Case Nos. 22-2333 and 22-2334

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LEINANI DESLANDES & STEPHANIE TURNER,

Plaintiffs-Appellants

v.

MCDONALD'S USA LLC et al,

Defendants-Appellees

On Appeal from the United States District Court
For the Northern District of Illinois, Nos. 17-cv-04857 & 19-cv-05524
Hon. Jorge L. Alonso, United States District Judge

BRIEF OF *AMICI CURIAE* LABOR ECONOMISTS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are distinguished labor economists, professors, and scholars who conduct research and possess expertise on competition in labor markets. Their names, titles, and affiliations are:

- Alan Manning, Professor of Economics, London School of Economics
- Evan Starr, Associate Professor of Management & Organization at the Robert H. Smith School of Business, University of Maryland
- Marshall Steinbaum, Assistant Professor of Economics, University of Utah
- Matthew Gibson, Associate Professor of Economics, Williams College
- Ruth Gilgenbach, Lecturer, Rutgers University

Amici seek to highlight the extensive economic literature on employer power in labor markets and the empirical findings that no-hire agreements like the one at issue in this case can enhance that power and lead to wage suppression. *Amici* respectfully submit this brief to assist the Court in better understanding the evidence of relevant market power held by Defendants in this case.[1]

[1] *Amici* file solely in their capacity as individuals and not on behalf of any institutions with which they are affiliated. *Amici* have not been retained by any party to this action. This brief was not authored in whole or in part by counsel for any party. No person other than *amici* and their counsel made a monetary contribution that was intended for the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In its opinion granting judgment on the pleadings for McDonald's, the district court ruled that the no-hire provision in the McDonald's franchise agreement—through which McDonald's franchisees agreed not to hire employees from other McDonald's franchisees or from McDonald's itself—was not an unlawful restraint of trade in the labor market for employees. One stated reason for the district court's conclusion was that the plaintiffs—employees of McDonald's Corp. and McDonald's-licensed franchises—could not plausibly allege that McDonald's had market power, and "without market power, [McDonald's] could not suppress plaintiffs' wages."[2] A major premise of the district court's "no market power" conclusion was its belief that all quick-serve restaurants of all brands should be considered as part of the relevant market.[3]

While this brief does not opine on the specific, local market at issue in this case, *amici* economists submit this brief to help correct the district court's misconceptions about the economics of labor markets generally and the effects of no-hire agreements in the quick-serve industry. *First*, a well-established and growing body of empirical literature indicates that labor market monopsony is widespread,

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[2] Memorandum Opinion and Order, *Deslandes v. McDonald's USA, LLC*, No. 17-cv-4857 (N.D. Ill. June 28, 2022) ("Dist. Ct. Order"), at 12.

[3] *See id.* at 12 ("Within ten miles of Deslandes's home were 517 quick-serve restaurants. Accordingly, Deslandes cannot plausibly allege that defendants had market power in the relevant market within which she sold her labor. Within ten miles of Turner's home were 253 quick-serve restaurants. Accordingly, Turner cannot plausibly allege that defendants had market power in the relevant market in which Turner sold her labor.").

and that employers (including in the fast-food industry) have substantial power in the labor market, including over low-skill workers. Monopsony power exists when one buyer (such as an employer that buys labor) faces little competition from other buyers for that labor.[4] It is now widely accepted among economists that there is "a large amount of monopsony power" in the U.S. labor market, and that employers are able to exploit their monopsony power to suppress wages.[5] *Second*, no-hire agreements like those McDonald's and its franchises entered into both indicate employers' market power—firms would not enter into such agreements unless they had enough market power to make them profitable—and enhance employers' market power by suppressing competition for employees and reducing workers' ability to find other work. No-hire agreements are extremely common in the quick-serve industry, and economic research demonstrates that their widespread use has the same anticompetitive effects as mergers, effectively reducing the number of competitors in the labor market from the number of *restaurants* to the number of *brands*.[6] No-hire agreements also prevent employees who have acquired brand-specific skills from offering those skills to other restaurants within the same brand,

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[4] Suresh Naidu, Eric Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536, 538 (2018).

[5] Alan Manning, *Monopsony in Labor Markets: A Review*, 74 ILR Rev. 3, 13 (2021) [hereinafter *Monopsony in Labor Markets*]; *see also* Orley Ashenfelter, Henry Farber & Michael Ransom, *Labor Market Monopsony*, 28 J. of Labor Econ., vol. 2, 203, 209 (2010) ("The remarkable common feature of all the studies reported here is the high 'monopsony power' implied by the firm-level estimates of labor supply.").

[6] Alan Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 57 Journal of Human Resources S324, S331 (2018).

further "reduc[ing] the likelihood that a worker leaves a specific franchisee outlet," which in turn reduces labor supply elasticity and suppresses wages.[7]

Amici hope this brief will assist the Court as it considers whether Plaintiffs-Appellants plausibly alleged that the McDonald's no-hire agreement suppressed their pay.

ARGUMENT

I. Monopsony Power In Labor Markets Is A Well-Documented Problem.

In a traditional monopoly, the seller of a product has the ability to charge higher prices without losing all of its customers because of the lack of competition from other firms selling the same or a similar product. Monopsony power is the mirror image on the purchaser side: A firm with monopsony power can purchase its inputs at lower prices because of the lack of competition from other firms purchasing the same inputs. One such input is labor. In the labor market, monopsony power "has adverse effects comparable to enhancement of market power by sellers,"[8] including suppressing wages below competitive levels and increasing income inequality. And "[b]ecause monopsonists can artificially restrict labor mobility, monopsony can block entry into markets, and harm companies who need to hire workers."[9]

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[7] *Id.* at 330.

[8] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (2010) §1.

[9] Ioana Marinescu & Eric Posner, *A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony* at 2, Roosevelt Institute Working Paper (2018).

A. Monopsony Prevails in Many U.S. Labor Markets.

In a perfectly competitive labor market, workers are able to move freely between jobs and the employer must pay a wage equal to the worker's marginal revenue product ("MRP")—*i.e.*, the amount of value that the worker adds to the employer's bottom line. If an employer offers wages below the MRP in a perfectly competitive market, workers will simply leave and work for one of that employer's competitors in the labor market. In monopsonistic labor markets, by contrast, employers have enough market power to "pay workers less than the value of their contribution to output"—*i.e.*, less than the MRP—without losing all of their workers to competing employers.[10]

Until relatively recently, "economists assumed that labor markets are fairly competitive."[11] Most believed that employees—especially those in urban centers and/or working in low-skill jobs—had plentiful options for employment, and that any remaining market imbalances were being sufficiently mitigated by wage-and-hour and labor laws.[12] But new and now widely accepted evidence demonstrates that this common assumption was largely incorrect, and "that many labor markets around the country are not competitive but instead exhibit considerable market power enjoyed by employers."[13] Indeed, "[e]vidence that labor markets, particularly

[10] Alan Krueger & Eric Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion* at 6, The Hamilton Project (2018).

[11] *Id.* at 6.

[12] Naidu, *supra* n.4, at 541-43.

[13] *Id.* at 538-39.

low-wage labor markets, are monopsonistic has been accumulating over the past two decades."[14]

Broadly speaking, monopsony power exists when worker mobility is low—that is, when workers cannot easily switch to a competing employer if their employer attempts to suppress their wages. Worker mobility is measured in terms of "labor supply elasticity," or workers' responsiveness to changes in wages. In a perfectly competitive labor market, a small decline in wages would mean that employees would all quit—worker mobility is high and labor supply elasticity is infinite.[15] If no one quits in response to such a wage decline, then worker mobility is low and labor supply elasticity would be zero.[16] A recent summary of economic studies of monopsony concluded that "low labor elasticities … are surprisingly common throughout the economy," and that "[e]ven the residual supply of low-skill labor is relatively inelastic … despite the earlier conventional wisdom that inelastic labor markets were caused by the time and cost of obtaining education and specialized training, which low-skill workers, by definition, lack."[17]

For example, one recent study measured U.S. labor market concentration (the degree to which a few firms dominate hiring in the labor market) by using data from online job postings; the study found the elasticity of job applications to wages to be 0.43—which is highly inelastic—and even lower as labor markets became

[14] *Id.* at 560.

[15] *Id.* at 557.

[16] *Id.*

[17] *Id.* at 564.

more concentrated, suggesting lower competition in such markets.[18] Similarly, a study of "quit elasticity" in the United States and the United Kingdom examined the number of quits and recruits in response to wage increases.[19] If the "quit elasticity" in relation to the wage is high, then there is less monopsony power; but if it is low, then employees are paid less than their MRP, implying monopsony power.[20] The results showed "the implied elasticities are much smaller in magnitude than would be expected from a perfectly competitive model."[21] Another study, using data from the U.S. Census Longitudinal Employer Household Dynamics, was able to directly estimate the effects of firm wages on the rate of new hiring and separations, and likewise found low residual labor supply elasticity.[22] Taken together, these studies (and others) show that "there seems to be a large amount of monopsony power," and certainly "more than one might have expected a priori."[23]

These studies suggest that three major forces are responsible for the limited worker mobility and resulting monopsony power in today's economy: Market concentration, search frictions, and job differentiation.[24] Market concentration exists when there are a limited number of firms in the market for a particular type

[18] Manning, *Monopsony in Labor Markets*, *supra* n.5, at 6.

[19] Naidu, *supra* n.4, at 561.

[20] Krueger & Ashenfelter, *supra* n.6, at S334.

[21] Naidu, *supra* n.4, at 561.

[22] *Id*. at 562.

[23] Manning, *Monopsony in Labor Markets*, *supra* n.5, at 6.

[24] Naidu, *supra* n.4, at 553-54.

of labor. "When few employers exist, a worker who is underpaid by her existing employer lacks the ability to quit and work for an alternative employer for a higher wage. This allows the incumbent employer to suppress the wage."[25] Search frictions "refer to the difficulty faced by workers with finding new jobs if they are unsatisfied with their existing employer."[26] Search frictions allow employers with monopsony power to reduce wages, benefits, and amenities without losing their employees because they know that their employees cannot easily find other suitable opportunities.[27] Finally, job differentiation refers to "the way that different employers can offer a worker different packages of amenities—including, for example, shift flexibility, childcare, vacation and sick time, and the overall atmosphere at work."[28] Employees who come to rely on these amenities may be less willing to leave their job even if their employer suppresses wages below the competitive level.

Low-skill workers may be even more vulnerable to these factors than others. Because in labor markets both employers and employees are looking to match their needs—employers look for qualified workers that also fit the skillset and personality traits needed for their workplaces, and employees look for appropriate working conditions that match their preferences and personal circumstances—

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[25] Marinescu & Posner, *supra* n.9, at 3.

[26] *Id.*

[27] *See* Alan Manning, *Monopsony in Motion*: *Imperfect Competition in Labor Markets*, 4B Handbook of Labor Economics 973 (2011) [hereinafter *Imperfect Competition*].

[28] Marinescu and Posner, *supra* n.9, at 3.

workers are only hired when both sets of needs are met. This two-sided differentiation "is why low-skill workers may be as or even more vulnerable to monopsony than high-skill workers, despite possibly being less differentiated for employers."[29] Low-skill workers may "have less access to transportation, well-situated housing markets, child care options, and job information," and jobs are thus less "substitutable" for them.[30] And search frictions can be especially acute for low-skill workers, who "are less likely to move across geographic boundaries [for a new job] than high-wage workers."[31]

B. Monopsony Power Has Led To Wage Suppression.

In the labor market, monopsony power is particularly harmful because "a lack of competition in the labor market enables employers to suppress the wages of their workers."[32] That, in turn, harms the economy: "[T]he low wages force workers out of the workforce" and "suppress[] economic growth" by restricting the pool of available workers from which potentially new competitors can draw.[33]

With more academic work emerging of late showing an increase in monopsony power in U.S. labor markets,[34] it is becoming clear that perfectly

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[29] Naidu, *supra* n.4, at 555.

[30] *Id.*

[31] Marinescu and Posner, *supra* n.9 at 14.

[32] *Id.* at 2.

[33] *Id.*

[34] *E.g.*, Efraim Benmelech, Nittai Bergman & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 57 J. of Human Resources S200, S201 (2019).

competitive labor markets are not "an adequate description of wage-setting processes."[35] The observation that market power causes wage suppression is not new, of course—Adam Smith observed that employers "are always and everywhere in a sort of tacit, but constant and uniform combination, not to raise the wages of labour above their actual rate."[36] When employers have considerable labor market power, they often use that power to suppress wages[37] by paying employees "less than the value of their contribution to output."[38] Employers are thus able to lower the costs of labor, and even though "some people qualified to work will refuse [to be paid less than what workers would be paid in a competitive labor market], employers gain more from wage savings than they lose from having a more limited pool of workers from which to hire."[39] Wage suppression, in turn, enhances societal income inequality by separating those who work in concentrated markets from those who work in competitive labor markets.[40] Workers that already have low incomes are affected the most because they lack bargaining power and alternatives.[41]

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[35] *Id*. at S201.

[36] Krueger & Ashenfelter, *supra* n.6, at S324-325 (citing Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Bantam Books (1776)).

[37] Naidu, *supra* n.4, at 537.

[38] Krueger & Posner, *supra* n.10, at 6.

[39] Naidu, *supra* n.4, at 539.

[40] *Id*. at 537.

[41] *Id*.

Early evidence suggesting that employers were using their monopsony power to suppress wages came from a seminal study by Nobel Laureate David Card and Professor Alan Krueger, which found that a minimum-wage increase in New Jersey in 1992 did not affect employment levels in the fast-food industry.[42] In a competitive market, one would expect that workers were already being paid a wage equal to their MRP, and that an employer's rational response to a minimum-wage increase would be to reduce employment. As it turned out, however, employers were able to absorb the wage increase without reducing employment.[43] That result suggested monopsonistic wage suppression: "If employers pay workers less than their marginal product, then a minimum wage hike—if not too great—will result in higher wages without disemployment."[44] In other words, the "finding that increases in minimum wages do not inevitably cost jobs" reflects the reality that many workers are currently being underpaid relative to their MRP. [45]

Subsequent studies have found similar results. One study found that, after analyzing labor market concentration in the United States for various occupations,

[42] 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).

[43] *Id.*

[44] Naidu, *supra* n.4, at 546.

[45] Manning, *Monopsony in Labor Markets*, *supra* n.5, at 13; *see also* Dale Belman & Paul J. Wolfson, *What does the minimum wage do?*, W.E. Upjohn Institute for Employment Research (2014); Doruk Cengiz, Arindrajit Dube, Attila Lindner, & Ben Zipperer, *The effect of minimum wages on low-wage jobs*, 134 Quarterly J. of Economics 1405–54 (2019).

"higher concentration is associated with significantly lower posted wages."[46] Upon calculating market shares using data from a U.S. online job board, results showed that "the average HHI[47] is 3,157, which is … above the 2,500 threshold for high concentration according to the Department of Justice-Federal Trade Commission (DOJ-FTC) horizontal merger guidelines."[48] Moreover, after running "regressions of posted wages on concentration at the market level" and controlling for labor market tightness (or vacancies/applications), the number of vacancies, and job titles, the findings showed that "the effect of concentration on wages is still highly significant and negative but smaller, suggesting that concentration may change the composition of jobs towards lower paying jobs."[49] Even after controlling for additional, alternative measures of labor market concentration (such as the inverse of the number of hiring firms or the measure of market concentration as the number of applications), labor market concentration was shown to have a "highly significant impact" on posted wages.[50] The authors noted that their findings "could be used to incorporate labor market concentration concerns as a factor in antitrust analysis."[51]

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[46] José Azar, Ioana Marinescu & Marshall I. Steinbaum, *Labor Market Concentration*, 57 Journal of Human Resources S167, S168 (2022).

[47] "HHI" stands for the Herfindahl-Hirschman index, a common measure of market concentration.

[48] Azar, *supra* n.46, at S168.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 197.

Another study analyzing local labor market concentration's effect on wages showed similar results.[52] Using data from the U.S. Census Bureau from 1978 to 2016, the study analyzed the manufacturing sector, controlling for standard measures of labor productivity.[53] It measured the HHI of firm employment "at both the county-by-industry-by-year level as well as the commuting-zone-by-industry-by-year level,"[54] which were then compared to average wages and productivity "at the establishment level," taken from the Census of Manufacturers and the Annual Survey of Manufacturers. The results showed a negative relation between employer concentration and wages, meaning that "employers operating in areas with more concentrated labor markets thus appear able to exploit monopsony power in order to reduce employee wages," and that the negative relation increases over time.[55] The study produced the same results even after controlling for factors that may affect wages, such as labor productivity, market size, and firm-by-year fixed effects.[56] These findings yield the conclusion that labor market power has some influence over the ability and behavior of employers to set wages.[57]

A third study also analyzing the relation between local labor market concentration and wages across different demographics came to the same

[52] Benmelech *et al.*, *supra* n.34, at S200.

[53] *Id*. at S202.

[54] *Id*.

[55] *Id*.

[56] *Id*.

[57] *Id*. at S243.

conclusion—namely, that "increased concentration reduces earnings" for workers.[58] The analysis used administrative data on firms from the Longitudinal Business Database between 1976 and 2015 and demographic information from surveys.[59] The data also showed that when measuring the 90th percentile against the 10th percentile of earnings distribution, increased concentration lead to greater income inequality.[60] Additionally, low-income populations were found to be more negatively affected by concentration changes.[61]

In sum, market concentration and other contributors to low worker mobility allow employers to use their market power to pay workers less, and employers are doing exactly that. As explored next, the market for labor at quick-serve restaurants is particularly susceptible to these dynamics, especially when employers like McDonald's further restrict worker mobility through the use of no-hire agreements.

II. No-Hire Agreements Enhance Monopsony Power By Further Reducing Worker Mobility And Suppressing Wages.

Some of the causes for low worker mobility discussed above arise naturally, or at least innocently—for example, the fact that an employee may be willing to accept a below-market wage to ensure continuity in her job-related amenities is not necessarily the result of anticompetitive or monopsonistic conduct. But firms with

[58] Kevin Rinz, *Labor Market Concentration, Earnings, and Inequality*, 57 J. of Human Resources S251, 254 (2022).

[59] *Id*. at 253.

[60] *Id*. at 254.

[61] *Id*.

monopsony power are increasingly leveraging and enhancing that power through the use of anticompetitive no-hire agreements, which are agreements between two or more employers not to hire each other's employees.[62] One recent, high-profile example involved several Silicon Valley firms, including Apple and Google, who agreed not to hire each other's employees. The firms eventually entered into an antitrust settlement with the Department of Justice,[63] but "the way in which such major firms, with sophisticated legal staffs, engaged in such a blatant violation of the law" both "alarmed antitrust authorities" and sparked further academic research on such agreements.[64] One study analyzed employer market power and its effects on labor outcomes given the no-hire agreements used by these Silicon Valley companies.[65] Using data from Glassdoor, the study "compared outcomes at colluding firms to those at other information-technology firms before and after the DOJ intervened," and found that the agreements "reduced salaries at colluding firms by 4.8 percent."[66]

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[62] Krueger & Posner, *supra* n.10, at 5.

[63] *See* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements* (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-techcompanies-stop-entering-anticompetitive-employee.

[64] Naidu, *supra* n.4 at 544.

[65] Matthew Gibson, *Employer Market Power in Silicon Valley*, Institute of Labor Economics (Nov. 2021), *available at* https://docs.iza.org/dp14843.pdf.

[66] *Id.* at 4.

These no-hire agreements are not limited to high-skilled workers or technical industries. To the contrary, such agreements are especially prevalent among major franchise chains, who (like McDonald's) use them "in their franchise contract [to] restrict the recruitment and hiring of workers currently employed (and in some cases extending for a period after employment) by other units affiliated with the franchisor."[67] One recent study analyzed data for franchisors with more than 500 franchise units and found that "58 percent of major franchise chains include noncompetitive clauses in their franchise contract."[68] The data also showed an increase in prevalence of no-hire agreements among the 45 largest franchisors over time, from 35.6 percent in 1996 to 53.3 percent in 2016.[69]

The prevalence of no-hire agreements is, first of all, strong evidence that the franchisors entering into them already have substantial monopsony power—or else the agreement would not be profitable. "For example, if two out of ten equivalent firms agreed to divide a market the agreement would be unprofitable because the remaining eight would be free to compete as they pleased. They would steal workers from any cartel member who sought to decrease its wage. Successful collusion requires that the colluding firms in the aggregate have a sufficient share

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[67] Krueger & Ashenfelter, *supra* n.6, at S326.

[68] *Id.*

[69] *Id.* at S329.

of the market so that their own agreement cannot quickly be offset by the actions of their competitors."[70]

More important for present purposes, no-hire agreements enhance monopsony power by increasing market concentration and, as a result, decreasing worker mobility and allowing employers to further suppress wages relative to the marginal product of labor.[71] In many franchise industries, including quick service restaurants, "it is natural to assume that there are literally hundreds of competitors in each labor market,"[72] as the district court in this case appeared to do, *see* Dist. Ct. Order at 12. As a recent study of no-hire agreements explains, however, the use of such agreements "essentially reduces the number of competitive employers in a market to no more than the number of franchise companies."[73] It has an effect similar to "making the group of franchisees belonging to a chain a single employer in this labor market."[74] Put another way, "franchise agreements have the same anticompetitive effects in labor markets as mergers do in product markets."[75]

The authors offer an example of quick-serve restaurant workers in Rhode Island, where there are 261 individual restaurants belonging to 18 major chains. Assuming that each individual restaurant had the same number of employees, the

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[70] Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 Indiana L.J. 1031, 1035 (2019).

[71] Krueger & Ashenfelter, *supra* n.6, at S330.

[72] *Id.*

[73] *Id.*

[74] *Id.* at S332.

[75] *Id.* at S331.

HHI would be 38.3, "indicating a very high degree of competition."[76] But if the franchisees affiliated with each franchise agreed not to hire each other's workers, the HHI would rise to 1,678.0, "indicating a high degree of employer concentration in this labor market."[77] The authors performed similar calculations for the quick service restaurants in Washington, D.C., finding an HHI of "45.0 if the restaurants are considered individually and 1,666.7 if no-hire agreements restrict competition within franchise chains."[78] These analyses make clear that "franchise no-poaching agreements increase employer concentration and have the potential for driving a wedge between the value of a worker's marginal product and the wage"—and this analysis does not even account of the possibility that employers may explicitly collude *across* franchise chains for wage-setting purposes, the potential for which is increased by no-hire agreements.[79]

Another recent study evaluated the Washington Attorney General's campaign to remove no-hire provisions from future franchising contracts and to eliminate enforcement of those in existing contracts.[80] The study found that "the enforcement campaign increased annual earnings by 3.3 [percent]. For a worker with median earnings of $26,133 in the treatment group, that corresponds to an

[76] *Id.* at S332.

[77] *Id.* at S332.

[78] *Id.* at S332, n.6.

[79] *Id.* at S333.

[80] Brian Callaci, Sérgio Pinto, Marshall Steinbaum & Matthew Walsh, *The Effect of No-poaching Restrictions on Worker Earnings in Franchised Industries* at 1 (2022), *available at* https://ssrn.com/abstract=4155577.

increase of $862.39."[81] The results imply that no-hire agreements are "costly for workers in franchised industries"[82] and can be seen as "evidence against perfect competition in low-wage service sector labor markets," since no-hire agreements reduce outside opportunities for workers and limit the promotions they would have been able to obtain by moving to a new company.[83] In short, firms with monopsony power use no-hire agreements "to bind workers and discourage competitors from entering the market because they will face a scarcity of available labor."[84] A subsequent paper, building on this evidence, concluded that "[e]ffective concentration increases significantly when franchisees are combined in chains that use no-poach restraints," which the study noted are prevalent in the fast food industry.[85]

One final respect in which no-hire agreements harm workers is by preventing them from offering their brand-specific skills to other franchisees within the same brand. Research in the related area of non-compete agreements—which are executed between employer and employee rather than between would-be competing employers—offers valuable insight into how no-hire agreements further limit worker mobility. For example, one study found that the use of non-compete clauses

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[81] *Id*. at 11.

[82] *Id*. at 12.

[83] *Id*.

[84] Krueger & Posner, *supra* n.10, at 5.

[85] Brian Callaci, Sergio Pinto, Marshall Steinbaum & Matthew Walsh, *Vertical Restraints and Labor Markets in Franchised Industries* (2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4155571.

"is associated with a higher level of firm-sponsored training, but with lower wages," which allows firms to absorb more of the returns from that training by reducing labor market competition.[86] Similarly here, no-hire agreements mean that an employee's McDonald's-specific training can be used only on behalf of one franchisee—preventing the employee from offering her skills in the labor market where she could command the highest wage for them.[87] Moreover, the specific skills that workers gain from franchise training are helpful only when similar, alternative employment is available between firms. Accessibility to substitute opportunities that are closest to the employee's current employment entails that workers are able to more readily switch, and elasticity of labor supply curves increase. Workers "would be expected to have little or no earnings loss. But, the sizeable group of workers whose post-displacement job is not a perfect substitute for the one lost will suffer larger earnings losses."[88] Similar alternative employment, such as jobs at

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[86] Manning, *Monopsony in Labor Markets*, *supra* n.5, at 14 ("Lipsitz and Starr (2019) showed chilling effects of non-competes on labor mobility and also reductions in wages, especially when presented to workers after accepting the job offer"); *see* Evan Starr, *Consider this: Training, wages, and the enforceability of covenants not to compete*, 72 ILR Rev. 783–817 (2019); Matt Marx, *The firm strikes back: Non-compete agreements and the mobility of technical professionals,* 76 Am. Sociological Rev. 695 (2011); Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. labor force*, Univ. of Mich. L. & Econ. Research Paper No. 18-013 (2018), *available at* http:/ dx.doi.org/10.2139/ssrn.2625714; Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan & Evan Starr, *Locked* in? *The enforceability of covenants not to compete and the careers of high-tech workers*, US Census Bureau Center for Economic Studies Paper No. CES-WP-17-09 (2019); Michael Lipsitz & Evan Starr, *Low-wage workers and the enforceability of non-compete agreements* (2020), *available at* https://ssrn.com/abstract=3452240.

[87] Krueger & Ashenfelter, *supra* n.6, at S335.

[88] Manning, *Imperfect Competition*, *supra* n.27, at 990.

various McDonald's franchises, is therefore important for maintaining competition, and "[a] no-hire agreement reduces workers' outside options and lowers their quit rate, increasing the share of net returns to training captured by employers."[89]

CONCLUSION

Plaintiffs-Appellants allege that they and other employees of McDonald's are barred from seeking employment at other McDonald's franchises because of no-hire agreements executed among McDonald's franchisees and McDonald's itself. Assessing plaintiffs' claims that these agreements violate the antitrust laws requires a clear understanding of monopsony power in labor markets, the effects of monopsony power on wage suppression and worker mobility, and the ways in which no-hire agreements enhance monopsony's effects. The district court appeared to misunderstand several of these key economic principles. Whether or not the Court agrees with the district court's ultimate determination, *amici* offer this brief to aid the Court's evaluation of these economic principles and to assist its understanding of the relevant academic literature, which demonstrates a growing consensus that both monopsony power generally and no-hire agreements specifically can significantly harm workers' welfare, including in the quick-serve industry.

[89] *Id.*

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Circuit Rule 29 because it contains 4,953 words, not counting portions of the brief listed in Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) and Circuit Rule 32(b) because it was prepared using Microsoft Word 2010 in Century Schoolbook 12-point font.

s/ *Jamie Crooks*
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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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