in the SmileDirectClub case. This is important work, but it's also important to note that, at the end of the day, states control licensing regimes, and can limit competition if they choose. Antitrust has a role, but it is limited.

No-Poach Agreements

A no-poach agreement is when two or more companies agree to restrict hiring or recruitment efforts. That impedes labor mobility. In 2016, the FTC and DOJ released Antitrust Guidance for Human Resource Professionals, which addressed concerns like no-poach agreements and put firms on notice that they may face criminal or civil liability.[16] The FTC has continued its work in this area, last year going after two small home health agencies in Texas that tried but failed to set wages.[17] We will remain vigilant. The Department of Justice's Antitrust Division is doing important work in this area, bringing cases and warning employers that they will be prosecuted for per se violations criminally.[18]

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[14] *Id*. at 1108-9.

[15] *Id*. at 1113-4; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-6 (1980).

[16] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 2 (2016).

[17] Complaint, In the Matter of Your Therapy Source, Neeraj Jindal and Sheri Yarbray, FTC Matter No. 171-0134 (July 31, 2018), https://www.ftc.gov/system/files/documents/cases/1710134_your_therapy_source_complaint_7-31-18.pdf.

[18] *U.S. v. Knorr-Bremse AG and Westinghouse Air Brake*, 1:18-cv-00747-CKK (D.D.C. July 11, 2018) (settlement with rail equipment companies who engaged in naked no-poach agreements); U.S. DEP'T OF JUSTICE, DIVISION UPDATE SPRING 2019, NO-POACH APPROACH (Sep. 30, 2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach.

Non-Compete Agreements

Non-competes are contractual terms in which the worker promises their employer some limitation on the worker's labor, generally after their employment ends. Members of the House and Senate, and state legislators, are devoting increased attention—and skepticism—to non-competes. English common law was similarly skeptical, deeming them "great abuses" by employers that could lead to "the loss of [one's] livelihood and the subsistence of his family" and an abuse against society "by depriving it of a useful member".[19] Today, the enforceability of non-competes is a matter of state law, which varies widely. California generally prohibits non-competes.[20] Oregon voids them for lower-wage workers.[21] Hawaii prohibits them for tech workers.[22] Non-competes can serve good purposes, incentivizing investment in workers and protecting trade secrets—worthy goals in our increasingly knowledge-driven economy.[23] Note, however, the work of Stanford Law professor Ronald Gilson, who attributes the innovation boom in California to the cross-pollination of ideas stoked by that state's prohibition.[24]

But non-competes also reduce labor mobility. A 2016 study by the Department of the Treasury found that non-competes are "associated with both lower wage growth and lower initial

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[19] *Mitchel v. Reynolds*, 1 P. Wms. 181, 189 24 Eng. Rep. 347, 350 (K.B.1711). *See also* Daniel P. O'Gorman, *Contract Theory and Some Realism About Employee Covenant Not to Compete Cases*, 65 SMU L. REV. 145, 185 (2012).

[20] S*ee, e.g.,* CAL. BUS. & PROF. CODE § 16600 (West 2019).

[21] OR. REV. STAT. ANN. § 653.295 (West 2019).

[22] HAW. REV. STAT. ANN. § 480-4 (West 2019).

[23] Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force* 8 (Univ. of Michigan Law & Econ. Research, Paper No. 18-013, Sep. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714. Note that the authors find that there is only an increase in training when workers are notified of the non-compete before accepting the job offer. *Id*. at Table 7.

[24] Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999). Note, however, that California's restrictive approach to non-competes may have led firms to engage in no-poach arrangements, which are more problematic from a competition perspective and are not even apparent to the workers.

wages".[25] Professor Evan Starr and his colleagues have revealed a surprising prevalence of non-competes across the economy.[26] We do not know if they have been increasing in frequency; but they are certainly more ubiquitous than we thought and occur in contexts where the justifications for non-competes are not obvious, for example some twelve percent of workers earning less than $40,000 per year,[27] or seasonal Amazon warehouse workers.[28] That concerns me.

The FTC is putting together a workshop to examine non-competes. We will consider both the competition and consumer protection implications of different kinds of non-competes, and what federal approach is warranted.[29] Labor mobility is a complex issue, and examining the inputs to it from both sides has a better chance of contributing to a thoughtful response that will improve the lot of American workers and the nation as a whole.

Labor Monopsony and Mergers

The forces that impede labor mobility can contribute to market power that firms have over workers. The FTC and DOJ have long been concerned about monopsony power generally, incorporating it into the Merger Guidelines in 1992.[30] And scholars like Ioana Marinescu have

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[25] U.S. DEP'T OF THE TREASURY, COUNCIL OF ECON. ADVISORS & DEP'T OF LABOR, *supra* note 6 at 19.

[26] Starr, et. al., *supra* note 23 at 17.

[27] U.S. DEP'T OF THE TREASURY, COUNCIL OF ECON. ADVISORS & DEP'T OF LABOR, *supra* note 6 at 3.

[28] Spencer Woodman, *Exclusive: Amazon makes even temporary warehouse workers sign 18-month non-competes*, THE VERGE (Mar. 26, 2015), https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts.

[29] Although we are still exploring the appropriate policy toward non-competes in general, the agency has long understood that non-competes in specific contexts can hinder entry and expansion and has taken them into account in merger review. *See* Complaint at ¶ 4, In the Matter of Visant Corp., Jostens, Inc., and Am. Achievement Corp., No. 9362 (F.T.C. Apr. 17, 2014), https://www.ftc.gov/system/files/documents/cases/140417visantcmplt.pdf; Complaint at ¶ 70, In the Matter of Sysco Corp., USF Holding Corp., and US Foods, Inc., No. 9364 (F.T.C. Feb. 19, 2015), https://www.ftc.gov/system/files/documents/cases/150219syscopt3cmpt.pdf; Complaint at ¶ 12, In the Matter of American Renal Associates, Inc., and Fresenius Med. Care Holdings, Inc., No. 4202 (F.T.C. Sep. 7, 2007), https://www.ftc.gov/sites/default/files/documents/cases/2007/09/070907complaint.pdf.

[30] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 0.1 (1992); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 12 (2010). As a routine part of our merger investigations, we continually look for instances in which monopsony power might be used to drive down input prices. For example, the FTC recently required global health care company Grifols S.A. to divest blood plasma

brought increased attention to the notion that labor monopsony concerns deserve more attention from antitrust regulators. Last year, the FTC's Hearings on Competition and Consumer Protection in the 21st Century included several expert panels on labor monopsony and the role of antitrust in labor markets, to challenge and update our thinking on these issues. As a result, the FTC has now made it standard practice to screen for harms from enhanced labor monopsony power as part of every merger review. This process has just begun.

Whatever our merger investigations and the continued research on the effects of mergers on labor monopsony yield, mergers by themselves are unlikely to explain the declining share of national income that is captured by workers.[31] Labor mobility must be a central part of this discussion.

Thank you, and I look forward to your questions.

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collection centers in three U.S. cities, among other conditions, to resolve charges that Grifols' acquisition of Biotest US Corporation would be anticompetitive. Decision & Order, In the Matter of Grifols, S.A., and Grifols Shared Services North America, Inc., No. C-4654 (F.T.C. Sept. 18, 2018), https://www.ftc.gov/system/files/documents/cases/181_0081_c4654_grifols-biotest_decision_and_order_9-18-18.pdf. The FTC's administrative complaint alleged that Grifols and Biotest were the only two buyers of human source plasma in three U.S. cities, and that these three cities constituted relevant geographic markets because plasma donors typically do not travel more than 25 minutes to donate plasma. Without the divestitures, Grifols likely would have been able to exercise market power by unilaterally decreasing the donor fees in the three cities. Complaint at ¶¶ 11, 16, In the Matter of Grifols, S.A., and Grifols Shared Services North America, Inc., No. C-4654 (F.T.C. Sept. 18, 2018), https://www.ftc.gov/system/files/documents/cases/181_0081_c4654_grifols-biotest_complaint.pdf.

[31] *See e.g.*, Guy Rolnik, Labor Market Monopsonies and the Decline of the Labor Share: Q&A with Sandra Black, U. OF CHICAGO BOOTH SCH. OF BUS., STIGLER CTR.: PRO-MARKET BLOG (Jan. 6, 2017), https://promarket.org/labor-market-monopsonies-decline-labor-share-qa-sandra-black ("Market concentration is one way that firms might be able to gain wage-setting power through behaviors such as collusive wage-setting. That would be one example. But there are a number of other ways that firms could have wage-setting power, even in the absence of product market concentration").