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When Monopolists Union-Bust: Antitrust Standards for Unilateral Labor Market Conduct

Abstract: This article clarifies standards for evaluating whether a firm's unilateral labor market conduct (wage suppression) violates antitrust law. It begins by analyzing suppression of collective bargaining (union busting) as conduct that can violate Section 2 of the Sherman Act. This article is the first to argue that wage suppression can violate Section 2 if the conduct (1) harms the competitive process within a labor market and increases monopsony, (2) tends to exclude law-abiding rivals from product or service markets, or (3) forecloses any adjacent market. Conduct that satisfies any of these three standards can be restrained with antitrust law. The antitrust standards presented are applicable to any kind of unilateral labor market conduct, including worker misclassification, wage theft, vertical restraints, restrictive covenants, employer-driven debt, or child labor.

Keywords: antitrust, labor antitrust, labor monopsony, wage suppression

I. Introduction

From the 1960s through the 2000s, American labor economists generally conceptualized labor markets as perfectly competitive (Azar and Marinescu 2024, 492). This meant that employers rarely had the power to lower wages or worsen working conditions without workers quitting en masse (Card 2022). Switching jobs was assumed to be easy, and workers' wages were assumed to reflect the value that workers generated. This view was bolstered by labor market data that lacked significant detail about employers (*ibid.* at 8). Antitrust enforcement reflected that economic consensus—enforcers did not consider labor market effects of mergers, regularly police labor market conspiracies, or restrain conduct that increased labor monopsony.

Starting in the 1990s, an empirical turn in labor economics found contradictory evidence: Workers facing reduced pay quit at rates far lower than would be expected in competitive markets (Sokolova and Sorensen 2020; Card and Krueger 1995), employment in many markets is concentrated to a few firms (US Department of the Treasury 2022), and employer conduct, including conspiracies and employment terms, frequently prevents workers from switching jobs.

In the last decade, a new consensus has emerged. Mainstream economists now recognize that many US employers have significant wage-setting capacity and that a plurality of markets are characterized

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by two or fewer employers that can control wages and working conditions with little pressure from competitors or workers (US Department of the Treasury 2022, 26; Azar and Marinescu 2024). At the same time, there has also been a growing recognition of a decline in worker power—that is, workers’ ability to obtain higher wages and better working conditions (Stansbury and Summers 2020). This reduction has coincided with declining unionization, a reduced threat of union organizing, firms lacking incentives to treat workers as stakeholders, and worker pay lagging productivity. These trends contribute to high wage markdowns—the difference between the value that workers generate for their employers and their compensation (Yeh et al. 2022). Administrative data suggests that the wage markdown for manufacturing workers is so high that most workers only earn sixty-five cents for every marginal dollar they generate (ibid.). A core characteristic of a competitive market is that participants earn roughly the value they generate because they have equality of bargaining power. If a worker was facing a significant wage markdown in a competitive market, they would be able to switch to a job where they were paid in accordance with their productivity. Therefore, these high wage markdowns suggest that monopsony, not competition, is pervasive in US labor markets.

Collective bargaining can countervail monopsony and thereby increase labor market competition. While the Treasury Department estimates that labor monopsony reduces workers’ wages by 20 percent compared to competitive market conditions (US Department of the Treasury 2022), other research found that “high levels of unionization ameliorate the negative effects of labor market concentration on earnings which has been identified in a growing set of empirical studies over the last few years” (Dodini et al. 2021, citations omitted). These findings suggest that when monopsonists suppress collective bargaining, they are not simply abusing their market power (in other words, coercing trading partners in ways that require market power), but taking intentional action to increase or maintain their market power. This intentional acquisition of monopoly power should create liability under Section 2 of the Sherman Act. See 15 U.S.C. § 2. Courts can apply the Sherman Act to address wage suppression conduct when it increases employers’ labor market monopsony or their monopoly in an adjacent market.

Doing so could deter and remediate many of labor monopsony’s harms that labor law cannot currently remediate. Labor law is only structured to address a portion of the harm created by wage suppression conduct—harm to specific workers that is caused by their employer. This typically leaves workers at other firms within the same labor market, product-market rivals, and unions without a compensatory remedy when they are injured by wage suppression conduct.

Regardless of the harmed party, the National Labor Relations Board (NLRB) has determined that it does not have the power to penalize employer conduct with monetary damages beyond “make-whole” remedies. *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970). The agency is also not regularly able to secure preliminary injunctive relief for workers. Accordingly, it is profitable to illegally fire a worker for labor organizing if doing so would reduce the likelihood of a union forming by as little as 0.15 percent (Stansbury 2021, 1). Without deterrence, wage suppression conduct remains pervasive (McNicholas et al. 2019).

By contrast, antitrust plaintiffs can receive preliminary injunctions and have access to far more potent and equitable remedies. These remedies include imprisonment for up to ten years, fines for individuals up to \$1 million, fines for corporations up to \$100 million, and treble damages for plaintiffs. Sherman Act, 15 U.S.C. § 2. Successful Sherman Act plaintiffs also receive attorneys’ fees. National Cooperative Research Act of 1984, 15 U.S.C. § 4304. Antitrust monitors can request documents, force CEOs to sit for interviews, or recommend new penalties for noncompliance. The Sherman Act also allows

private plaintiffs to initiate actions directly in court, in contrast to the National Labor Relations Act (NLRA), which requires disputes to be handled through administrative adjudication before a lengthy appeal to federal courts.

Sherman Act enforcement could supplement NLRA enforcement to compel persistent NLRA violators to comply with existing labor law; deter misuses of regulatory processes that harm competition; and allow workers, competitors, and unions to seek preliminary antitrust injunctions and remedies that may only be available for labor market conduct that creates antitrust injury.

Take Amazon as an example. As of 2023, Amazon faced over 240 open or settled NLRB cases across twenty-six states (Palmer 2023a). In Bessemer, Alabama, where Amazon's processing center was the largest employer, the NLRB determined that the company engaged in a wide variety of illegal conduct that effectively suppressed labor organizing. NLRB Case No. 10-RC-269250. The NLRB found that Amazon illegally fired union organizers, polled and interrogated employees about their union support, and created the impression that Amazon had control over the conduct of the mail ballot election.¹ In a redo election, the union alleged that workers were threatened with plant closures if workers unionized, were prohibited from posting pro-union literature, and were surveilled and documented for labor organizing. At Amazon's JFK8 processing center, workers won a union election in April 2022, but as of August 2025, Amazon has refused to bargain, even after the NLRB General Counsel charged that this refusal violated labor law. NLRB Case No. 29-RC-288020.

Following Amazon's conduct, unionization at the affected facilities and among Amazon's 100+ US processing centers has been halted. Eliminating the threat of unionization likely increases Amazon's market power in labor, product, and union services markets. Within product markets, union-busting conduct raises the comparative costs of law-abiding rivals, who must either deter unionization by more costly means or bargain in good faith with unions (Farber 2005). Playing by a different set of labor market rules can leave law-abiding rivals less able to compete and thereby produce an exclusionary effect. By foreclosing collective bargaining, Amazon also increases its labor monopsony power—the capacity to control wages and working conditions.

When Amazon's conduct was ongoing in Bessemer, workers, competitors, or public antitrust enforcers could have sought an injunction under the Sherman Act to enjoin any deceptive and exclusionary practices before the election occurred or pay treble damages to compensate trading partners for the injuries generated by the conduct. At JFK8, the Sherman Act could be used to compel Amazon to bargain and to pay damages for the multiple years that Amazon's refusal to bargain granted it enhanced control over various labor markets. In either case, an antitrust court could order a monitor to be put in place to ensure that none of Amazon's labor practices unlawfully increased the firm's economic power. The monitor could order the parties to bargain and even require binding mediation to resolve any disputes.

By contrast, a recent first contract with unionized Amazon drivers resulted in workers winning a \$10 an hour raise (Molla 2023). If Amazon were able to foreclose unionization to these drivers, its capacity to offer lower wages would be higher.

¹ Decision and Direction of Section Election, Amazon.com Services LLC, NLRB Case No. 10-RC-269250 (Nov. 29, 2021), <https://s3.documentcloud.org/documents/21119381/rd-supplemental-decisions.pdf>.

Damages could not only compensate workers for past harms but also create significant deterrents against future exclusionary or deceptive labor market practices. Strong antitrust enforcement against unilateral labor market conduct could increase worker power toward the competitive level, structurally countervail monopsony power, and thereby increase wages, productivity, and tax revenue (Naidu et al. 2018).

Both case law and antitrust scholarship lack detailed standards for when dominant firm conduct that interferes with labor rights can create antitrust liability. Part II of this article will attempt to fill that gap.

II. Antitrust Standards for Labor Market Conduct

This section will clarify standards for when dominant firms' labor market conduct violates Section 2 of the Sherman Act. Even if the conduct reduces worker, consumer, and total welfare, the conduct may still be permissible under current interpretations of Section 2. To incur Section 2 liability, the conduct must maintain or increase the dominant firm's power over a market beyond the power that it obtained by either historical accident, innovation, or business acumen. *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966).

While this article primarily analyzes foreclosure of collective bargaining (union busting), other wage suppression conduct by dominant firms—worker misclassification, wage theft, child labor, employer-driven debt, or vertical labor restraints—could similarly be shown to violate Section 2 using the same standards (Naidu et al. 2018; Marinescu and Posner 2019).

A. Standards for Illegal Monopolization via Labor Market Conduct

The Supreme Court defines monopoly power as “the power to control prices or exclude competition.”² Companies can exclude law-abiding product-market rivals via their labor market conduct. Companies engage in wage suppression like illegal union busting to lower their costs, earning them a “labor rent” (Araki et al. 2022). This rent becomes a subsidy in their product market, which may allow them to be more profitable than equally efficient competitors who comply with labor laws. This unfair advantage can increase or maintain a dominant firm's monopoly by reducing law-abiding rivals' capacity to compete. When a firm has been “attempting to exclude rivals on some basis other than efficiency,” it is fair to characterize its behavior as predatory. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985). In this way, a monopolist's labor market conduct can erode competition within product markets.

The illegal monopoly standard is explained most definitively in *Grinnell Corp.* and has been repeated in almost every Section 2 case since—“the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). This standard seeks to immunize the acquisition of market power through competition on the merits while prohibiting dominant firms from acquiring power by any other means. In *Microsoft*, the court invoked this standard and then set out an additional balancing test for Section 2 liability—(1) conduct must harm the

² *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (discussing “the power to control prices or exclude competition”) (citing *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)).

competitive process, (2) creating an anticompetitive effect (3) without creating a larger procompetitive effect. *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

Wage suppression conduct like union busting satisfies the *Grinnell Corp.* test because it is intentional conduct that increases the firm's power to control wages or exclude law-abiding competition without improving products. Even after satisfying the *Grinnell Corp.* test, courts may still subject an illegal monopsony claim to a *Microsoft*-like competitive effects test. Wage suppression conduct can produce anticompetitive effects in product markets by excluding law-abiding rivals, increasing quality-adjusted prices, or degrading service quality. When the monopolist artificially suppresses wages and working standards, it can both exclude rivals and lower industry employment as workers respond by leaving or not entering the market (Melamed and Salop 2024). Standard antitrust economic models predict that further suppressing wages below an already monopsonistic level can create reduced employment or labor shortages that can feed into the product market as reduced output and higher prices (*ibid.*).

The Department of Justice embraced this theory in a recent amicus brief, stating that “anti-unionization tactics by a monopsonist arguably limit unionized rivals’ ability ‘to compete profitably’ by lowering UPMC’s costs relative to the rival’s.”³

Federal Trade Commission (FTC) Commissioner Bedoya has made similar arguments that worker misclassification creates anticompetitive harm by excluding law-abiding employers from markets. He recounted the story of construction contractors who refused to misclassify their workers and were thereby excluded from certain markets (Bedoya and Miller 2024). Preventing conduct that deprives competitors of the capacity to compete fairly has been a core aim of the Sherman Act since its inception. The Supreme Court has called back to this notion when defining monopolization: “Senator Hoar, in discussing s 2, pointed out that monopoly . . . , ‘involved something like the use of means which made it impossible for other persons to engage in fair competition.’” *United States v. E.I. du Pont de Nemours & Co.*, 351 U. S. 377, 390 (1956).

Rideshare markets may suffer from this kind of illegal monopolization. One federal court has recognized cost savings from illegal labor practices as anticompetitive product-market conduct. *Diva Limousine, Ltd. v. Uber Technologies, Inc.*, 392 F. Supp. 3d 1074, 1093 (N.D. Cal. 2019). The case involved a limousine company suing Uber for the alleged anticompetitive advantage it derived from misclassifying its workers: “[Plaintiff’s] allegations support the inference that Uber could not have undercut market prices to the same degree without misclassifying its drivers to skirt significant costs.” *Diva Limousine*, 392 F. Supp 3d at 1093.

The Department of Justice echoed this sentiment in an amicus brief to the NLRB on its worker misclassification rule, stating that “firms that misclassify their workers as independent contractors may gain an unfair competitive advantage over their rivals in cutting their costs, potentially enabling predatory schemes that may harm competition in the markets for goods and services in which they participate.”⁴

³ Department of Justice, Statement of Interest of the United States of America, *Mizell v. UPMC*, No. 1:24-cv-00016-SPB, at 20 (W.D. Pa. Sept. 30, 2024) (citation omitted).

⁴ Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party, *Atlanta Opera, Inc.*, NLRB Case No. 10-RC-276292, at 7 (Feb. 10, 2022), <https://www.justice.gov/atr/case-document/file/1470846/download>.

In this case, Uber's conduct allowed it to compete by a different set of rules than its taxi and limousine rivals. Rivals were required to pay minimum wage, pay overtime, and respect workers' collective bargaining rights. Meanwhile, Uber allegedly misclassified its drivers, claiming they were independent small businesses. Law-abiding employers who dealt with its drivers as employees could have been excluded from the rideshare market and replaced by employers who misclassified their workers.

By suppressing drivers' compensation further below drivers' marginal product, this conduct may shrink the size of the rideshare workforce and thereby hurt rideshare consumers via higher prices, driver shortages, and lower consumer safety.

Modern antitrust jurisprudence takes a lax approach to enforcing predation claims out of fear that tougher enforcement would chill price-reducing, procompetitive behavior. *United States v. AMR Corp.*, 335 F.3d 1109 (2003). However, when the exclusion itself is fueled by conduct that a law-abiding rival cannot engage in, these claims are more aptly evaluated under a "raising rivals costs" framework. *LePage's Inc. v. 3M*, 324 F.3d 141, 155 (3d Cir. 2003). Under such a framework, the plaintiff would not be required to show below-cost pricing and recoupment. Instead, it would only need to show that the conduct excludes law-abiding rivals. The alternative position would have antitrust courts recognize illegal conduct as procompetitive and "efficient."

Typically, raising-rivals'-costs claims involve raising costs for competitors, not reducing costs for the monopolist. Still, some "raising-rivals'-costs" cases do not literally raise rivals' costs but rather leave rivals less able to compete without engaging in similar practices, for example *LePage's Inc.*, in which the court stated: "The principal anticompetitive effect of bundled rebates as offered by 3M is that when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer." *LePage's Inc. v. 3M*, 324 F.3d 141, 155 (3d Cir. 2003).

Antitrust courts typically view firms reducing their costs as efficient and take great care not to deter increased firm efficiency (Leary 2002). While most cost savings are considered efficiencies, cost savings derived from illegal activity should not be accepted by antitrust courts as efficient or procompetitive—doing so would encourage illegal labor market conduct and work to exclude law-abiding competitors. Judicial interpretation in this area may also consider that many of the Sherman Act's drafters, including Senator Sherman, vocally opposed using the antitrust laws to reduce worker wages (see 21 Cong. Rec. 2562 (statement of Sen. Sherman); Vaheesan 2019, 791).

The unearned subsidy from union busting can be quantified with limited assumptions. Take FedEx and UPS, which, together control nearly 70 percent of the parcel-shipping market (Flashman 2022). The COVID-19 pandemic provided direct evidence suggesting that both firms have significant pricing power (Ziobro 2020). UPS's workforce is unionized while FedEx's is not, due to a legal loophole.⁵ Accordingly, FedEx drivers are classified as contractors and earn between \$15 and \$25 an hour (Black 2023). At the same time, UPS drivers are unionized employees who earn \$49 an hour and receive full pension and health-care benefits (Josephs 2023). We can conservatively estimate that on a per-worker basis, FedEx's labor rent is at least \$30 an hour per worker for each of its roughly one hundred thousand contract drivers. If the average FedEx driver works for forty hours a week, then FedEx would have a \$6.2 billion unearned advantage over an equally efficient rival. While this may not have

⁵ FedEx claims to be subject to the Railway Labor Act (RLA), a law that requires the unionization of airlines or railways via a single, company-wide process (see Teamsters for a Democratic Union 2010).

an exclusionary effect on UPS given its size, this advantage would create significant hurdles for a law-abiding nascent competitor.

Amazon fulfillment is another example. In the United States, Amazon has 110 fulfillment centers, which employ more than 1,500 workers each (Sullivan 2023). The Federal Trade Commission and over a dozen states are arguing that Amazon does have market power within its product market. *FTC v. Amazon.com, Inc.*, No. 2:23-CV-01495-JHC, 2024 WL 4448815 (W.D. Wash. Sept. 30, 2024). Amazon fulfillment centers have twice the accident rate of other warehouses, experience extremely high rates of turnover, and are home to reports of workers being made to urinate in bottles to meet productivity quotas (Palmer 2023b; Picchi 2021). These nonprice effects indicate that Amazon has significant labor market power. The starting pay rate for these workers was \$17 an hour in 2023 (Tung and Lathrop 2023). As discussed above, Amazon also has a well-documented history of engaging in conduct that suppresses collective bargaining at its warehouses. In 2023, unionized Amazon delivery workers earned a first union contract that raised their wages from around \$20 an hour to \$30 an hour (Molla 2023). If warehouse workers unionized and experienced a similar pay bump, Amazon's labor costs would increase by \$3.4 billion, assuming a forty-hour work week, or over \$30 million per fulfillment center. Assuming a competitor like Target or Walmart did not illegally union-bust, it would need to be \$30 million more efficient at each fulfillment center each year to break even against Amazon. It could even be \$29 million more efficient than Amazon fulfillment and still be less profitable. This anticompetitive subsidy puts law-abiding firms at a disadvantage.

A fact-specific inquiry may be necessary to determine whether this advantage is significant enough to be recognized as maintaining a monopoly. Alternatively, courts could recognize that the practice as a general matter produces exclusionary effects and treat a pattern of illegal union busting by a dominant firm as a per se antitrust violation. The case for doing so would be strong when seeking injunctive relief alone because firms are already legally required to respect the collective bargaining process. *National Constructors Ass'n v. National Electrical Contractors Ass'n, Inc.*, 498 F. Supp. 510 (D. Md. 1980).

This approach would allow litigation against monopolists for the effects of their labor market conduct on product-market competition. This would allow plaintiffs to bring cases against product-market monopolists even without formal evidence of labor market power.

Union busting could similarly violate Section 2 within bidding or auction markets. In these markets, a government or corporation solicits bids for a project, and then interested businesses submit bids to earn the contract. Recently, antitrust enforcers have been cracking down on collusion in these markets by bidders, commonly known as "bid-rigging."

A plaintiff would first need to show market power to establish Section 2 liability. It could do so directly by analyzing the degree to which the bidder can set prices for contracts or indirectly by the share of relevant contracts awarded to the firm. If a dominant firm in the bidding market engages in union busting, it is providing itself with a labor rent just like union busters in product markets. Since labor is a sizable component of many contracting jobs, union busting may produce a significant rent for the dominant firm. When a dominant bidder engages in union busting, it provides itself with a cost advantage that equally efficient bidders who refuse to illegally union bust may be unable to compete with, rigging the market for the dominant bidder. Deploying this labor rent in the bidding market could exclude competitors who do not union-bust from being considered for contracts. When a dominant bidder does so, it violates Section 2 and creates antitrust injury that courts can remediate.

Government contracting may be an optimal area in which to bring Section 2 labor test cases. In these markets, governments have the bidding data to identify dominant firms and can cross-list that data with labor violation records to identify persistent union busters or identify other predatory labor market conduct. The Department of Justice recently won its first criminal monopolization case in forty years within a bidding market. *United States v. Zito*, No. CR 22-113-BLG-SPW, 2022 WL 16549305 (D. Mont. Oct. 31, 2022).

Other wage suppression conduct can violate Section 2 in product or bidding markets if the conduct generates a labor rent sizable enough to harm competition. Firms that have or acquire monopoly power in product or bidding markets, irrespective of their labor market power, can create this kind of antitrust injury. Firms with national monopolies, like Amazon, AB InBev, Owen Illinois, or Boeing, are exposed to product-market liability for their labor market conduct. Alternatively, businesses that are dominant in an individual geographic market, like meat-packers, hospital systems, private utilities, or pharmacy chains, may also have antitrust liability for their labor market conduct.

B. *Standards for Illegal Labor Monopsony*

Within the labor market, conduct can increase or maintain a firm's monopsony power by either reducing rivals' capacity to hire within the labor market or by granting the dominant firm increased control over wages and working conditions. Antitrust restraint of an illegal monopsony, therefore, requires the plaintiff to demonstrate that a firm has monopsony power and has engaged in conduct that either tends to exclude rivals or increases control over wages or prices. The plaintiff must also distinguish the defendant firm's conduct from competition on the merits. *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966).⁶

1. Illegal Monopsony via Supracompetitive Control over Wages and Conditions of a Labor Market

Wage suppression conduct can most simply violate Section 2 by increasing or maintaining a dominant firm's "power to control prices" within the labor market beyond the control it derives from competing on the merits.⁷

Most firms already have some labor market power due to search frictions and other structural aspects of labor markets (Naidu and Posner 2022). This allows firms to durably pay workers less than the value that workers contribute to production. Simply using market power to lower wages would be insufficient to establish Section 2 liability under modern judicial interpretation, just like increased

⁶ See also *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945) ("[T]he growth must be something else than 'natural' or 'normal'; that there must be a 'wrongful intent,' or some other specific intent; or that some 'unduly coercive means must be used.'").

⁷ *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001).

prices are insufficient to establish an illegal monopoly, *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1339 (7th Cir. 1986) but a monopsonist violates Section 2 when it engages in specific conduct that maintains or increases its control over market conditions and harms the competitive process within a labor market.

When a monopsonist engages in conduct that grants it increased power to push down wages, it moves market conditions further away from the competitive level and thereby harms the competitive process. Standard economic analysis suggests that further suppressing wages that are already below the competitive level will produce anticompetitive effects—reduced employment and perhaps lower productivity (Melamed and Salop 2024, 13).

Harm to competition can more intuitively be understood by examining how employer union busting affects workers' alternative job opportunities within the relevant market (Naidu and Swerdlow 2024).⁸ In a market where all employers abide by labor law, each worker in the market, regardless of who they work for, has more and higher-quality employment alternatives as compared to a similar market where union busting is pervasive. When the dominant firm chooses to union-bust, it increases its labor market power and therefore its ability to offer worse wages and working conditions. This not only affects the dominant firm's employees; it also erodes the exit option of all other workers in the labor market. Whereas before, rival workers could threaten to leave for higher wages and employment conditions at the dominant firm, they now can no longer make as credible a threat because conditions at the dominant firm are suppressed. As workers' exit option erodes, so does the competition between employers for labor. In this way, even though there is not necessarily an exclusion of a competitor from the market, the competition between employers in the market is still impaired.

Through this channel, unilateral conduct that suppresses wages, working conditions, and employment levels within an already imperfect market can violate Section 2 of the Sherman Act. Litigants must demonstrate that the dominant firm possesses labor market power, engages in conduct that harms the competitive process, and will probably produce anticompetitive effects. Recently, a class of nurses alleged that a hospital system had engaged in illegal monopsonization in part by union busting. Class Action Complaint, *Ross v. UPMC*, No. 1:24cv16 (W.D. Pa. Jan. 18, 2024).

Defendants may attempt to rebut an illegal monopsonization claim based on the alleged procompetitive effects of their conduct. Typically, procompetitive effects must be shown within the same market, meaning that defendants must argue that union busting increases labor market competition.⁹ Defendants would have to argue that their conduct prevents workers' wages from exceeding the value that workers add to production and therefore allows for greater labor market output. As discussed above, this assertion contravenes a broad empirical economic literature on the existence of sizable wage markdowns in labor markets (Azar and Marinescu 2024). Because labor markets are already categorized by wages that are significantly below workers' productivity, further wage suppression cannot plausibly create any procompetitive labor market effects. In real-world monopsonized markets where wages are suppressed by as much as 35 or even 50 percent, this

⁸ For antitrust purposes, the relevant labor market is the set of job openings that are available to a class of workers at a particular time (see Marinescu and Posner 2018, 5; Naidu et al. 2018, 574).

⁹ *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (“In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition.”) (citations omitted).

argument is particularly implausible (Melamed and Salop 2024, 22; Yeh et al. 2022; Azar and Marinescu 2024).

Unable to plausibly argue for procompetitive effects within the labor market, defendants may turn to supposed procompetitive product-market effects. Courts may choose to bar these defenses entirely based on the market specificity rule or based on the tendency of union busting to harm law-abiding product-market rivals. If courts do allow for out-of-market balancing, defendants could allege that unilateral conduct should not be considered illegal monopsonization if it increases consumer welfare by lowering prices. This would mirror the approach taken in *Weyerhaeuser*, an input market monopsony case, wherein the Supreme Court required showing that the monopsonist could recoup the cost of its input market conduct in its product market to establish liability under Section 2. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 313 (2007). If out-of-market balancing is permitted, defendants could attempt to show that wage suppression benefits consumers. To show any consumer benefit at all though, defendants would need to proffer extraordinary evidence that restraining union-busting conduct is likely to raise wages by more than the entirety of the wage markdown. Otherwise, no consumer benefit can be expected to stem from the wage suppression conduct. Even if union-busting employers redirect their labor rent into lower prices for some period, the standard economic model predicts that those price decreases may be offset at some point by price increases that stem from the output-reducing effects of union busting in an already imperfect labor market (Melamed and Salop 2024, 7; Naidu et al. 2018). Importantly, plaintiffs do not need to demonstrate a lack of procompetitive effects. Instead, the burden rests with the defendant to establish the existence of compelling procompetitive effects that cannot be achieved through less restrictive means (Carrier 2019).

As judicial familiarity with wage suppression conduct grows, courts may wish to adopt a presumption against recognizing the procompetitive effects of wage suppression conduct because of how much larger existing wage markdowns are than the likely effects of restraining employer conduct.

Using the criteria set out in *Microsoft*, courts should find that union busting within a monopsonistic market violates the Sherman Act. The conduct harms the competitive process by removing the countervailing constraint that worker organizing places upon a monopsonistic employer and, by extension, erodes the incentives for employers to compete as vigorously with each other for labor. This produces anticompetitive effects, and lacks a valid procompetitive justification. *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001). To the extent that courts recognize this channel as automatic, they should recognize this conduct as a per se violation of the Sherman Act such that workers would only need to demonstrate the fact of union busting, not its effect on market conditions in each case (Rooney et al. 2021).¹⁰

Workers and public enforcers would have standing to bring cases in this area since the harm occurs within the labor market.¹¹ If courts determine that unions do not have direct standing, they can be third-party payers for cases brought by affected workers. Large employers—hospitals, factories,

¹⁰ *Nat'l Soc. of Pro. Engineers v. United States*, 435 U.S. 679, 692 (1978) (describing “agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality”).

¹¹ See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983) (“[T]he nature of the alleged injury to the Union, which is neither a consumer nor a competitor in the market in which trade was allegedly restrained, the tenuous and speculative character of the causal relationship between the Union’s alleged injury and the alleged restraint, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy—weigh heavily against judicial enforcement of the Union’s antitrust claim.”).

fulfillment centers, meat processors, and educational institutions—can most easily be shown to have the requisite level of labor market power for Section 2 liability. Smaller firms that hire more specialized workforces, like dialysis clinics, engineering firms, animation studios, and specialized construction workers, may also have sufficient market power to violate Section 2 by union busting.

2. Illegal Monopsony via Exclusion of Labor Market Rivals

While a case based purely on supracompetitive control of the market could be consistent with existing Section 2 standards, most illegal monopoly cases have involved competitor exclusion. Competitor exclusion is apparent for certain types of labor market conduct like mergers and employment clauses that restrict or reduce workers' ability to change jobs. See *United States v. Bertelsmann SE*, No. CV 21-2886-FYP, 2022 WL 16949715 (D.D.C. Nov. 15, 2022). It is less clear that union-busting conduct would tend to exclude rivals from labor markets directly. To make a successful labor market claim for exclusion, plaintiffs would need to show that the defendant's labor market conduct tends to degrade their ability to hire in that market. The rival would have to distinguish the dominant firm's conduct from competition on the merits—providing superior employment opportunities.

On its face, wage suppression tends to lower the wages that rival employers need to pay their workers and may thereby make it easier for rivals to hire within the affected labor market. Wage suppression conduct may eliminate law-abiding employers from product markets and these employers may therefore be less able to compete in labor markets, but that labor market exclusion is a secondary effect of product-market exclusion.

To bring a successful competitor-exclusion case within a labor market, a plaintiff could show that a defendant has suppressed wages in one labor market and used that savings to distort conditions in a secondary market, for instance, if the dominant firm was suppressing wages for experienced workers while raising wages for entry-level workers. This could impair rivals for whom the threat or reality of union bargaining requires them to pay experienced workers closer to the value that they generate. A law-abiding labor market rival may be forced to hire fewer workers or be less able to pay experienced workers optimally, since their costs for entry-level hiring are being distorted.

C. *Standards for Illegal Monopoly in Labor Union Services Markets: Foreclosure via Tying*

Union-busting conduct could also violate Section 2 in the labor union services (LUS) market if it tends to foreclose that market. In footnotes 10 and 14 of *Associated General Contractors of California, Inc. v. California State Council of Carpenters (AGC)*, the Supreme Court alluded to the market for LUS as an antitrust market, building on prior cases that had accepted unions as valid antitrust plaintiffs to defend against conspiracies that threatened the union's ability to represent workers. 459 U.S. 519, 526 nn.10–14 (1983). *AGC* distinguished that market from the general labor market.

In the LUS market, workers are the consumers. Unionized workers receive services from a union in exchange for their membership dues. Prior to *AGC*, appellate courts had recognized antitrust injuries to unions when employer conspiracies reduced a union's ability to engage in business: In *Tugboat* the Fifth Circuit concluded that “the interests of a union in being protected from anticompetitive behavior in situations such as that alleged by Seafarers can clearly be brought within the injury to ‘commercial interests or enterprises’ standard. Unions are in the business of representing employees. If their ability

to organize workers is injured by a conspiracy involving employers, the union's ability to attract membership and represent employees is weakened." *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1176–77 (5th Cir. 1976). The Supreme Court cited *Tugboat* and *International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n*, 483 F.2d 384, 397–98 (3rd Cir. 1973), when recognizing the LUS market. If employer conspiracies to harm a union are a cognizable antitrust harm, then a single employer that forecloses or impairs the LUS market should also be prohibited from doing so by the Sherman Act. There are no other antitrust plaintiffs that receive protection from Section 1 of the Sherman Act but not from Section 2.

While protecting worker associations' right to engage in business with the antitrust laws may seem novel, associations of farmers, businesses, and consumers have regularly sought the protection of the antitrust laws. Grocery cooperatives are granted standing to sue meat and fish suppliers who conspire to injure the cooperative. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022). Farmer cooperatives have sued meat-packers for fixing prices as well. *Independent Purchasing Cooperative, Inc. v. Koch Foods, Inc.*, No. 1:20CV02013 (N.D. Ill. 2020). Drug store cooperatives have used the antitrust laws to sue drug manufacturers for pay-to-delay schemes. *In re Zetia (Ezetimibe) Antitrust Litigation*, No. 20-2184 (4th Cir. Aug. 4, 2021).

When dominant employers suppress collective bargaining, they engage in customer foreclosure within the LUS market.¹² This conduct ties participation in the monopsonist's labor market to acceptance of a set of services that the monopsonist provides as a substitute for union services. For instance, unions provide workers a service of collectively negotiating health-care benefits as opposed to an employer who provides a substitute-benefit selection service to workers. If an employer persuasively convinced workers that it could provide a better health-care plan than workers would receive through union bargaining, it would be competing on the merits with unions for customers, but when a dominant employer impairs workers' ability to select a union or impairs a union's ability to bargain, it impermissibly ties workers' acceptance of the employer's union-like services to acceptance of employment.

Employers compete directly with unions to provide this set of services. Employers launch organized campaigns, make persuasive speeches, and change workplace practices to compete to be workers' choice of service provider. Labor union services are economically separable and have independent demand from employment in a labor market, and should therefore be understood as a distinct market. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 462–63 (1992).

Ideally, a firm competes on the merits with a union to be selected as a service provider by making the case that it will better represent workers than a union would. But when a dominant employer reduces workers' capacity to choose collective bargaining, the employer opts out of competition and instead coercively ties workers' employment in the labor market with their submission to the employer's LUS substitutes. When a firm has monopsony power within a labor market, it is conditioning employment not just within a firm, but within the broader labor market on abstaining from labor union services.

This conduct should be understood as illegal tying. Dominant firms are per se prohibited from tying products or services in an adjacent market to their own when (1) the products or services are

¹² *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984), abrogated by *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) ("Exclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market.")

economically separate; (2) the firm has market power in the tying market; (3) the firm conditions access to the tying market on acceptance of tied services; (4) there is evidence of or clear reference to the economic effect of the tying arrangement.¹³

Dominant firm union busting satisfies this test. For the LUS market, the services in question are separable from the labor market, as demonstrated by the regular coexistence of unions providing services to workers at the same time that workers contract into employment with dominant firms. Monopsonist union-busting conditions work within the labor market on submitting to the monopsonist's substitutes for union services. The effect can be shown by either the union's lost revenue stemming from the exclusion, or by workers' reduced welfare from being denied labor union services. Even if the tying firm does not possess labor market power, courts can still analyze whether the conduct "unreasonably restrained competition" in the LUS market. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 9–18 (1984).

Antitrust litigation over the right to repair is a near analogue.¹⁴ In these cases, manufacturers are liable for foreclosing the market for repair services on their own products. Manufacturers typically foreclose this market with their design choices or warranty policies. While the public policy concern in these cases is consumers' rights and product quality degradation, the cognizable antitrust harm is the foreclosure of the market for repair services, a distinct market from the manufacturers' goods market. Denying consumers the right to repair does not exclude rivals from the good's product market. Still, the practice forecloses the repair market for that good, creating antitrust injury for repair market vendors. In the same way, denying workers' right to collective bargaining does not need to exclude employers from the labor market. Just as consumers lose their ability to shape their products when they cannot repair them, workers lose their ability to shape the labor market when they lose access to the market for labor union services.

Defendants may argue that employer provisioning of substitute union services is not distinct from the employer's role within the labor market since there is no use for these services without the underlying employment. The Supreme Court rebutted this claim directly in *Kodak*: "For service and parts to be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide service separately from parts [F]unctionally linked products at least one of which is useless without the other [can be] prohibited tying devices." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 462–63 (1992). Even though the employment opportunity and the union services are functionally linked, there still exists a demand for union services that allows unions to operate. Therefore, dominant employers should be per se prohibited from tying employment in a labor market to the acceptance of employers' substitute services.

In the market for labor union services, labor unions and the public would have standing to bring cases. Consumers of LUS may also have standing. Any dominant firm that successfully impairs or forecloses a LUS market would be liable under Section 2. As stated above, a showing of labor market power may not be necessary to bring a claim of tying under the rule of reason (Ahlborn et al. 2004, 49). LUS market tying claims may eventually warrant per se treatment because of direct evidence that most employers possess substantial labor market power (Naidu and Posner 2019).

¹³ In re Cox Enterprises, Inc., 871 F.3d 1093, 1107 (10th Cir. 2017); *Jefferson Par. Hosp. Distr. No. 2 v. Hyde*, 466 U.S. 2, 9–18 (1984).

¹⁴ See in re Deere & Co. Repair Servs. Antitrust Litig., 607 F. Supp. 3d 1350 (J.P.M.L. 2022); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992).

D. *Standards for Wage Suppression as an Unfair Method of Competition Under Section 5 of the FTC Act*

The FTC's unfair methods of competition (Section 5) authority should also be used to proscribe union busting that harms competition. Section 5 does not require showing that a firm possesses market power or that it is excluding rivals. The statute was written broadly to prohibit conduct that is outside the scope of the Sherman and Clayton Acts. *E.I. du Pont de Nemours v. FTC*, 729 F.2d 128, 136 (2d Cir. 1984). Section 5 can prohibit conduct so long as it is "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature," or has an "anti-competitive purpose," or "cannot be supported by an independent legitimate reason" *E.I. du Pont de Nemours*, 729 F.2d at 140.

According to the FTC's Policy Statement, conduct must be a "method of competition, . . . conduct undertaken by an actor in the marketplace," and be "unfair, meaning that the conduct goes beyond competition on the merits" to violate Section 5 of the FTC Act (US Federal Trade Commission 2022, 8). On its face, coercive suppression of labor organizing—retaliating against organizing workers, sabotaging a union election, or failing to bargain with a union—is conducted within a marketplace and goes beyond competition on the merits. Within the statement, the FTC also warns that "violations of generally applicable laws by themselves, such as environmental or tax laws, that merely give an actor a cost advantage would be unlikely to constitute a method of competition" (*ibid.*). Union busting does not "merely give an actor a cost advantage" but can durably increase an actor's capacity to control labor market conditions, reduce labor and product-market output, and foreclose union services markets—classic competition problems. The agency could also invoke Section 5 on the sort of nascent antitrust violation theory that the Justice Department articulated in its submission on the NLRB misclassification rule. Its brief asserted that restricting collective bargaining "increases the likelihood that employers will impose one-sided contract provisions . . . that themselves may tend to further restrain competition in the labor market."¹⁵

The FTC should be able to use Section 5 authority to penalize union busters when their actions meet the criteria that are established in its Section 5 policy statement. The FTC could also defer to the expertise of the NLRB and employ the *Heat & Frost Insulators* procedure for handling conduct that creates both labor and antitrust liability—first allow the NLRB to make a substantive labor law decision and then enforce Section 5 to ensure that the conduct does not harm competition.¹⁶

The FTC could use its unfair methods of competition authority to penalize persistent union busters that abuse the NLRB regulatory process and thereby harm competition. For instance, over 360 Starbucks stores have voted to unionize, yet Starbucks refused to negotiate with any store for several years. The NLRB determined in 2022 and 2023 that Starbucks had illegally refused to negotiate with hundreds of its stores in good faith. The FTC, having allowed the labor authorities to make the substantive labor law determination, could have used Section 5 to address Starbucks's conduct. The

¹⁵ Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party, Atlanta Opera, Inc., NLRB Case No. 25-CA-236574, at 6 (Feb. 10, 2022), <https://www.justice.gov/atr/case-document/file/1470846/download>.

¹⁶ *Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers v. United Contractors Ass'n Inc. of Pittsburgh, Pa.*, 483 F.2d 400, 400–01 (3d Cir. 1973).

FTC could determine whether Starbucks's refusal to negotiate with workers has the effect of degrading competitive conditions in a labor, product, or union services market.

The NLRB has long understood the potential for refusals to deal with unions to harm labor markets and the inadequacy of relief under the NLRA: “[C]urrent remedies of the Board designed to cure violations of Section 8(a)(5) are inadequate. A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay of 2 or more years in the fulfillment of a statutory bargaining obligation. It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative . . . or protect the Union from the loss of employee support attributable to such delay.” See *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970).

While the NLRA's remedial powers may be limited, the FTC Act can be used to enjoin and penalize abuses of legal process that degrade competition: “[M]isuse of regulatory processes that can create or exploit impediments to competition (such as those related to licensing, patents, or standard setting) constitutes a method of competition.”¹⁷ Just as frauds on the patent office can be an unfair method of competition, *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), baselessly challenging hundreds of union victories in order to maintain heightened labor market power for multiple years should be as well. The FTC could establish that baseless refusals to bargain constitute an abuse of regulatory process that produces anticompetitive effects. It could then prohibit this conduct as an unfair method of competition. The FTC could then send Starbucks notices of penalty offenses for each of the 350+ stores it refused to negotiate in good faith with. Companies that continue to engage in prohibited practices after receiving a notice of penalty offense can face civil penalties of more than \$50,000 per violation per day of noncompliance. For Starbucks, this would increase the maximum cost of noncompliance from \$0 to \$18 million a day or \$6.6 billion a year. Starbucks would still be free to appeal the NLRB's decision, but in the interim, management would be required by the FTC to bargain in good faith for a first contract with workers. If Starbucks were successful in its appeal, it would be free to discard the contract, but it would not be able to maintain increased labor market power via its refusal, erode the union's capacity to remain in business, or place rival law-abiding coffee shops at a competitive disadvantage.

This type of enforcement could have greatly shortened the period in which it was profitable for Starbucks to foreclose hundreds of labor union services markets and allow workers to negotiate better wages and conditions for hundreds of thousands of Starbucks employees. This is not a Starbucks-specific problem, but a common occurrence that structurally increases employers' labor market power. As of 2022, it took on average 565 days after a union election to reach a first contract (Greenhouse 2023). That is nearly double the length as in 2007, which was itself an unreasonable delay.

While the FTC Act can be used to penalize anticompetitive regulatory abuse, it cannot compensate workers or rival businesses for the competitive harms that this conduct creates. The FTC Act would likely also have limited deterrence value since firms could engage in this conduct until they received a notice of penalty offense without fear of any consequence. Section 2 enforcement would still be necessary to create deterrence, to create a private right of action, and to compensate trading partners for harm done to them. Still, Section 5 enforcement would be valuable both to target violations where

¹⁷ Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, at 5 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

firms lack demonstrable monopoly power and to establish a clear standard and notice-of-penalty-offense regime that could more efficiently police wage suppression conduct.

III. Challenges for Wage Suppression Antitrust

This section addresses potential challenges to wage suppression antitrust. While wage suppression conduct may meet existing criteria for Sherman and FTC Act restraint, there may still be historical or doctrinal challenges that weigh against antitrust enforcement in this area.

A. *Does Restraining Monopsonist Wage Suppression Increase “Competition”?*

While increased worker welfare may be a valid public policy goal, antitrust courts may not accept wage suppression antitrust unless it can be shown to increase “competition” (Stucke 2012; Francis and Sprigman 2024, 27). Within union services markets, wage suppression antitrust plainly increases competition by ending the foreclosure of the market. Within product markets, wage suppression antitrust increases competition by opening up markets to law-abiding firms and channeling competition toward improving the quality and efficiency of their products. Wage suppression antitrust could also increase product-market competition more generally by increasing economic output (Melamed and Salop 2024). Within labor markets, labor antitrust increases competition by increasing employers’ incentives to provide the highest level of employment and compensation consistent with workers’ productivity.

From a Law and Economics perspective, competition is maximized when factors of production are compensated at their marginal value added to production (Francis and Sprigman 2024, 44). Within this idealized “perfectly competitive market,” employers and workers have an equality of bargaining power such that workers are paid approximately the value that they generate for their employers. A collective bargaining system within an already perfectly competitive market could raise wages above the value that workers generate for their employers, leading to reduced employment, reduced output, and increased consumer prices, but in real-world markets that are filled with imperfect information, search frictions, and wage suppression conduct, workers have substantially less bargaining power than their employers. Within monopsonized markets, workers often earn as much as 35 or even 50 percent less than the value they generate for their employers (Yeh et al. 2022; Azar and Marinescu 2024). This distortion from the competitive level leads to lower employment, lower wages, and less competitive labor markets (Melamed and Salop 2024). The available empirical record suggests that collective bargaining tends to raise wages by 10–15 percent, meaning that courts should presume that restraining employer suppression in monopsonized markets will increase working standards toward the perfect competition point and has little to no practical risk of causing wages to exceed the “perfect competition” level in real-world markets (US Department of the Treasury 2023). In this environment, wage suppression antitrust should be expected to increase output in both product and labor markets.

Other antitrust scholars reject this “perfect competition” framework and instead embrace a “moral economy” framework (Paul 2021). Under this analysis, the social coordination of markets is assumed and antitrust law works to shape the moral economy around a set of normative principles. Under this framework, worker coordination furthers the goals of antitrust law by restraining powerful business combinations. This principle can be read in the text and the legislative purpose of the antitrust laws. Wage suppression antitrust would be similarly compatible with a moral economy vision, although it would be justified without reference to any markdowns from a perfectly competitive market.

Some may argue that while collective bargaining interventions may improve both working conditions and competitive output, increasing worker voice only mimics the results of competition instead of improving the competitive process. This notion is misguided. While workers' voice does raise standards within the firm, it also changes competitive dynamics between all firms in the affected labor market (Naidu and Swerdlow 2024). By raising standards at the monopsonist firm, wage suppression antitrust forces labor market rivals to make more attractive employment offers to remain competitive. This change represents an increase in competitive intensity such that all employers in the labor market will have to compete more vigorously for workers. While this may sound like a burden for employers in the market, the capacity to pay workers closer to the value they add to production while remaining competitive with a dominant rival should allow smaller employers to stabilize their workforce and expand their productive capacity as compared to competing in a monopsonized market that suffers from labor shortages, instability, and reduced output (Berger et al. 2022).

This increase in job quality across the market will also lure more workers into the market, increasing competition by boosting employment and, by extension, labor market output.

Antitrust enforcers should therefore understand wage suppression antitrust not only to raise labor standards at a single firm but to improve competitive conditions across entire labor markets.

B. *Does Sherman Act Jurisprudence Foreclose Wage Suppression Antitrust?*

Some commentators have argued that antitrust's historical and procedural requirements leave it less able to redress labor monopsony compared to labor or minimum wage laws (Hafiz 2020; Dimick 2023). Specifically, they raise concerns that antitrust enforcement in labor markets may require proving both labor and product-market power, balancing worker welfare against consumer welfare, and making trade-offs between efficiency and distribution in various markets. These concerns may be valid for merger enforcement, where a transaction could theoretically benefit consumers while harming workers, but restoring worker's capacity to choose collective bargaining within monopsonized markets should both improve efficiency and reduce inequality such that workers and consumers are better off (Dodini et al. 2021; Melamed and Salop 2024; Naidu and Swerdlow 2024, 13).

In recent labor antitrust litigation, consumer welfare has not been a significant barrier. In its successful blockage of the Penguin Random House merger, the DOJ argued that conduct that harms workers ultimately harms consumers as it creates decreased market output. *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1 (D.D.C. 2022). Scholars have also made similar arguments (Melamed and Salop 2024). In the FTC's successful challenge to the Kroger/Albertsons merger, the court reiterated the validity of labor market challenges to mergers and centered the analysis around harm to unionized grocery workers. *FTC v. Kroger Co.*, No. 3:24-CV-00347-AN, 2024 WL 1526504 (D. Or. Apr. 8, 2024).

The court in *Le v. Zuffa* certified a class of workers to sue under Section 2 of the Sherman Act without a need to show product-market power or reductions in consumer welfare: "[T]he Court finds that Plaintiffs have only maintained their claims regarding Defendant's monopsony power. As a result, the precise definition of the input market is the relevant market to evaluate throughout this order. The output market is relevant insofar as Zuffa's market power on the seller side reinforces its ability to maintain a monopsony in the input market." 2023 WL 5085064, at *16 (D. Nev. Aug. 9, 2023). The

court required a showing of market power only within the labor market, did not engage in balancing between consumers and workers, and focused on the wage suppression conduct of the dominant firm.

The case was recently settled for over \$375 million (Hale 2024). A class of skilled health-care workers has also filed a private class action suit against a large hospital system alleging a Section 2 violation for wage suppression conduct (Ward 2024). This suit similarly centers harm to worker plaintiffs. While the case law in this area is nascent, courts have yet to complicate wage suppression litigation with consumer-welfare balancing. The Department of Justice in a recently filed statement of interest also argued against heightened standards or requirements to show product-market power in labor monopsony cases: “Section 2 claims for monopsonization of a labor market therefore have the same elements as any other Section 2 monopolization claim. Those elements are: ‘(1) the possession of monop[sony] power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.’”¹⁸

To the extent that restraining employers’ wage suppression conduct could harm consumers, the defendant would bear the burden of proof after an initial showing of harm in any market (Hovenkamp 2018, 103). The empirical consensus on large wage markdowns in monopsonized labor markets makes such a finding extremely unlikely in wage suppression suits against dominant firms (Manning 2011, 982–83). Importantly, losing a wage suppression antitrust challenge would not expose workers to any antitrust liability because of the Clayton and Norris-LaGuardia Act’s labor exemptions (Schwochau 2000; Clayton Act, 15 U.S.C. § 17 (1914)). These statutes give workers a safe harbor from antitrust attacks on labor organizing.

Recent Section 2 cases similarly do not create barriers to wage suppression antitrust. The Court in *American Express* articulated heightened Section 2 requirements for two-sided platform markets. *Ohio v. American Express Co.*, 585 U.S. 529 (2018). Still, labor markets are not “two-sided” markets in which the employer acts as a broker that simultaneously provides connecting services to multiple parties. Instead, employers usually asynchronously provide employment opportunities to workers and goods or services to customers such that *American Express* would not require evaluating both areas as a single market.

In *Trinko*, the Court reiterated the criteria for refusals to deal with rivals and counseled against antitrust enforcement where other regulatory schemes are structured to prevent anticompetitive conduct. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). While *Trinko* may have deterred Section 2 enforcement against many kinds of anticompetitive conduct, it largely restated existing antitrust doctrine and only made clarifications for refusal-to-deal claims against rivals. Accordingly, commentators have recommended reading the case narrowly to only govern refusals to deal (Gavil 2023).

Trinko’s hesitance to apply the Sherman Act to regulated industries with their own antitrust statutes is not relevant to labor markets. In *Trinko*, Justice Scalia opined that “[w]hen there exists a regulatory structure designed to deter and remedy anticompetitive harm, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.” *Trinko*, 540 U.S. at 399 (Scalia, J., dissenting). In the case

¹⁸ Department of Justice, Statement of Interest of the United States of America, *Mizell v. UPMC*, No. 1:24-cv-00016-SPB, at 4 (W.D. Pa. Sept. 30, 2024) (citations omitted).

of labor markets, there exists no regulator who has been tasked with deterring and remedying anticompetitive harm. While the Department of Labor and NLRB are tasked with regulating some of the conduct that can create anticompetitive harm, they have not been designed to detect, measure, or remedy anticompetitive labor market conduct.

Neither agency has the resources or authority to police labor markets for anticompetitive conduct. In fact, the NLRB has been banned from employing economists, who would be needed for antitrust enforcement (Hafiz 2018). Note the structural difference between these agencies and an agency like the Federal Communications Commission that has been granted explicit competition policy authority.

Even if wage suppression antitrust meets doctrinal criteria, it must still navigate labor law preemption. Labor law preemption would amount to an implied repeal of the Sherman Act written into the NLRA. Historically, there has been a strong presumption against implied repeals (Taylor 2023, 42). Instead, courts look for ways to effectuate overlapping statutes, especially where there is no indication that Congress intended to displace the earlier law.¹⁹ In past cases, the Supreme Court has expressly rejected labor law preemption of federal antitrust enforcement. Instead, it recognized a “collateral issue” doctrine: “[F]ederal courts may decide labor law questions that emerge as collateral issues in suits brought [under] . . . the antitrust laws.” *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975).²⁰ In *Connell*, the Supreme Court determined that agreements to exclude nonunion workers were prohibited by the Sherman Act, even if the NLRA imagined and regulated these agreements. The collateral issue doctrine must also apply to wage suppression antitrust. Accordingly, a federal court should have jurisdiction to decide labor law questions raised as collateral issues to wage suppression antitrust claims.

Antitrust courts have also navigated NLRA preemption by referring labor law questions to the NLRB while retaining subject matter jurisdiction over whether the conduct also violates the antitrust laws. *International Ass’n of Heat & Frost Insulators v. United Contractors Ass’n*, 483 F.2d 384, 400 (3rd Cir. 1973). Within this framework, plaintiffs could either file suit under the antitrust laws after the NLRB has ruled on a controversy or file suit under the antitrust laws with the expectation that the court will refer the conduct to the NLRA for any labor law questions that are in controversy.

Antitrust standards for implicit repeals also cast doubt on NLRA preemption of wage suppression antitrust. The dominant standard has been whether there is “clear repugnancy” between the antitrust complaint and the secondary body of law. *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 264 (2007). Put another way, the two bodies must be “clearly incompatible.” (ibid. at 264) In this case, there is no incompatibility because antitrust law would be acting to restrain conduct that is either prohibited by or not imagined under the NLRA. Since there is no incompatibility, there is no cause for NLRA preemption.

C. *Historical Challenges to Wage Suppression Antitrust*

¹⁹ *Connell Constr. Co. v. Plumbers & Steamfitters Loc. Union No. 100*, 421 U.S. 616, 634 (1975) (“There is no legislative history in the 1959 Congress suggesting that . . . antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA.”).

²⁰ State antitrust enforcement however is preempted by labor law. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

Historically, the antitrust laws were used to restrain labor organizing (Vaheesan 2019, 791); therefore, using the same law to restrain employer union busting may seem out of place. Yet, a review of the Sherman Act's legislative history and prior wage suppression antitrust cases show that the Sherman Act's drafters sought to allow for worker collective bargaining, that they were concerned about dominant employers' repression of strikes, and that existing case law does not foreclose this type of antitrust.

The Sherman Act's drafters intended the law to preserve collective bargaining and restrain dominant firms (Vaheesan 2019). Still, federal courts initially used the Act in labor markets to restrain worker organizing instead of restraining employers' labor market conduct. Senator Sherman specifically named monopolists' suppression of labor strikes as a characteristic of what he called "unlawful combinations." "Unlawful combinations, unlawful by the code of any law of any civilized nation of ancient or modern times . . . command[] the price of labor without fear of strikes, for in [their] field [they allow] no competitors." 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman). Many drafters of the Sherman Act also understood labor organizing as a counterweight to monopsony: "[I]f the people who own the capital and the plant combine to regulate the price of the wages of laborers, just like the great armaments of Europe, labor is compelled to combine to defend itself." 21 Cong. Rec. 2726 (1890) (statement of Sen. Edmunds). Some senators understood labor organizing to be not just a natural response to monopoly, but a preferred tool to reduce monopolistic control: "I believe that the true remedy against such trusts is that of counter combinations among the people" (see Vaheesan 2019, citing 21 Cong. Rec. 2565 (1890)).

The Sherman Act's legislative history is replete with references to restraining industrial monopolies and preserving workers' ability to take collective action (Vaheesan 2019). Early drafts prohibited "all arrangements, trusts, or combinations between such citizens or corporations, made with a view or which tend to advance the cost to the consumer of any such articles." 21 Cong. Rec. 2600 (1890). Senator Sherman himself was emphatic that this language did not apply to unions: "[C]ombinations of workmen to promote their interests, promote their welfare, and increase their pay if you please, to get their fair share in the division of production, are not affected." 21 Cong. Rec. 2562 (statement of Sen. Sherman).

A significant block of legislators refused to support the Sherman Act without an explicit labor exemption, fearing that the law would be used to suppress organized farmers and workers. The draft language above that named consumer welfare as the key determinant of illegal monopoly was rejected and replaced with a prohibition on certain kinds of business conduct—contracts, combinations, or conspiracies that restrained trade or monopolized markets. 15 U.S.C. §§1–2. Both the congressional debates and the terms of the new bill indicate that senators understood the updated bill to not apply to farmer or worker organizing, only to conduct by businesses. The alternative reading, that senators changed their position on labor combinations and chose not to debate the subject further, has been rejected by legal scholars and historians (Boudin 1940).

The courts disagreed. In the first few Sherman Act cases, federal courts regularly used the Sherman Act to prohibit certain activities by labor organizations (Boudin 1940). This enforcement ran contra to the Sherman Act's legislative intent and, eventually, Congress responded with explicit labor exemptions in the Clayton and Norris-LaGuardia Acts.²¹ Even after the passage of the labor

²¹ See 15 U.S. Code § 17 - Antitrust laws not applicable to labor organizations ("Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for

exemptions, federal courts continued to apply the antitrust laws to worker organizations. Nearly 80 percent of the antitrust cases against workers between 1890 and 1929 were brought after the passage of the labor exemption in 1914 (Vaheesan 2019).

After the exemption, the courts often used the antitrust laws to limit secondary strikes, agreements between workers and employers that implicated third parties, and collective action by workers who are not classified as employees (Paul 2016). Even today, the antitrust laws can be applied to certain union activities (see Jacob 2023; Burford 1965).

At the same time, workers and unions attempted to use the Sherman Act to constrain employer conspiracies and conduct. Only a few dozen Section 2 cases have ever been brought by workers, despite the extraordinary social and economic harms that labor monopsonist conduct creates. Workers typically lack the resources to bring complex antitrust cases. To fill this gap and to protect their own business interests, unions have tried to bring several Section 2 labor cases. Typically, these unions' cases are dismissed for lack of standing. See *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983) (*AGC*). Regardless, some commentators have argued for providing unions with antitrust standing to sue on behalf of their workers (Hovenkamp 2023, 539). To circumvent this issue, workers still have standing to bring Section 2 cases in labor markets and unions can serve as third-party payers. Government enforcers can also bring cases in the labor market to circumvent standing concerns. As discussed above, the footnotes in *AGC* suggest that unions may have standing to bring antitrust claims within the labor union services market. *AGC*, 459 U.S. at 519, 526 nn.10–14.

In one case, a union was given standing in the labor market to challenge practices of two other unions on purely injunctive grounds: “[A] plaintiff need not meet the strict personal injury standards of s 4 in order to sue for injunctive relief under s 16, and . . . an association may have standing under s 16.” See *National Constructors Ass’n v. National Electrical Contractors Ass’n, Inc.*, 498 F. Supp. 510 (D. Md. 1980). This pathway has not been foreclosed to unions and may provide unions with antitrust standing to sue labor monopsonists for their conduct that attempts or maintains a monopoly or monopsony.

Many attempts by workers to use Section 2 have been based on a theory of shared monopoly—that a conspiracy of multiple market participants has together monopolized a market. Generally, these cases have been resolved as conspiracies under Section 1 of the Sherman Act.²²

Section 2 labor monopsony cases have also failed because courts have determined the harm in question not to be of a “type that the antitrust statute was intended to forestall.”²³ Generally, this has been because either the harm is a purely economic loss or the harm occurs in a market that is different than the market in which the plaintiff is alleging harm in. For unions, this has been applied to labor markets where the union has been deemed not to be a direct participant. For workers, this has meant

the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”)

²² *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118 (9th Cir. 2011); *Surf City Steel, Inc. v. Int’l Longshore & Warehouse Union*, 780 F. App’x 467 (9th Cir. 2019).

²³ *Associated Gen. Contractors of Ca., Inc. v. Ca. State Council of Carpenters*, 459 U.S. 519, 540 (1983). See also *Int’l Ass’n of Heat & Frost Insulators & Asbestos Workers v. United Contractors Ass’n, Inc. of Pittsburgh, Pa.*, 483 F.2d 384 (3d Cir. 1973).

suing their employers for product-market conduct that has the effect of harming competition and reducing wages in the labor market. See *Thomsen v. Wester Electric Co.*, 512 F. Supp. 128, 134 (N.D. Cal. 1981). Other cases failed because the court determined that the defendant lacked sufficient market power. See *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.*, 613 F. Supp. 3d 1308, 1333 (S.D. Cal. 2020).

Some of the few successful labor antitrust actions have been related to professional sports. *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989). In 2023, professional golfers and the LIV Golf League alleged that the PGA was illegally maintaining its monopoly over professional golf. *Jones v. PGA Tour, Inc.*, 668 F. Supp. 3d 907 (N.D. Cal. 2023). A class of mixed martial artists (MMA) has recently struck a \$375 million settlement with the UFC for engaging in conduct that has monopsonized the professional MMA market. *Le v. Zuffa, LLC*, No. 215CV01045RFBBNW, 2023 WL 5085064 (D. Nev. Aug. 9, 2023).

Synthesizing Section 2 labor market case law gives us a guidepost for the requirements for a successful wage suppression antitrust case. Directly affected parties have standing to bring Section 2 cases against dominant firms when they engage in unilateral labor market conduct that increases or maintains firm dominance. So long as the plaintiff is directly affected, it should be able to bring a case for damages in any market where a cognizable antitrust injury occurs. Even if it is judged to be indirectly harmed, it may be able to still bring a case for injunctive relief.

IV. What Wage Suppression Antitrust Could Look Like

Wage suppression antitrust has the potential to durably reduce inequality, increase economic output, and increase government tax revenue by directly challenging conduct that reduces worker power and increases firms' control over the lives of millions of workers. Previously, enforcers and commentators have lacked clear standards for when wage suppression conduct violates the antitrust laws. This article fills that gap and enumerates the various channels through which union-busting conduct specifically can violate the Sherman and FTC Acts. The approaches presented for establishing liability within the labor, product, or labor union services markets are consistent with the conduct requirements set forth in modern Section 2 jurisprudence and the Sherman Act drafters' intent to preserve labor organizing as a salutary counterweight to industrial monopolies. Related conduct like worker misclassification, vertical restraints, wage theft, restrictive covenants, employer-driven debt, or child labor could similarly be remedied by Section 2 when said conduct works to increase or maintain a dominant firm's market power.

Today, labor law is not structured to deter or remedy wage suppression conduct. Accordingly, where wage suppression conduct maintains or extends a firm's dominance, antitrust law can be used to restrain that conduct. When firms refuse to bargain with their unionized workers and thereby raise rivals' comparative costs, those competitors can bring antitrust suits to enjoin the conduct. When hospitals engage in hundreds of unfair labor practices, health-care workers can seek a preliminary antitrust injunction, the imposition of a monitor, or damages for the supercompetitive control over the labor market that the conduct has granted the firm. When meat-packers exclude unions from their worksites by threatening or retaliating against organizing workers, unions can bring an antitrust suit against them for illegally foreclosing the market for labor union services. Government enforcers can supercharge wage suppression antitrust by bringing cases and setting precedents during a single administration that can enhance private parties' capacity to enforce their rights across changing

administrations with varied approaches to labor and antitrust policy. The antitrust agencies can also publish policy guidance on illegal labor market conduct under Section 2 of the Sherman Act that mirrors their standing policy guidance on illegal labor market conduct under Section 1.

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