Statement of the International Brotherhood of Teamsters, Service Employees International Union, and the Strategic Organizing Center to the House Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law for the "Reviving Competition, Part 4: Twenty-first Century Antitrust Reforms and the American Worker" Hearing,
September 28, 2021

Founded in 1903 by the merger of the two leading team driver associations, the International Brotherhood of Teamsters is one of America's largest and most diverse unions and proudly represents 1.4 million hard-working men and women employed as public defenders, sanitation workers, brewers, newspaper workers, healthcare workers, and secretaries, in addition to delivery and warehouse workers, throughout the United States, Canada and Puerto Rico. Service Employees International Union unites 2 million diverse members working in the healthcare industry, in the public sector, and in property services in the United States, Canada, and Puerto Rico. The Strategic Organizing Center is a democratic federation of labor unions representing millions of working people. The SOC strives to ensure that every worker has a living wage, benefits to support their family and dignity in retirement, and SOC advocates not just for jobs, but for good jobs: safe, equitable workplaces where all employees meaningfully participate in the decisions affecting their employment.

We commend the Subcommittee for taking on the vitally important task of antitrust reform for a new era, and we support the six Big Tech bills being considered in Congress as a good first step. However, Congress must also recognize the key role that the neglect of workers and lack of attention to labor markets have played in the erosion of economic opportunity in the last several decades. There are epidemics of high labor market concentration and accompanying employer abuses in a range of areas such as wage stagnation, worker misclassification, increasing employment violations, and a rise in the use of worker restraints such as non-compete restrictions and forced arbitration. Thus, for any antitrust reform to be effective – to reshape the tools needed to address increased corporate concentration, including labor market concentration and related employer abuses, and level the economic playing field for everyone – workers and labor markets must be at the center of solutions and reform going forward.

Labor market concentration is a growing problem

Corporation concentration has grown significantly over the last several decades, with troubling effects on the economic health of businesses, workers, and consumers. In terms of product markets, over the last two decades approximately 75 percent of U.S. industries have become more concentrated.[1] Since 1980, in a variety of sectors across the economy, the four largest firms have significantly increased their

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[1] Gustavo Grullon, Yelena Larkin, and Roni Michaely, *Are U.S. Industries Becoming More Concentrated?,* Rev. of Fin., Swiss Fin. Inst. Res. Paper No. 19-41, Oct. 25, 2018, at 1 https://ssrn.com/abstract=2612047.

share of sales.[2] With respect to efficiency and innovation, this is a cause for concern. The entry rate of new firms into the U.S. market has fallen sharply, particularly since 2007,[3] while firm exit rates have remained relatively flat.[4] In other words, the number of firms in various industries is declining, and existing producers are gaining share while new entrants find it increasingly difficult to challenge the established dominant players. This implies a lack of economic dynamism and increased market concentration.

Over the past decade, empirical evidence has demonstrated that the majority of local labor markets in the U.S. is also overly concentrated.[5] Research indicates that 20 percent of all U.S. workers work in highly-concentrated labor markets,[6] and that, across all U.S. labor markets, the average measurement of concentration well exceeds the Federal Trade Commission and Department of Justice's own guidelines.[7] Using the 6-digit Standard Occupational Category to define occupation and the USDA's commuting zone to define the geographic labor market, sixty percent of U.S. labor markets are highly concentrated.[8] In fact, in markets defined according to these criteria, labor supply elasticity – a measure of whether workers will quit if employers lower wages – is actually negative, meaning even if wages go down, workers will not quit.[9] Even in labor markets one would expect to be highly competitive, such as online platforms that offer at-home work, studies show employers have "considerable monopsony power."[10]

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[2] Ufuk Akcigit and Sina Ates, *Slowing Business Dynamism and Productivity Growth in the United States,* Fed. Reserve Bank of Kansas City, Oct. 8, 2020, at 4, 31 n.31, 45 https://www.kansascityfed.org/documents/4952/aa_jh_201008.pdf. The sectors are manufacturing, retail trade, wholesale trade, services, utilities and transportation, and finance. *Id. See also* David Dayen, *Monopolized: Life in the Age of Corporate Power* at 3 (2020) (noting that in the markets for airlines, commercial banking, and phone, wireless, cable and internet services, four companies control the market).

[3] John Haltiwanger, *Entry, Innovation and Productivity Growth in the U.S. Economy,* Fed. Reserve Bank of Dallas, May 31, 2018, at 9, https://www.dallasfed.org/-/media/Documents/research/events/2018/18ted-haltiwanger.pdf.

[4] *Id.*

[5] *E.g.*, Suresh Naidu, Eric A. Posner and Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L.R. 536, 546 & N.38-39 (2018) (studies of potential monopsonies in labor markets were sparked by a study showing an increase in New Jersey's minimum wage had no discernable impact on employment levels, thus showing labor markets affected were not competitive, which was followed by many studies confirming those results and the more general point that labor markets are much more concentrated than was previously thought, especially for low wage workers) (citing David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772 (1994) and other sources).

[6] José Azar, Ioana Elena Marinescu, Marshall Steinbaum, and Bledi Taska, *Concentration in US Labor Markets: Evidence from Online Vacancy Data,* Nat'l Bur. of Econ. Rev., Aug. 10, 2018, at 2, https://www.nber.org/system/files/working_papers/w24395/w24395.pdf.

[7] José Azar, Ioana Elena Marinescu, and Marshall Steinbaum, *Labor Market Concentration,* Nat'l Bur. of Econ. Rev., Dec. 10, 2018, at 2, https://www.nber.org/system/files/working_papers/w24147/w24147.pdf. These results are according to the Herfindahl-Hirschman Index (HHI); as discussed below, the HHI was developed for product markets but substantial research indicates firms possess market power in labor markets at much lower levels of market concentration than in product markets.

[8] José Azar et al, *supra* note 6 at 2.

[9] *Id*. at 12.

[10] Alan Manning, *Monopsony in Labor Markets: A Review*, ILR REV., 2021;74(1):3-26 at 2, https://journals.sagepub.com/doi/10.1177/0019793920922499; *id*. at 4 (citing studies). *See also* Arindrajit Dube, Jeff Jacobs, Suresh Naidu, and Siddharth Suri, *Monopsony in Online Labor Markets*, AER: INSIGHTS 2(1): 33–46 (2020), https://doi.org/10.1257/aeri.20180150.

Labor monopsony – the corollary of monopoly in the labor market – may significantly impact the wages and working conditions of workers. Labor monopsony power, alongside persistent trends including declining labor mobility,[11] can lead to negative outcomes for U.S. workers. A range of studies have shown that workers in highly-concentrated labor markets experience suppressed wages,[12] lower non-wage compensation in the form of health benefits,[13] and are more likely to be subject to labor rights violations.[14] Further, such negative impacts fall much more heavily on workers of color, so labor market concentration also exacerbates the existing problems of inequality and ongoing racism in our economy.

As discussed below, recent antitrust jurisprudence has disregarded competitive harms to workers and focused on harms to consumers; but research also indicates that monopolizing employers do not actually pass on cost savings they receive from reduced wages to consumers.[15] Instead, dominant employers tend to retain savings from lower wages.[16] At the same time, lower wages can increase consumer prices because employers purchase less of the input (labor), which results in higher marginal costs per product, and thus higher prices.[17]

Labor market dominance occurs at market share levels of 20 percent or lower

Compared to monopolists in product markets, employers are able to exercise outsized labor market power at lower levels of market concentration. Substantial academic research identifies several reasons labor markets are more susceptible to dominance at lower levels of concentration than product markets. For example, there are certain "search frictions" involved in looking for jobs, or circumstances that make changing jobs or finding new jobs difficult. Search frictions include the time and effort to search for a new job,[18] and factors that differentiate jobs but are extremely difficult to assess before working somewhere (quality of supervisors or colleagues for example).[19] These search frictions exist even in unconcentrated labor markets.[20] In addition, individualized needs of workers, such as location/transportation requirements, availability of child care near work and similar factors further

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[11] Damien Azzopardi, Fozan Fareed, Mikkel Hermansen, Patrick Lenain, Douglas Sutherland, *The decline in labour mobility in the United States: Insights from new administrative data,* OECD (December 14, 2020), https://www.oecd-ilibrary.org/docserver/9af7f956-en.pdf?expires=1615398612&id=id&accname=guest&checksum=19D81A08C345C32998FCE5FBCBBBE60B.
[12] Azar et al, *supra* note 6.
[13] Yue Qiu and Aaron J. Sojourner, *Labor-Market Concentration and Labor Compensation,* IZA INST. OF LABOR ECON. (January 8, 2019), https://ssrn.com/abstract=3312197.
[14] Ioana Elena Marinescu, Yue Qiu, and Aaron J. Sojourner, *Wage Inequality and Labor Rights Violations,* IZA INST. OF LABOR ECON., (August 13, 2020), https://ssrn.com/abstract=3673495.
[15] *See* Alan James Devlin, *Questioning the Per Se Standard in Cases of Concerted Monopsony,* 3 HASTINGS BUS. L.J., 223, 224 (July 6, 2009) (citing statements by DOJ antitrust division officials regarding the consumer price impact of monopolies), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1106&context=hastings_business_law_journal.
[16] *Id.* at 231.
[17] *Id*.
[18] Naidu et al, *supra* note 5 at 553.
[19] *Id*. at 554.
[20] Manning, *supra* note 10 at 4.

limit job mobility.[21] Such factors "may explain why low-skill workers may be as or even more vulnerable to monopsony than high-skill workers."[22] Importantly, these search frictions are inefficiencies that shift power from workers to employers,[23] and thus explain in part why employers have dominant labor market power at lower market shares than in product markets.

The most important difference between labor markets and product markets may be the two-sided nature of employment decisions.[24] Current models used for product markets assume products are indifferent to who purchases them, whereas in labor market both employers (buyers of labor) and prospective employees (suppliers of labor) have preferences.[25] This makes intuitive sense: the shampoo is indifferent to who purchases it, hence, it is much easier to switch shampoo brands, for example, than to switch jobs. Thus the two-sided nature of employment creates significant additional friction in labor markets, which further lowers the market share level at which employers can be expected to be dominant in labor markets. For these reasons current analyses, such as the DOJ/FTC Horizontal Merger Guidelines, which do not account for the two-sided nature of labor markets, underestimate the power over workers firms can yield at lower levels of labor market concentration.[26]

In its report, adopted by Congress, the Subcommittee recommended adopting a threshold of 30 percent market share as indicative of market power, but indicated a lower threshold might be appropriate for monopsony claims.[27] In one of the rare cases to consider outsized buyer power, the Seventh Circuit concluded that toy retailer Toys R Us was able to constrain competition in the national toy market with only 20 percent of that market.[28] The research discussed above also supports the conclusion that an employer that holds a market share level of 20 percent in a specific labor market is extraordinarily likely to possess sufficient market power to exercise dominance over its workers. Thus, antitrust reform should recognize that firms have market power in labor markets at lower levels of concentration than in product markets. Thus, we believe a reasonable threshold for labor market power is 20 percent.

Additional employer actions that unfairly restrain on workers

As corporations have benefitted from concentrated labor markets, employers have also increasingly placed restraints on workers that exacerbate the power disparity between workers and employers. These restraints further distort the labor market in ways that increase competitive harm in labor

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[21] Naidu et al, *supra* note 5 at 555. *See also* Manning, *supra* note 10 at 5-6, who explains the variety of individualized needs and job-seeking criteria as heterogeneity of tastes that adds an additional dimension to job searches beyond search frictions.
[22] Naidu et al, *supra* note 5 at 555.
[23] *Id*. at 541.
[24] *Id*. at 554-555, 584.
[25] *Id*.
[26] *Id*. at 584-85.
[27] *Investigation of Competition in Digital Markets*, Subc. on Antitrust, Comm'l & Admin. Law of the H. Comm. of the Judiciary, at 393 (2020) ("It is the view of Subcommittee staff that the 30% threshold established by the Supreme Court in *Philadelphia National Bank* is appropriate, although a lower standard for monopsony or buyer power claims may deserve consideration by the Subcommittee.") (citing *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963)).
[28] *Toys "R" Us, Inc. v. Fed. Trade Comm'n,* 221 F.3d 928 (7th Cir. 2000).

markets. These restraints include non-compete restrictions, no-poach agreements, and nondisclosure restrictions, which are direct anticompetitive restraints on workers that should be banned outright.

Non-compete restrictions prevent workers from seeking certain jobs in similar professions or geographic markets, or both, for a certain time after their employment ends, and no-poach agreements are agreements by employers, quite literally, not to compete for each others' workers. Both restrictions directly interfere with workers' mobility and limit their ability to compete for different jobs with better wages or other terms of employment. They are direct restraints on competition, and exacerbate inequality and the imbalance between corporate and worker power in labor markets.

Non-disclosure restrictions placed on many workers by employers similarly impede workers' ability to bargain and compete fairly for better wages and working conditions by preventing workers from even learning about pay and working conditions. Prohibiting the exchange of wage and benefit information among employees exacerbates existing information asymmetries, a quintessential labor market distortion, and keeps workers from having the information needed to make informed decisions about their own economic futures. Research shows many of these measures have contributed to the gap between productivity growth and wages observed during the last several decades.[29]

These specific restraints are in addition to new models of employment that have fissured the workplace and further enhanced employer power at the expense of workers. These models include gig platforms such as Uber and Instacart, through which one central company sets prices and wages for an entire network of supposedly independent businesses and their customers – arrangements that in early years of antitrust enforcement would have been viewed as illegal vertical business arrangements.[30] They also include rampant and systematic misclassification of workers as independent businesses which, again, permits a firm to control workers outside its corporate boundaries, currently without antitrust liability for these arrangements.[31] Workers – who lack not only job security but also the protection of wage and hour laws, labor laws, and other on-the-job protections as well as individual and collective bargaining power – suffer the most under these models. But fissuring models also have competitive implications, not only due to their widespread use, but because they represent such a dramatic and systematic shift in power from workers to employers. Antitrust law is concerned with who –which firms, employers or workers – controls the structure of markets,[32] and was intended to mitigate the accumulation of power by large firms at the expense of smaller players.[33] Fissuring models in which firms control external parties, including workers, through vertical arrangements present a disturbing challenge that current antitrust jurisprudence does not address, but should.

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[29] Larry Mishel & Josh Bivens, *Identifying the policy levers generating wage suppression and wage inequality* at 47-49, Economic Policy Institute (May 13, 2021), *available at* https://www.epi.org/unequalpower/publications/wage-suppression-inequality/.

[30] *See, e.g., United States v. Richfield Oil Corp.,* 99 F. Supp. 280 (S. D. Cal., 1951), aff'd, 343 U.S. 922 (1952).

[31] Marshall Steinbaum, *Antitrust, the Gig Economy and Labor Market Power*, 82 L. & Contemp. Probs. 45, 48 (June 12, 2019), http://dx.doi.org/10.2139/ssrn.3347949; Brian Callaci, *Control Without Responsibility: The Legal Creation of Franchising, 1960-1980,* Feb. 28, 2020, at 7, https://doi.org/10.1017.eso.2019.58.

[32] Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 745 (2016).

[33] Sanjukta Paul, "Hearing on Antitrust and Economic Opportunity: Competition in Labor Markets," Testimony Before the Comm. on the Judiciary, Subc. on Antitrust, Comm'l, and Admin. Law, Oct. 29, 2019, at 4.

Workers know the effects of labor market domination by large firms first-hand. The workers who are bringing their stories before the Subcommittee today vividly illustrate what the research above confirms, the power of large, dominant employers and the human cost of that dominance.

Nila Payton works in the pathology department of Presbyterian Hospital, which is owned by the University of Pittsburgh Medical Center (UPMC). UPMC has absorbed at least eight hospitals in the Pittsburgh area alone, and has such a hold on the labor market for medical jobs in that area that Nila feels trapped. Not only does Nila work for UPMC, but as an employee she must purchase UPMC medical insurance and use UPMC for medical care. Like many of her coworkers, Nila owes medical debt to her employer. And she knows – because she has checked – that UPMC has a significant impact on wages and benefits at smaller area hospitals but also across the service sector. Under the thumb of UPMC, she is earning far below a living wage for Pittsburgh – she is making $19 per hour when the living wage for her family is $28 per hour – and her hospital feels little pressure to react to health care workers' demands for additional PPE or for hazard pay made available by the state for front-line health care workers. In addition, UPMC imposes non-compete restrictions on some employees, like doctors, which lock them into their jobs because they are prohibited from working for any UPMC-affiliated office or UPMC's main competitor in the entire county for a substantial period of time after leaving UPMCs employ. If they try to leave for another such job in the area, they may owe UPMC significant damages. The experience of UPMC workers are powerful examples of why we need antitrust reform that includes workers.

Similarly, Dan Gross's experience working for UPS points to how the unchecked growth and dominance of a company like Amazon threatens middle class American jobs. Mr. Gross has moved up the ranks over the last 22 years into different driver positions and has earned a solid, middle class living that has supported his family. His middle class job and those like it are threatened, however, by companies like Amazon that have grown through leveraging their power in one market, e-commerce in Amazon's case, to exert power and gain market share unfairly in many other markets, including in logistics. As the Subcommittee reported, Amazon leverages its e-commerce power to require sellers to use its fulfillment and delivery services, which has unfairly enabled Amazon to grow its presence in logistics. At the same time, Amazon's approach to employment in its delivery operations – where the company utilizes a large network of drivers it controls but does not employ – is undermining the working standards that Mr. Gross and millions of skilled truck drivers have fought for and maintained over decades. These standards are threatened when a behemoth like Amazon can utilize its power to expand unfairly into multiple lines of business and then undermine the wages and working standards in those businesses without facing consequences under antitrust law.

Antitrust law has failed workers since at least the 1970s

In spite of the problems caused by labor market concentration, labor market antitrust litigation against employers is extremely rare. Since 1960, there have been fewer than 100 labor market cases compared to over 2,300 product market antitrust cases.[34] Fully half the labor market cases that have been brought under Section 1 of the Sherman Act have addressed only the niche employment setting of sports

[34] Eric A. Posner, *Why the FTC Should Focus on Labor Monopsony, Pro Market* (November 5, 2018), *available at* https://promarket.org/2018/11/05/ftc-should-focus-labor-monopsony/.

leagues.[35] At the same time, not a single labor market case brought under Section 2 of the Sherman Act has survived summary judgment.[36] This "litigation gap" is exacerbated by the lack of attention to labor market effects in the Department of Justice and Federal Trade Commission's current Horizontal Merger Guidelines.[37] No merger has ever been blocked based on increased labor market concentration.

There is broad agreement that the Clayton Act provides for review of the effects of mergers on labor markets as well as on product markets. Indeed, Congress's intention to protect labor markets from the harms of monopsony power has been clear since the inception of U.S. antitrust policy: One of the reasons Senator John Sherman gave for legislating against monopoly was that "[i]t commands the price of labor without fear of strikes, for in its field it allows no competitors."[38]

Yet in the 1970s, courts and enforcement agencies embraced the "Law and Economics" theory espoused by the University of Chicago School and Robert Bork. The results are clear: corporate concentration and labor market concentration have soared, while innovation, new business formation, and wage growth are stagnating. Vertical mergers, integration, and restraints have been tolerated, if not encouraged, as "efficient" during this recent era of antitrust jurisprudence. And the centerpiece of this philosophy has been consumer welfare as the sole barometer of potential competitive harm. The consumer welfare standard, which focuses solely on whether consumers experience measurable changes in welfare, usually by looking primarily at whether prices have increased, has left out many, especially workers. Under a consumer welfare-focused view of competition, courts have often required harm to consumers even where workers are the parties who have claimed – and shown – harm.[39] Similarly, courts have required that even where a party has shown competitive harm in a labor market, a showing of pro-competitive benefits (even speculative benefits) to consumers may offset or justify the harm to labor markets.[40]

Reform that includes workers

There is a growing consensus that the long-reining Law and Economics ideology evident in antitrust jurisprudence since the 1970s has not served most participants in the economy well, and that antitrust law should be revitalized to hew more closely to its original purpose of mitigating the power of the largest corporations and protecting smaller economic participants from that power. At the federal level alone, the Biden administration recently issued an Executive Order announcing a policy of reinvigorating antitrust policy, including regulation and enforcement, with directives to include workers and labor markets in this effort. And just two weeks ago, the Federal Trade Commission rescinded the 2020 Vertical Merger Guidelines in part because the Guidelines "adopted a flawed economic theory" which

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[35] Ioana Elena Marinescu and Eric A. Posner, *Why Has Antitrust Law Failed Workers?,* 105 CORNELL L. REV. 1343, 1365 (2020), https://ssrn.com/abstract=3335174.
[36] *Id.* at 1371.
[37] *Horizontal Merger Guidelines,* U.S. Dep't of Justice & Fed. Trade Comm'n (Revised April 8, 1997), https://www.justice.gov/atr/horizontal-merger-guidelines-0.
[38] Congressional Record 2457 (1890), https://appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf.
[39] *E.g.*, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig*., 958 F.3d 1239, 1266 (9th Cir. 2020) (M. Smith, Cir. J., concurring).
[40] *Id*.

suggested that procompetitive effects can cure a vertical merger that is otherwise illegal, an approach that "has no basis of support in law or market reality."[41] Congress, led by this Subcommittee, has been at the forefront of efforts to reinvigorate antitrust law to confront challenges presented by today's economy – starting with the so-called "Big Tech" bills voted out of the Judiciary Committee in June.

These initiatives are encouraging, but Congress must take on broader reform of the antitrust laws to address more fundamental concerns regarding how courts have misinterpreted antitrust laws and imported theories and standards found neither in those statutes nor consistent with their original purpose. Further, such reform must include provisions that unambiguously and rigorously protect labor markets, on par with protecting competition in product markets.

Labor law reform, while also vital, cannot provide the entire solution to the dominance that most workers experience in today's economy. Workers – and labor markets – are the driving force of work, production, value – in short, the backbone of the economy. Laws that shape how power is dispersed in the economy impact workers just as fully as they impact owners of capital in society.[42] While collective bargaining is a potent counterweight to concentrated corporate power in labor markets, the relentless weakening of antitrust law has allowed the rise of corporate concentration and significant shifts in the balance of power between employers and workers, issues that labor rights alone cannot mitigate. These problems concern the overall structure of the economy and the ways that corporate power is distributed, the very subject that antitrust law was meant to address. In short, labor issues must be at the center of any antitrust reform effort.

For these reasons, we urge the Subcommittee to undertake reform legislation that includes the following key labor-related provisions to clarify and strengthen antitrust law:

1. <u>Establish bright line rules and eliminate unsupported recognition of so-called efficiencies</u>: Establish clear, simple rules against abuse of market power, to prevent courts from misinterpreting the law or imposing additional barriers to antitrust protections in the future. Piecemeal or partial rules that permit pro-competitive justifications, or that leave it for courts to define abuse of market power, provide too great an opening for continued judicial law-making and subversion of antitrust protections. This should include, at minimum, that:
   i) parties should be permitted to prove an antitrust violation by showing anti-competitive harm from a dominant firm's conduct in a labor or product market. Firms should not be able to defend, or rebut, evidence of abusive conduct by offering a pro-competitive justification;
   ii) parties should not be required to show an antitrust violation through indirect evidence of market share if they are able to show a violation through direct evidence of illegal conduct; and
   iii) harm to consumers should not be required in order to show an antitrust violation, particularly where competition in labor markets is involved.

[41] *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary*, Press Release, Fed. Trade Comm'n, Sept. 15, 2021, https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines.
[42] Paul, *supra* note 33 at 4 (examining how antitrust law coordinates rights among economic actors); Khan, *supra* note 32 at 745 ("Whether a market is competitive is inextricably linked to…how that market is structured.").

2. Provide bright line rules prohibiting firms from engaging in specific types of conduct known to be exclusionary or anticompetitive: Such conduct should include exclusive dealing arrangements, exclusionary contracts or payments, and tying arrangements. The law should provide these rules expressly rather than leaving it to courts to determine whether these types of anticompetitive acts are harmful on a case by case basis. With respect to workers, such exclusionary and anticompetitive acts would include, at least, non-compete and nondisclosure restrictions, and horizontal and vertical no poach agreements.

3. Provide for labor monopsony claims clearly and expressly: Provide for labor monopsony claims under antitrust laws by including and defining abuse of labor market power and exclusionary conduct in labor markets in antitrust laws and legal standards. These changes should be expressed in clear and unambiguous language so that courts may not refuse to apply antitrust laws to labor monopsony or with respect to labor markets.

4. Establish an appropriate threshold for labor market power: Establish an appropriate market share threshold at which a firm is presumed to have market power. Evidence suggests that a special feature of labor markets is that they become significantly less competitive at lower levels of concentration than product markets; we thus urge a 20 percent threshold for labor markets.

5. Expand antitrust exemption to include gig workers and other independent contractors: Organizing activity by workers is pro-competitive activity that counters employer power, especially over workers who are already deprived of the protections and power of being directly employed. Workers classified as independent contractors should be exempt from antitrust laws just as employee organizing is exempt to enable these workers to engage in collective activity to improve their wages and working conditions and to balance the power of employers.

We believe that the structure of our economy matters. In order to have a reasonable chance at a good job, family-supporting wages, and the ability to negotiate these conditions, it matters who has power in our economy and in our system. In all of these areas, as discussed above, we believe the power of individuals has been declining, and the power of large corporations has increased. And it is increasingly clear that corporate concentration of power harms consumers, workers and other market participants as well as the economy itself in a multitude of ways – from wage inequality to corporate influence on politics to innovation.

Antitrust laws – and how those laws are interpreted, applied, and enforced – have a tremendous role to play in how corporate power is allocated, exercised, and manifested in our system. Those laws have quite simply failed for far too long. This failure is particularly problematic at a time when the economy and the very nature of work itself face substantively new challenges, from digital platform companies to fissured workplaces. We urge this Subcommittee to undertake substantial – and lasting – revisions of our antitrust laws that will protect and enhance fair competition for our country's workers going forward.