The Legal Causes of Labor Market Power in the U.S. Agriculture Sector

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Recent developments in law and economics have shown that labor market power is a pervasive antitrust issue contributing to earnings inequality and slowed economic growth. In the agriculture sector, workers—especially H-2A temporary agricultural workers—have consistently suffered from low, stagnating wages and poor working conditions. This Comment evaluates the extent of labor market power in the agriculture sector and how antitrust law and immigration-policy norms exacerbate labor monopsony. I show that the pervasiveness of labor monopsony is due, in part, to a conflict between antitrust law and immigration regulation. Specifically, I examine an immigration statute that allows temporary guest workers to work in the agriculture sector. Immigration regulation and its enforcement allow employers to engage in anticompetitive practices that entrench farmers' labor market power. While Section 1 of the Sherman Act protects workers from any agreement to restrain wages, the H-2A statutory standard allows conduct that can lead to wage suppression, thus bolstering farmers' and ranchers' labor-market power. Additionally, antitrust enforcement is weakened by courts' interpretation of the immigration statute as immune from antitrust law. To resolve these issues, I first offer a guide for judges to interpret immigration and antitrust laws together. Second, I provide some suggestions for legislators to amend the provisions of the immigration statute.

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INTRODUCTION

Rodolfo Llacua is a shepherd in Colorado. On a typical day, Llacua herds about one thousand sheep in mountainous terrain. He ensures that the animals have enough land to graze, hauls water for them, and keeps them away from hazards such as "coyotes, mountain lions, and wolves, harmful or poisonous plants, and man-made dangers like highways and domesticated dogs."[1]

Llacua's job is a 24/7 commitment: he also "assist[s] the animals in the birthing process, and . . . provide[s] for the health and

[1] Second Amended Complaint ¶ 43, Llacua v. W. Range Ass'n, 930 F.3d 1161 (10th Cir. 2019) (No. 17-1113).

medical needs of the herd."[2] Yet Llacua earns as little as $4.50 per hour.[3]

Llacua is one of many shepherds who move to the United States for a few months each year with an H-2A visa to work on a ranch. The H-2A program allows U.S. employers to petition to hire foreign temporary agricultural workers, provided that the employers satisfy specific regulatory requirements.[4] Once Llacua's visa expires, he will go back to his home country of Peru. If all goes well, his employer, a rancher, will probably petition and pay for another H-2A visa, and Llacua will return to Colorado the next season. There are multiple sheep ranches in Colorado; they vary in size, and many have been managed by the same family for generations.[5] These ranches rely on organizations such as the Western Range Association (WRA) and the Mountain Plains Agricultural Service (MPAS) to help them fill out visa applications and determine wage rates for Llacua and other migrant and nonmigrant shepherds. From October 1, 2013, to October 1, 2014, the WRA and MPAS were responsible for recruiting 91% of shepherds.[6]

The labor market power held by the WRA and the MPAS is a classic case of labor market monopsony. "'Market power' is a short-hand for when competition conditions don't hold."[7] In a labor market with such circumstances, employers are able to influence market wages and working conditions.[8] A monopsony is a market condition that arises when a buyer (or a group of buyers) dominates the demand for goods or services and is able to unilaterally (or collectively) fix prices below their competitive level.[9] In the labor market, a monopsony distorts the market when a single firm, industry, or employer dominates the market and, by manipulating the demand for labor, can set wages below competitive

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2 *Id.*

3 *See id.* ¶ 81.

4 *See H-2A Temporary Agricultural Workers*, U.S. CUSTOMS & IMMIGR. SERVS. (last updated Jan. 12, 2021), https://perma.cc/LJ38-2JU8.

5 *See* Laurel Miller, *Feeling Sheepish: Craig, Colorado, Celebrates Its Ranching Heritage*, EDIBLE ASPEN (Sept. 06, 2015), https://perma.cc/93PT-32G9.

6 Llacua v. W. Range Ass'n, 930 F.3d 1161, 1171 (10th Cir. 2019).

7 A. DOUGLAS MELAMED, RANDAL C. PICKER, PHILIP J. WEISER & DIANE P. WOOD, ANTITRUST LAW AND TRADE REGULATION: CASES AND MATERIALS 65 (7th ed. 2018).

8 *See id.*

9 John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625, 638 (2005).

levels but still benefit from a steady labor supply.[10] A monopsony is often seen as the "mirror image" of a monopoly,[11] which occurs when a single seller controls the supply (instead of the demand) for goods or services.

Labor market monopsony is a symptom of an unhealthy labor market. Firms exercising monopsony power employ fewer workers at lower wages than they would in a competitive labor market.[12] From an economic standpoint, a monopsony is particularly damaging because it "reduce[s] output and revenue" and allows employers to "shift some of the benefits of production from wages to profits."[13] Further, a monopsony "weaken[s the] link between labor productivity and wages" and "opens up the possibility that wages can differ—both between and within firms—even among workers with similar skills," contributing to increased earnings inequality.[14]

Migrant shepherds receive extremely low pay for work that requires them to be "on call 24/7 in remote locations."[15] One rancher has conceded that "[their] industry has known [it] needed to get the wages up."[16] This sort of wage suppression—i.e., firms colluding to fix wages below the competitive wage in a given labor market—is "killing the economy."[17] Specifically, to increase its profits, an employer will pay workers below the competitive wage. In turn, the suppressed wage leads some workers to quit those jobs or to simply not apply in the first place. The loss in workers leads to lower production, but employers still make profits off

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[10] COUNCIL OF ECON. ADVISERS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES 2–3 (2016).

[11] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 321 (2007) (quoting Kirkwood, *supra* note 9, at 653).

[12] *See* Yue Qiu & Aaron Sojourner, *Labor-Market Concentration and Labor Compensation* 18 (IZA DP No. 12089, 2019); José Azar, Ioana Marinescu & Marshall I. Steinbaum, *Labor Market Concentration* 15 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24147, 2019); Suresh Naidu, Eric Posner & Glen Weyl, *More and More Companies Have Monopoly Power Over Workers' Wages. That's Killing the Economy*, VOX (Apr. 6, 2018), https://www.vox.com/the-big-idea/2018/4/6/17204808/wages-employers-workers-monopsony-growth-stagnation-inequality.

[13] COUNCIL OF ECON. ADVISERS, *supra* note 10, at 2; *see also* Orley C. Ashenfelter, Henry Farber & Michael R. Ransom, *Labor Market Monopsony*, 28 J. LAB. ECON. 203, 208 (2010) ("[H]igh rates of monopsony power imply large welfare losses to society through the misallocation of labor and considerable redistribution of income away from workers and to residual claimants.").

[14] COUNCIL OF ECON. ADVISERS, *supra* note 10, at 3.

[15] Dan Frosch, *Sheepherders Are Set to Get a Raise*, WALL ST. J. (Oct. 13, 2015), https://www.wsj.com/articles/sheepherders-are-set-to-get-a-raise-1444776966.

[16] *Id.*

[17] Naidu et al., *supra* note 12.

workers who have not quit.[18] Thus, labor monopsony power "reduces employment, raises prices, and depresses the economy."[19] In agriculture, when farmers lose domestic workers due to lower wages, the regulatory framework allows them to hire migrant workers instead. This hurts the U.S. economy by reducing domestic employment, but the effects are somewhat less visible because farmers can still maintain production levels and low prices by replacing domestic workers with migrant workers.

Legal remedies have been largely unsuccessful in dealing with this issue.[20] For instance, antitrust enforcement can target some anticompetitive conduct, such as no-poaching agreements,[21] but "[c]onventional antitrust enforcement would not address wage suppression" stemming from the costs that workers incur when searching for a job.[22] Meanwhile, migrant worker visas are booming, with completed H-2A applications rising from 9,115 in 2015 to 15,483 in 2019.[23]

There is an extensive literature on labor market monopsony, both in law and in economics.[24] Most of the existing research mentions wage fixing as part of an overall assessment of labor market monopsony.[25] It includes discussions of no-poaching agreements, mergers, and labor market monopsony.[26] The literature also

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18 *Id.*

19 *Id.*

20 *See generally* Suresh Naidu & Eric A. Posner, *Labor Monopsony and the Limits of the Law*, 56 J. HUM. RES. (forthcoming).

21 *See No More No-Poach: The Antitrust Division Continues To Investigate And Prosecute "No-Poach" and Wage-Fixing Agreements*, U.S. DEP'T OF JUST. (last updated Apr. 10, 2018), https://perma.cc/N35S-P5NK (discussing a DOJ court filing that "explains that [ ] no-poach agreements are properly considered per se unlawful market allocation agreements under Section 1 of the Sherman Act").

22 Naidu & Posner, *supra* note 20, at 12.

23 *I-129 - Petition for a Nonimmigrant Worker Temporary Agricultural Worker (H-2A) by Fiscal Year, Month, and Case Status: October 1, 2014 - March 31, 2020*, U.S. CUSTOMS & IMMIGR. SERVS., https://perma.cc/892M-UVXD; *see also id.* (stating that, over the same timeframe, H-2B visas—another type of guestworker visa—also saw a rise in applications, from 5,309 to 7,476). While the rise in guestworker visas is not a problem in itself, it becomes one when it is due to anticompetitive practices in labor markets that heavily recruit migrant workers. This is one of the main issues with the H-2A program. *See infra* Part II.A.

24 *See generally, e.g.*, Alan Manning, *Imperfect Competition in the Labor Market*, *in* 4B HANDBOOK OF LABOR ECONOMICS 973 (David Card & Orley Ashenfelter eds., 2011); Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018); ALAN B. KRUEGER & ERIC A. POSNER, THE HAMILTON PROJECT, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION (2018).

25 *See, e.g.*, Naidu et al., *supra* note 24, at 597.

26 *See, e.g.*, *id.* at 544–47.

discusses wage fixing and wage suppression in other contexts, such as healthcare and sports.[27]

There is also an ongoing discussion in the literature about guest worker programs like the H-2A program. Existing scholarship has challenged pervasive cultural narratives that paint "U.S. workers [as] lazy or incapable" and "guest workers [as] innately migratory and well-suited for hard work."[28] Further, such work has shown how the legal framework of guest worker programs grants employers the ability to "degrade the wages and working conditions of guest worker jobs."[29] Such work also highlights some of the legal and sociological constraints faced by agricultural laborers.[30] However, the existing literature has not analyzed the effects of labor market monopsony on labor markets in agriculture.

This Comment will show that immigration law exacerbates labor market issues and cripples antitrust enforcement. The text and implementation of the immigration statute governing the H-2A program allow employers to engage in anticompetitive practices. Further, courts interpret the statute governing the H-2A program as carving out an exception to antitrust law enforcement. Although the H-2A program allows, by statute, agricultural associations to act as employers, the fact that they consolidate their efforts to hold labor market power is anticompetitive and should be evaluated under antitrust laws. In short, antitrust laws and immigration laws should be interpreted together.[31] Lastly, the H-2A program creates barriers to labor mobility, which entrenches labor market power. For the aforementioned reasons—that the H-2A program is seen as exempt from antitrust law—antitrust law has been ineffective at correcting the anticompetitive conduct stemming from the H-2A program. To address this problem, courts could rely on interpretive frameworks better suited to the context of labor monopsony and H-2A disputes. Additionally, or alternatively, legislators could amend the provisions

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[27] *See, e.g.*, Jeff Miles, *The Nursing Shortage, Wage-Information Sharing Among Competing Hospitals, and the Antitrust Laws: The Nurse Wages Antitrust Litigation*, 7 HOUS. J. HEALTH L. & POL'Y 305, 338–49 (2007); Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 209–12 (1990).

[28] Jennifer J. Lee, *U.S. Workers Need Not Apply: Challenging Low-Wage Guest Worker Programs*, 28 STAN. L. & POL'Y REV. 1, 26 (2017).

[29] *Id.* at 9.

[30] *See, e.g.*, Annie Smith, *Imposing Injustice: The Prospect of Mandatory Arbitration for Guestworkers*, 40 N.Y.U. REV. L. & SOC. CHANGE 375, 389–91, 410–11 (2016).

[31] *Cf.* Pac. Seafarers, Inc. v. Pac. Far E. Line, Inc., 404 F.2d 804, 818 (D.C. Cir. 1968) ("[A]ntitrust laws . . . continue in effect as to the shipping industry, and their ratemaking activities in foreign commerce.").

of the H-2A program in the statutory text, and the Department of Labor (DOL) could change some of the defective regulation.

This Comment proceeds in three parts. Part I explains the basic framework for litigating antitrust wage suppression claims under Section 1 of the Sherman Antitrust Act[32] and evaluates the history of the H-2A program. Part II demonstrates that the H-2A program exacerbates labor market issues and cripples antitrust enforcement. Part II.A shows that immigration law, as designed, leads to labor market power, and Part II.B shows that courts' interpretation of immigration laws aggravates the negative consequences of the H-2A program and hamstrings antitrust enforcement. Lastly, Part III offers two sets of recommendations. The first set refers to potential interpretive methods that courts should use in labor monopsony and H-2A disputes: courts should rigorously define the labor market power, analyze whether the labor market in question is susceptible to anticompetitive conduct, scrutinize the conduct of agricultural associations, and assess the extent of the anticompetitive effects of the alleged conduct and the antitrust injury. The second set of recommendations provides suggestions for legislators and the DOL to amend the provisions of the H-2A program: Congress should consider removing parts of the statute that constrain the labor market and prevent labor mobility. Additionally, the DOL should reform H-2A workers' wage calculation so that it disincentivizes farmers and ranchers from setting wages below the competitive rate.

I. BACKGROUND: LABOR MONOPSONY DISPUTES AND GUESTWORKER PROGRAMS

Wage suppression experienced by H-2A workers stems from shortcomings in both antitrust and immigration law. This Part proceeds in two sections. The first discusses the limits of antitrust law as applied to wage-fixing claims, and the second discusses how the history of the H-2A program shaped current immigration practice.

A. The Limits of Section 1 of the Sherman Act in Labor Monopsony Disputes

Congress enacted the Sherman Act in 1890 to create "a comprehensive charter of economic liberty aimed at preserving free

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[32] 15 U.S.C. § 1.

and unfettered competition as the rule of trade."[33] The Sherman Act embodies the free market "premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources" while safeguarding "our democratic political and social institutions."[34] Section 1 of the Sherman Act protects workers from any agreement to restrain their wages. In practice, however, Section 1 labor monopsony claims are rarely adjudicated.[35] This Section describes the general framework for bringing a Section 1 claim and then evaluates the limitations of such a framework in wage-fixing cases.

1. General framework for a Section 1 claim.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade."[36] To be successful, a Section 1 plaintiff must show (i) the existence of an agreement between two or more economic actors and (ii) that this agreement unreasonably restrains trade.[37]

First, a Section 1 plaintiff must prove that the challenged conduct resulted from an agreement between two or more economic actors, rather than from defendants' independent, unilateral actions.[38] When the agreement is between two competitors (e.g., two employers from competing companies), it is deemed "horizontal."[39] The Supreme Court has noted that horizontal agreements "almost always tend to restrict competition and decrease output."[40] For example, an agreement between competitors to fix wages would be held per se illegal.[41]

Second, a Section 1 plaintiff must show that the agreement unreasonably restrains competition. In order to assess whether an agreement restrains competition, courts use different tests

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33 N. Pac. Ry. v. United States, 356 U.S. 1, 4 (1957).

34 *Id.*; *see also* James A. Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743, 744–48 (1950) (summarizing the historical background and the importance of Section 1).

35 *See* Naidu et al., *supra* note 24, at 570.

36 15 U.S.C. § 1.

37 *See, e.g.*, FTC v. Qualcomm Inc., 969 F.3d 974, 988–89 (9th Cir. 2020) (quoting Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1178 (9th Cir. 2016)).

38 *See, e.g.*, Fisher v. City of Berkeley, 475 U.S. 260, 266 (1986) ("[T]here can be no liability under § 1 in the absence of agreement.").

39 *In re* Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1191 (9th Cir. 2015).

40 *Id.* (citing Broad. Music, Inc. v. CBS, 441 U.S. 1, 19–20 (1979)).

41 *See, e.g.*, Fleischman v. Albany Med. Ctr., 728 F. Supp. 2d 130, 162 (N.D.N.Y. 2010) (finding that the per se rule applies to wage fixing).

depending on the nature of the agreement. If the agreement is facially restrictive of trade—such as horizontal agreements between competitors to fix prices, share profits, or divide territory—a court will conclude that it is per se illegal under Section 1.[42] Essentially, this means that if a plaintiff can prove that a defendant engaged in the alleged unlawful practice, the court will hold the defendant liable "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[43]

However, the per se rule is not appropriate when the economic impact of the alleged illegal practice is difficult to assess.[44] When faced with more complex agreements, courts will instead apply the "rule of reason," a test that balances the anticompetitive and procompetitive effects of the agreement at issue.[45] Under the rule of reason, a plaintiff must "demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive."[46] In other words, the court will assess whether, after considering the circumstances of the case, the alleged illegal practice "impos[es] an unreasonable restraint on competition."[47]

In *United States v. United States Gypsum Co.*,[48] the Supreme Court elaborated on the analytical framework of the rule of reason. When considering the exchange of price data, courts must evaluate "[a] number of factors including most prominently the structure of the industry involved and the nature of the information exchanged."[49] For example, "[t]he exchange of price data and

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[42] *See, e.g.*, Citizen Publ'g Co. v. United States, 394 U.S. 131, 133–35 (1969) ("The § 1 violations are plain beyond peradventure. Price-fixing is illegal *per se*.").

[43] *N. Pac. Ry.*, 356 U.S. at 5.

[44] *See* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (quoting FTC v. Ind. Fed'n of Dentists, 476 U.S. 477, 458–59 (1986)).

[45] *See e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018). In sports cases, for instance, league agreements can sometimes restrict competition by regulating players' compensation. *See, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049, 1073, 1079 (9th Cir. 2015) (vacating the district court's judgment that required the NCAA to allow its member teams to pay student athletes up to $5,000 per year and finding that the procompetitive purposes of "integrating academics with athletics" and maintaining a culture of amateurism could validate a compensation-fixing scheme). In those cases, courts use the rule of reason analysis to differentiate "restrictions that are necessary to ensure that league play is possible and those that merely suppress compensation for athletes." Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1366 (2020). *But see* NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021) (holding, in part, that the NCAA violated antitrust laws by limiting students' education-related benefits for their athletic services).

[46] Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006).

[47] Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

[48] 438 U.S. 422 (1978).

[49] *Id.* at 441 n.16.

other information among competitors does not invariably have anticompetitive effects,"[50] a principle that is of particular relevance when analyzing the behavior of trade associations.[51] In sum, there are two main ways to analyze Section 1 claims—the per se rule and the rule of reason—both of which are also used in antitrust labor disputes.[52]

2. The limits of Section 1 in labor monopsony disputes.

Since the enactment of the Sherman Act, the large majority of Section 1 disputes have concerned anticompetitive behavior affecting the product market—more specifically, agreements by sellers to artificially inflate the price of products.[53] By contrast, there have been very few labor monopsony disputes.[54]

Despite their rarity, labor monopsony disputes have existed for a long time. Before Congress enacted the Sherman Act, courts had already held that collusion among employers to fix working conditions could restrain trade, following the common law doctrine established in *Hilton v. Eckersley*.[55] In *Hilton*, the Queen's Bench held that a contract among eighteen Lancaster employers to fix wages, hours, and disciplinary practices was impermissibly in restraint of trade.[56] Importantly, the court determined that the employers' economic power to depress wages was contrary to public policy.[57] Similarly, in *Mineral Water Bottle Exchange & Trade Protection Society v. Booth*,[58] a court held that an agreement among competitors not to hire each other's employees within two

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50 *Id.*

51 *See, e.g.*, Anderson v. Shipowners Ass'n of Pac. Coast, 272 U.S. 359, 362–64 (1926) (drawing a distinction between impermissible associations involving "instrumentalities of commerce" and permissible associations "relat[ing] to local matters").

52 Courts also sometimes use a "quick look" test, which can be described as a subset of the rule of reason. Under the quick look analysis, a court does not need to go through the rule of reason's rigorous analysis of the market and anticompetitive effects because the alleged antitrust conduct is of the type that tends to have anticompetitive effects. *See Ind. Fed'n of Dentists*, 476 U.S. at 459. For an application of the quick look analysis in the labor monopsony context, see Deslandes v. McDonald's USA, LLC, No. 17 C 4857, 2018 WL 3105955, at *4–7 (N.D. Ill. June 25, 2018); Ogden v. Little Caesar Enters., Inc., 393 F. Supp. 3d 622, 635–36 (E.D. Mich. 2019).

53 *See* Marinescu & Posner, *supra* note 45, at 1364–65.

54 *See id.* at 1365.

55 (1855) 119 Eng. Rep. 781; 6 E. & B. 47 (Q.B.), *aff'd*, (1856) 119 Eng. Rep. 789; 6 E. & B. 66 (Ex.); *see also* Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 615 n.199 (1953).

56 *Hilton*, 119 Eng. Rep. at 782–83.

57 *Id.* at 784.

58 (1887) 36 Ch. D. 465 (CA).

years of departure restrained trade.[59] In line with the *Hilton* doctrine, additional wage-fixing disputes arose after the enactment of the Sherman Act. Just a year after the passage of the Act, in *Huston v. Rentlinger*,[60] a court held that an agreement among Louisville employers to fix wages restrained trade.[61] While a few labor-monopsony cases arose after *Huston*,[62] the development of labor-monopsony disputes has been far outpaced by price-fixing disputes, creating an antitrust "litigation gap" for labor-monopsony disputes.[63]

From a purely theoretical standpoint, it is unclear why labor monopsony disputes have not frequently arisen since the enactment of the Sherman Act. There is indeed little doubt that "[t]he Sherman Act . . . applies to abuse of market power on the buyer side—often taking the form of monopsony or oligopsony."[64] Recently, the Department of Justice and the Federal Trade Commission confirmed that "[n]aked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws."[65] Still, labor monopsony cases remain remarkably rare, with courts adjudicating "about six cases per year, about a tenth of the [number of] product market cases."[66]

Scholars attribute this litigation gap in part to classic economic theory, which postulates that labor markets are usually competitive.[67] The anticompetitive behavior in labor markets has not been extensively researched by economists, and it is only recently that studies have uncovered statistical evidence of labor market monopsony.[68]

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59 *Id.* at 467–68.

60 15 S.W. 867 (1891).

61 *Id.* at 869–70.

62 *See, e.g.*, H.B. Marienelli, Ltd., v. United Booking Offs. of Am., 227 F. 165, 171 (S.D.N.Y. 1914) (holding that combinations between vaudeville theaters and booking agents are in restraint of trade); *Anderson*, 272 U.S. at 361–63 (holding that it is illegal for members of an association of shipowners to collectively boycott a prospective worker who had not been granted his certification card from the shipowners' association).

63 Marinescu & Posner, *supra* note 45, at 1347.

64 Todd v. Exxon Corp., 275 F.3d 191, 201 (2d Cir. 2001); *see also* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 317–18 (2007) (holding that both predatory-pricing and predatory-bidding claims under the Sherman Act are analyzed through the same test).

65 ANTITRUST DIV., U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3 (2016).

66 Marinescu & Posner, *supra* note 45, at 1365.

67 *Id.* at 1376–77.

68 *Id.*

Scholars also attribute the existence of this litigation gap to the procedural hurdles that employees face in labor monopsony disputes.[69] From a practical standpoint, employees have little incentive to initiate a dispute against their employer for fixing wages because such suits are costly and individual employees' wages are usually minimally impacted by the anticompetitive conduct.[70] As a result, successful labor monopsony disputes must generally be brought as class actions and must therefore overcome the thorny requirements of commonality and predominance.[71] Yet, labor monopsony cases are often heterogeneous, with varying impacts on wages depending on each individual worker's situation, making it difficult for "every class member" of a labor monopsony class action to establish the "fact of damage . . . through proof common to the class."[72] In some cases, there is significant variation among workers in terms of their propensity to switch jobs, their skill level and responsibilities (which may result in different wages), and the transferability of their skills.[73] Employers' market power might also vary among different workers, which makes it difficult for a court to determine a common injury as opposed to an injury affecting a particular individual due to their specific characteristics.

The litigation gap might also result from the early hostility of antitrust practice against unions. Since the enactment of the Sherman Act, employers have consistently relied on the Act to prevent workers' collective actions.[74] In 1908, the Supreme Court

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69 *See id.* at 1379–82 (describing the difficulties in bringing class action lawsuits and the prevalence of mandatory arbitration clauses).

70 *See* Naidu et al., *supra* note 24, at 572 ("A typical antitrust violation raises prices (or lowers wages) by a relatively small amount over a vast number of people. This means that individuals rarely have an incentive to sue even while the social cost of anticompetitive behavior may be high."). In the H-2A context, although wages are potentially more substantially impacted, guestworkers do not bring suit due to other reasons such as fear of retaliation, language barriers, unfamiliarity with the U.S. legal system, and lack of time (they are seasonal workers). *See* CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., RIPE FOR REFORM: ABUSES OF AGRICULTURAL WORKERS IN THE H-2A VISA PROGRAM 18, 27 (2020).

71 *See* FED. R. CIV. P. 23(b)(3) ("[T]he court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.").

72 Reed v. Advoc. Health Care, 268 F.R.D. 573, 582 (N.D. Ill. 2009) (quoting Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003)).

73 *See, e.g.*, Weisfeld v. Sun Chem. Corp., 84 F. App'x 257, 263–64 (3d Cir. 2004) (rejecting class certification because "both the decreased salary and deprivation of opportunities inquiries would require considering numerous individual factors").

74 For a review of anti-union decisions, see generally C.J. Primm, Note, *Labor Unions and the Anti-Trust Law: A Review of Decisions*, 18 J. POL. ECON. 129 (1910).

unanimously held in *Loewe v. Lawlor*[75] that the Sherman Act applied to labor organizations and their activities.[76] It was only after a few years of antitrust hostility that unions were protected from antitrust enforcement by the Clayton Act of 1914[77] and the Norris-LaGuardia Act of 1932.[78] This early hostility against labor representation and collective bargaining arguably delayed the use of antitrust laws by workers against employers.

The lack of understanding of labor market monopsony is entrenched in the law.[79] The dearth of precedent leads to great uncertainty—and sometimes hostility—regarding this field of antitrust, with parties and courts sometimes misapprehending the subtle nuances and dynamics of the labor market. As a result of a misevaluation of the economics behind the cases, there is a concern that courts may end up condoning wage fixing.[80] For migrant workers in the agriculture sector, the extra layer of issues related to immigration law creates additional barriers to resolving labor monopsony disputes.

B. Guestworker Programs and Agriculture: History and the Statutory Standard

The United States has a long legacy of importing labor from Mexico, especially for work in the Southwest.[81] Although nowadays the United States imports labor from all over the world, about 90% of H-2A workers are from Mexico.[82] In fact, the H-2A program is the descendent of the Bracero Program and has been considerably shaped by the Bracero Program's history and practices. Labor market failures in the agriculture sector are rooted

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75 208 U.S. 274 (1908).

76 *Id.* at 279–80.

77 Pub. L. No. 63-212, 38 Stat. 730 (codified as amended in scattered sections of 15 U.S.C.).

78 Ch. 90, 47 Stat. 71 (codified as amended at 29 U.S.C. §§ 101–115); s*ee also, e.g.*, Milk Wagon Drivers Union v. Lake Valley Farm Prods., 311 U.S. 91, 100–03 (1940).

79 *See* Marinescu & Posner, *supra* note 45, at 1376–77.

80 *Id.* at 1377–78; *see also id.* at 1377 n.172 (critiquing a district court's decision in a NCAA antitrust case for "referring incorrectly to the labor market as a product market").

81 *See* Garry G. Geffert, *H-2A Guestworker Program: A Legacy of Importing Agricultural Labor*, *in* THE HUMAN COST OF FOOD 113, 114–16 (Charles D. Thompson, Jr. & Melinda F. Wiggins eds., 2002).

82 *H-2A Guest Worker Fact Sheet*, NAT'L CTR. FOR FARMWORKER HEALTH (last updated Oct. 2020), https://perma.cc/63PY-VC9T.

in decades of wage depression under the Bracero Program.[83] This Section describes the Bracero Program and then analyzes the statutory standard applicable under the H-2A program.

1. The Bracero Program and its legacy.

The Bracero program was the predecessor of the H-2A program. It was created during the Second World War through a series of bilateral agreements with Mexico.[84] At that time, growers in California, Texas, and Arizona complained about labor shortages and requested permission from the Immigration Service to hire Mexican workers. Initially, all requests were denied. However, after the U.S. Employment Service determined that there was a labor shortage at the prevailing wage, Congress enacted legislation under which Mexican workers—or "Braceros"—could be hired for seasonal contract labor in agriculture.[85] "From 1942 to 1964, 4.6 million [Bracero] contracts were signed, with many individuals returning several times on different contracts, making it the largest U.S. contract labor program" at the time.[86]

In theory, it seemed that Congress enacted the Bracero program to curb the lack of "domestic workers"[87] by importing migrant workers under strict conditions of "labor shortages"—i.e., the unavailability of domestic workers at the prevailing market wage. In practice, however, the Bracero program did not function adequately. It allowed farmers and ranchers to collude and artificially create labor shortages to import migrant labor at below-market wages even when domestic workers were readily available at the prevailing market wage.

Employers' wage-fixing practices operated as follows: Through their organizations and associations, employers artificially fixed the wage below the competitive level as the prevailing wage to curb the supply of domestic workforce and create an

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83 *See* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 70–71 (1992) (discussing the relationship of the Bracero Program to wage decreases and high unemployment rates among domestic farm workers).

84 *See The Bracero Program*, UCLA LAB. CTR. (2014), https://perma.cc/47NY-B2K2.

85 CALAVITA, *supra* note 83, at 20–23. The relevant legislation was the Act of Apr. 29, 1943, Pub. L. No. 45, 57 Stat. 70.

86 *The Bracero Program*, *supra* note 84.

87 "Domestic workers," under the Bracero program and the subsequent H-2A program, refers to the entire population of U.S. workers and must not be confused with workers performing childcare, household tasks, or upkeep of a home or surrounding yard on a regular basis in return for wages or other benefits, also known as "domestic workers" under U.S. immigration practice. *See Domestic Workers*, U.S. CUSTOMS & IMMIGR. SERVS. (last updated Nov. 27, 2019), https://perma.cc/89TY-BQQY.

artificial labor shortage. Ranchers and growers determined the wages they were going to pay and then reported it to state officials. "The 'prevailing wage' thus came to mean 'the wage that prevails' within the context of a non-competitive labor market."[88]

Employers' practice of artificially deflating the "prevailing wage" is highly anticompetitive and should be prohibited by antitrust regulation. To justify this anticompetitive practice, employers have long relied on the misconceived excuse that U.S. workers refuse to work in the fields and that only migrant workers are hardworking enough to do these jobs.[89] These "cultural mythologies [are] premised on problematic stereotypes" and "mask the ways in which guest worker programs degrade wages and working conditions to chase U.S. workers away."[90] In reality, there is no doubt that "raising wages . . . could recruit more U.S. workers to guest worker jobs."[91] In fact, there is ample evidence that U.S. workers are willing to take difficult migratory jobs if they pay well, demonstrating that labor supply is sensitive to wages and working conditions.[92]

Once employers had created the artificial labor shortage, they were allowed to recruit Braceros, who were paid a wage below the competitive level in the United States. Domestic workers were effectively eliminated from the market and replaced with a cheaper, more stable workforce. In California, this is exactly what happened: Growers organized in associations to set wages and prices. Between 1942 and 1946, about seventy-four associations of growers were created,[93] and individuals stated that the County Extension Agent (a state agent responsible for fixing the

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88 CALAVITA, *supra* note 83, at 23.

89 *See* Lee, *supra* note 28, at 34–35.

90 *Id.*

91 *Id.* at 35; *see also* Andrea Roberson, *Wages Rise on California Farms. Americans Still Don't Want the Job*, L.A. TIMES (Mar. 17, 2017), https://perma.cc/QM3H-REJR (quoting an economist's explanation that "[t]he law of supply and demand doesn't stop being true just because you're talking about people").

92 *See* Lee, *supra* note 28, at 37 (explaining that "more than 90,000 individuals submitted applications to become sanitation workers in New York City, with nationwide starting salaries of well over $40,000 including typical overtime pay," and that "[t]housands of workers flocked to North Dakota searching for jobs with a starting salary of $66,000, even given that the jobs require 80-120 hours per week in conditions that can reach -30 degrees Fahrenheit").

93 *See* DON MITCHELL, THEY SAVED THE CROPS: LABOR, LANDSCAPE, AND THE STRUGGLE OVER INDUSTRIAL FARMING IN BRACERO-ERA CALIFORNIA 89 (2012).

prevailing wage) "function[ed] as an employee of organized farm groups . . . and [was] therefore of doubtful impartiality."[94]

Additionally, it was very difficult for Braceros to challenge the terms of their labor contracts once they were employed in the United States. Indeed, Braceros were legally prohibited "from accepting work from other employers—work in other crops, in other industries, or even for other farmers than those to whom they had been assigned—for a better wage."[95] Further, some growers developed policing practices to ensure that other Bracero recruiters deflated wages of Bracero workers by recruiting "fieldmen" whose task was to "circulate[ ] around among those owner-farmers" and "attempt[ ] to police . . . and see that people weren't violating the agreement."[96] Finally, at the time, the large supply of potential Bracero workers allowed U.S. employers to maintain an artificially low wage, with one grower admitting that "the best control that we've ever had in this country is the Mexican labor (Mexican nationals) coming in here and stabilizing things" thanks to their willingness to accept below-market wages.[97]

Over the years, it became clear that the Bracero program was used to curb the U.S. labor market and not to resolve alleged labor shortages. In one instance, Bracero employers considered that among 1,700 unemployed individuals in Ventura County, California, none was suitable to work in the fields.[98] Facially, some excuses were made for this lack of suitability, such as the gender of the unemployed individuals (women were not considered qualified to replace Braceros) or their lack of agricultural experience.[99] However, in reality, the low, anticompetitive prevailing wages were keeping domestic workers away from the job and allowed Bracero employers to obtain authorization to recruit an extra 589 Braceros to the county.[100]

The Bracero program grew steadily throughout the 1950s, reaching more than 445,000 Bracero employees in 1956.[101] The domestic labor force had no other choice but to leave regions

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94 CALAVITA, *supra* note 83, at 22 (second alteration in original) (quoting LLOYD H. FISHER, THE HARVEST LABOR MARKET IN CALIFORNIA 108 (1953)).

95 MITCHELL, *supra* note 93, at 90.

96 *Id.* (quoting an unnamed peach grower).

97 *Id.* (quoting an unnamed farmer).

98 *Id.* at 91.

99 *Id.*

100 MITCHELL, *supra* note 93, at 91–92.

101 U.S. DEP'T OF AGRIC., TERMINATION OF THE BRACERO PROGRAM: AGRICULTURAL ECONOMIC REPORT NO. 77, at 5 (1965).

where Braceros worked. Texas, for example, was the largest importer *and* exporter of migrant labor as it was importing Braceros, but domestic workers were seeking work in other states.[102] Over time, political groups came to oppose labor contract work—such as the Bracero Program—and, in 1964, Congress terminated the Bracero program.[103]

The termination of the Bracero Program did not end the ability of domestic employers to import migrant laborers as guest workers. Indeed, alongside the Bracero Program, the U.S. government developed the H-2 program under the Immigration and Nationality Act[104] (INA) to effectively extend the Bracero Program to include workers from other countries. From 1952 to 1964, the H-2 program was not widely used—mostly because Braceros were available.[105] After the Bracero program was terminated, the H-2 program became more popular. The program was strengthened under the Carter administration but suffered from deregulation and underenforcement under the Reagan administration.[106] In 1986, however, Congress revised the H-2 program to streamline the process for growers. Thus, the "H-2A" program was born.[107]

2. The H-2A statutory standard.

The H-2A program involves the DOL, Citizenship and Immigration Services (USCIS), and the Department of State. One of Congress's goals in enacting the H-2A program was to protect the U.S. workforce while also providing labor to growers in case of labor shortages.[108] The INA requires that H2-A sponsors—the employers—obtain a certification of labor shortage from the DOL showing that:

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[102] TRUMAN MOORE, THE SLAVES WE RENT 88 (1965).

[103] *See Background Information About the Bracero Program*, AM. SOC. HIST. PROJECT CTR. FOR MEDIA & LEARNING, https://perma.cc/YF7J-LKJ9.

[104] Pub. L. No. 82-414, 66 Stat. 163 (1952).

[105] *See* H. Michael Semler, *Aliens in the Orchard: The Admission of Foreign Contract Laborers for Temporary Work in U.S. Agriculture*, 1 YALE L. & POL'Y REV. 187, 194–95 (1983).

[106] *See* Sarah deLone, *Farmers, Growers and the Department of Labor: The Inequality of Balance in the Temporary Agricultural Worker Program*, 3 YALE J.L. & LIBERATION 100, 103–04 (1992).

[107] *See id.* at 120–22.

[108] *See* Semler, *supra* note 105, at 192 (noting a "Congressional intent that foreign workers be admitted only 'for the purpose of alleviating labor shortages,' subject to 'strong safeguards for American labor'" (quoting H.R. REP. No. 82-1365, at 44, 50, *reprinted in* 1952 U.S.C.C.A.N. 1653, 1698, 1705)).

> (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
> (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.[109]

The requirements of 8 U.S.C. § 1188(a)(1) are designed to "provide [ ] assurances" that "[domestic] workers are given a preference over foreign workers for jobs that become available within this country."[110] Additionally, the requirements provide that, "to the extent that foreign workers are brought in, the working conditions of domestic employees are not to be adversely affected, nor are United States workers to be discriminated against in favor of foreign workers."[111]

Under § 1188(a)(1), labor shortages are assessed in aggregate by looking at the offer and demand of work "at the time and place needed" and not at an individual corporation or employer's needs.[112] It is therefore not sufficient for an employer to make a showing of a business justification—such as a need to recruit experienced migrant workers instead of inexperienced domestic workers—to satisfy the requirements of § 1188(a)(1). In *Elton Orchards, Inc. v. Brennan*,[113] an apple orchard owner challenged the DOL's policy of allocating inexperienced domestic apple pickers to his orchards.[114] The DOL allocated inexperienced domestic apple pickers to plaintiff's orchards but then allowed other apple orchard owners to import experienced foreign apple pickers.[115] Because the plaintiff (who was now required to use inexperienced pickers) used to hire those experienced workers, he alleged that he was hurt by the policy.[116] The court ruled that—despite the urgency in proper harvesting of apples and the fact that the employers and apple pickers had a previous work relationship—the DOL's policy prevailed.[117] In the words of the court: "To recognize a legal right to use alien workers upon a showing of business

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109 8 U.S.C. § 1188(a)(1).
110 Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 596 (1982).
111 *Id.*
112 8 U.S.C. § 1188(a)(1)(A).
113 508 F.2d 493 (1st Cir. 1974).
114 *Id.* at 496.
115 *Id.*
116 *Id.*
117 *Id.* at 500.

justification would be to negate the policy which permeates the immigration statutes, that domestic workers rather than aliens be employed wherever possible."[118]

Similarly, once a labor shortage is established, domestic employees cannot challenge the recruitment of migrant workers on the basis that domestic employees are available to work for a higher wage. In *Hernandez Flecha v. Quiros*,[119] the court held that if workers are not willing or able to work under conditions set by the employer, then workers meet the regulatory requirement under the labor certification provision of the statute.[120] *Hernandez Flecha* suggests that employers' working conditions inform whether they can import foreign labor. Thus, employers have an incentive to keep poor working conditions to deter domestic workers from applying to these positions. Interpreted differently, the court explained, the law could be used as a tool by domestic workers to request many advantages from their employers.[121] In turn, "the necessary effect would be that the alien market would never be reached [and] the employer would have to pay whatever the domestic workers sought, it being obvious that if there were no limit on the price that could be asked, workers could always be found."[122] Here, the court touches on an important point in line with economic theory: the adjustment of the quantity of labor through the wage rate as discussed in Part I.B.1. If employers can set wages and working conditions below what the market requires and hire cheaper foreign workers, then their actions are effectively within the scope of § 1188(a)(1)(B). Specifically, employment of foreign workers prevents domestic workers from getting paid better wages since employers can hire foreign workers when market conditions allow for higher domestic wages. In *Rogers v. Larson*,[123] the court recognized the tension between the dual roles of the H-2A program and noted the need to "strike a balance between the two goals,"[124] but it did not, as the previous cases show, fully account for the economic consequences of such balancing.

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118 *Elton Orchards*, 508 F.2d at 500.

119 567 F.2d 1154 (1st Cir. 1977).

120 *Id.* at 1155–56. Sections 1188(a)(1)(A) and 1182(a)(14)(A) (discussed in *Hernandez Flecha*) have the same language and both refer to labor certification requirements for immigrants.

121 *Id.* at 1156.

122 *Id.*

123 563 F.2d 617 (3d Cir. 1977).

124 *Id.* at 626.

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This Part has illustrated some of the general antitrust limits to Section 1 antitrust claims and has provided background history on the Bracero Program to uncover labor monopsony's systemic roots in the agricultural labor market. In Part II, the Comment will show how the H-2A program does not strike a balance between employers and workers but exacerbates labor market power in agriculture.

II. THE H-2A PROGRAM EXACERBATES LABOR MARKET POWER IN AGRICULTURE

The Bracero Program ended because it was causing more harm than good: it led to decreased labor market competition (which meant lower wages for domestic and foreign workers) and to the "poverty and despair"[125] of foreign workers. But, as this Part will demonstrate, the systemic flaws that plagued the Bracero Program and brought it to an end are present in the current H-2A program as well. Part II.A explains how immigration law and procedure exacerbates labor market power, and Part II.B shows that courts have interpreted the H-2A program as limiting the scope and the force of antitrust laws.

A. How Immigration Law Perpetuates Labor Market Power

By design, the application process for H-2A visas leads to power imbalances and allows for wage suppression practices, resulting in labor market monopsony. This Section shows that the statutory requirements for importing workers, as well as the role of associations in the H-2A program, contribute to labor market power.

1. The H-2A program allows employers to artificially create labor market shortages.

The first condition to qualify for petitioning to import migrant labor under the H-2A program is to demonstrate that "there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition."[126] Although the

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[125] CALAVITA, *supra* note 83, at 143.

[126] 8 U.S.C. § 1188(a)(1)(A).

certification process is supervised by the DOL,[127] the H-2A program lacks adequate procedural safeguards to prevent employers from artificially creating labor shortages to justify importing migrant labor at depressed wages.

One of the key steps in determining the existence of a labor shortage is an analysis, conducted by the employer, of the current availabilities in the domestic labor market. This is commonly done through a recruitment process, where the employer must first seek to recruit domestic workers to fill the required positions.[128]

The recruitment process is riddled with opportunities for deceit and procedural problems. The purpose of these job postings is to make sure that, despite a thorough search, employers cannot find workers and are suffering from a labor shortage. Such a situation would trigger § 1188(a)(1) and allow employers to import H-2A workers. While employers go through the recruitment process as required by the DOL, they signal in job postings that they are recruiting H-2A workers, effectively dissuading domestic workers from applying to those jobs. A search of states' databases containing current job listings yields interesting results. Job listings posted on California's Workforce Agency (CalJobs) show that, although harvesting and farming jobs are open to U.S. workers, many job postings start with "H-2A."[129] Job descriptions often include some language requirements, such as "[m]ust be able to understand work & safety instructions in English or Spanish, the languages spoken and written in the workplace."[130] The wage set by the employers, between $14.77 and $16.05 an hour,[131] is the same as the recommended wage for H-2A workers. A U.S. worker looking for a job as a crop harvester may not consider such a job because of the Spanish speaking requirement and not being "H-2A." Although the process is slightly different for herders, the results are the same. A job search for "herder" yields dozens of job offers, most of them seasonal (such as "Range Winter Sheep Herder"),

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127 *See* 8 U.S.C. § 1188(a)(1).

128 *H-2A Temporary Agricultural Program*, U.S. DEP'T OF LAB., https://perma.cc/L6AC-G6SS.

129 *See* CALJOBS (search terms used: "crop" and "farming, fishing, and forestry occupations" category), https://perma.cc/6Y35-FA3A; CALJOBS (search terms used: "harvester" and "farming, fishing, and forestry occupations" category), https://perma.cc/Q4X4-YHU7.

130 CALJOBS (search terms used: "harvester" and "farming, fishing, and forestry occupations" category), https://perma.cc/Q4X4-YHU7.

131 *Id.*

that mention "H-2A"—sometimes in the job title and sometimes in the job description.[132]

It is possible that these H-2A job postings are posted after an employer has gone through the U.S. recruiting process in good faith without success. However, this is unlikely. To apply for a job through official state websites such as Colorado's—that is, to create an online account and apply—one must provide a Social Security Number (SSN), effectively blocking foreign workers who do not have an SSN from even creating an online account.[133] In other words, these job listings with H-2A in the title would be seen predominately—if not entirely—by domestic workers. Employers do not usually rely on state agencies to recruit H-2A workers. Instead, "[w]hen USCIS approves an employer's petition, the employer often hires labor recruitment companies to locate workers for prearranged terms of employment."[134] Since the labor recruitment companies work directly with workers and employers, it is unlikely that they need to refer to online job postings on state databases; recruitment agencies know what employers are looking for and presumably have access to a large pool of interested applicants.

While such bad faith practices can seem shocking, they are not rare in the agriculture sector and are exacerbated by the lack of agency oversight. Indeed, other instances of procedural failures have been reported regarding the certification of H-2A applications.[135] The Office of Foreign Labor Certification, an office responsible for certifying H-2A applications,[136] has regularly approved deficient applications and failed to properly verify H-2A workers' working conditions.[137]

Because of these bad faith practices and lack of agency oversight, employers can pretend that there is a labor shortage in the domestic market and that the recruiting of migrant workers

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[132] *See* CALJOBS (search terms used: "herder" and "farming, fishing, and forestry occupations" category), https://perma.cc/J8YD-Z6MY; *see also* CONNECTING COLO. (search term used: "herder"), https://perma.cc/SJG8-L96K

[133] *See New Profile Settings*, CONNECTING COLO., https://perma.cc/VG35-R2AW.

[134] Lauren A. Apgar, *Authorized Status, Limited Returns*, ECON. POL'Y INST. (May 21, 2015), https://perma.cc/B5XW-FYQG.

[135] *See* Alison K. Guernsey, Note, *Double Denial: How Both the DOL and Organized Labor Fail Domestic Agricultural Workers in the Face of H-2A*, 93 IOWA L. REV. 277, 292–95 (2007) (discussing the failure of administrative agencies to accurately assess and monitor the prevailing-wage rate for H-2A workers).

[136] *See* 20 C.F.R. §§ 655.100–.101 (2020).

[137] *See* Guernsey, *supra* note 135, at 292.

would not hurt domestic workers. As a result, they can hire H-2A workers.

2. The H-2A program does not prevent domestic employers from paying submarket wages.

The second condition under § 1188(a)(1) is to show that "the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed."[138] In order to protect the wages and working conditions of workers in the United States, immigration law requires employers to calculate the wages of H-2A workers following a strict guideline, with wages that must generally be equal to or higher than the monthly Adverse Effect Wage Rates (AEWR).[139] The AEWR is based on the "annual weighted average hourly wage rate for field and livestock workers (combined) in the state or region as published by the U.S. Department of Agriculture" in its Farm Labor Report.[140]

But in practice, the AEWR does not prevent the clear wage disparity between the wages of H-2A workers and the wages of domestic workers. Indeed, the AEWR reflects existing market conditions and prevailing wages, which can be artificially low due to existing monopsonies—a dynamic similar to what occurred during the Bracero program.[141]

As the following table indicates, H-2A workers are in fact paid less than domestic workers.[142] This table is based on performance data that details the names and locations of farms, the wages paid, and anticipated working hours for H-2A workers.[143] The following table focuses on the wage differential between the average nationwide wage (which includes domestic workers) and H-2A workers in similar job categories.[144]

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138 8 U.S.C. § 1188(a)(1)(B).

139 20 C.F.R. § 655.211(a)(1) (2020).

140 Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2021 Adverse Effect Wage Rages for Non-Range Occupations, 86 Fed. Reg. 10,996, 10,996–97 (Feb. 23, 2021).

141 *See supra* text accompanying notes 88–94.

142 The national average wage, in the second column of the table, is different from the AEWR.

143 *Performance Data*, U.S. DEP'T OF LAB., https://perma.cc/G3YQ-NENY.

144 The average of nationwide wages for the same categories of workers is sourced from the Bureau of Labor Statistics. *See Occupational Employment Statistics*, U.S. BUREAU OF LAB. STAT., https://perma.cc/FZM2-J2S5.

TABLE 1: DIFFERENCE BETWEEN H-2A WAGES AND NATIONWIDE WAGES FOR SIMILAR OCCUPATIONS (2019)

Occupation	Average H-2A Hourly Wage	Average Nationwide Hourly Wage	Difference
Agricultural equipment operators	$12.25	$15.12	23%
Agricultural workers, all others	$13.01	$17.27	33%
Construction laborers	$12.48	$18.70	50%
Farmworkers and laborers, crop, nursery	$11.84	$12.05	2%
Farmworkers and laborers, crop, nursery, and greenhouse	$11.89	$12.05	1%
Farmworkers, farm, and ranch animals	$11.10	$13.38	21%
Farmworkers, farm, ranch, and aquacultural animals	$12.87	$13.38	4%
Firstline supervisors farming, fishing	$12.39	$24.11	95%
Graders and sorters, agricultural products	$11.65	$11.84	2%
General farmworkers	$11.31	$13.38	18%

As this table shows, H-2A workers' hourly wage is lower than domestic workers' hourly wage for the same occupation. The difference ranges from 2% to 95%. Across these categories, on average, the wage difference between H-2A workers and domestic workers is about 25%.

Such wage differences might suggest that H-2A workers are subject to monopsonistic power. The wage differential can hardly be explained away by alternative causes, such as lower productivity. First, due to their precarious, seasonal occupation, H-2A workers have a strong incentive to work hard to be recruited the next year. Second, H-2A workers are usually less constrained by obligations outside of work due to their lack of familial and social ties in the place they work. Additionally, the fact that migrant workers sometimes receive in-kind compensation—namely, living or traveling accommodations—fails to account for the wage difference. Employers routinely refuse to pay for accommodations or provide deplorably substandard living conditions for migrant workers.[145]

There is an additional explanation for the wage disparity between H-2A and domestic workers. Under competitive market conditions, domestic workers have enough labor mobility to change jobs if they seek better wages or working conditions. A lack of mobility can suppress the wages of a particular group.[146] H-2A workers are tied to their employment contract with their H-2A sponsor (their employer). If an H-2A worker is dissatisfied with her wage, she cannot seek employment from another employer because the employment contract is not transferrable; she instead can only quit and leave the United States. H-2A workers' lack of labor mobility exacerbates labor market power.[147]

3. Under the H-2A program, employers are allowed to coordinate their hiring efforts through professional associations.

In the context of the H-2A program, Congress has explicitly permitted agricultural associations to make collective decisions

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[145] *See* CENTRO DE LOS DERECHOS DEL MIGRANTE, *supra* note 70, at 21–23 (demonstrating that wage differences are not due to migrant workers receiving the difference in pay through in-kind compensation).

[146] *See* Michael R. Ransom & Val E. Lambson, *Monopsony, Mobility, and Sex Differences in Pay: Missouri School Teachers*, 101 AM. ECON. REV. 454, 458 (2011) (attributing a small portion of the gender-based wage gap in teaching jobs to the "different rates of mobility" between men and women).

[147] H-2A workers are not simply constrained by the nature of their employment contract. They also experience economic coercion such as "fees they are forced to pay before they start working" and "feeling unable to leave housing or employment." CENTRO DE LOS DERECHOS DEL MIGRANTE, *supra* note 70, at 19. Some workers report needing permission from their employers to leave their housing or being completely prohibited from leaving the worksite "other than to buy groceries." *Id.* at 23. Employers also sometimes seize workers' passports, preventing them from leaving the country. *Id.* at 24.

about hiring migrant labor, including decisions about their wages.[148] Petitioners or employers can apply for a certification through an agricultural association. In turn, this means that agricultural associations are allowed to act as sole employers in the context of H-2A certification.[149]

The main issue with associations acting as employers in the H-2A program is that they represent large shares of the labor market and allow individual employers to act in unison with regard to the certification process. This gives the associations labor market power. For example, in *Llacua v. Western Range Ass'n*,[150] the two associations at issue hired 91% of shepherds,[151] giving them considerable labor market power. If agricultural associations of ranchers can decide who they want to hire and at what price, they could easily be restraining trade. When a rancher and an association of ranchers (such as the WRA or the MPAS) petition together (cosigning the H-2A visa), as permitted by statute, to hire a foreign worker, it could be thought of as a horizontal agreement to fix wages and make collective hiring decisions.

B. Courts Interpret Immigration Laws as Limiting the Scope and the Force of Antitrust Laws

Claims of wage suppression brought under Section 1 of the Sherman Act are rare,[152] and, in the context of H-2A workers, they are almost nonexistent. However, the *Llacua* case illustrates such a claim and is an example of how courts interpret immigration laws as a limit on or an exception to antitrust laws.

1. Courts may limit antitrust enforcement for agricultural associations.

In *Llacua*, shepherds who were employed through the H-2A visa program sued ranchers' associations for violating Section 1

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148 *See* 8 U.S.C. § 1188(d).

149 *See* 8 U.S.C. § 1188(d)(2):

> If an association is a joint or sole employer of temporary agricultural workers, the certifications granted under this section to the association may be used for the certified job opportunities of any of its producer members and such workers may be transferred among its producer members to perform agricultural services of a temporary or seasonal nature for which the certifications were granted.

150 930 F.3d 1161 (10th Cir. 2019).

151 *Id.* at 1171.

152 *See* Marinescu & Posner, *supra* note 45, at 1365.

of the Sherman Act.[153] Specifically, the complaint alleged that the ranchers, through the WRA and the MPAS, agreed to keep wages below the competitive level.[154] These membership associations also controlled a significant portion of the labor demand for shepherds. "From October 1, 2013, to October 1, 2014, WRA hired approximately 55% of all open range shepherds hired in the United States."[155] The MPAS hired about 36% of all open range shepherds in the United States over the same period.[156] Together, the two associations were responsible for hiring 91% of all shepherds.

The court's reasoning highlights the general tension between the H-2A program and antitrust law. Section 1 of the Sherman Act reads: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal."[157] However, H-2A regulations allow farmers and ranchers to combine and hire H-2A temporary workers through associations.[158]

The court in *Llacua* explained the importance of the "regulatory overlay" that presumably justifies the contradictory goals of antitrust and immigration law in this context.[159] The court held that the existence of the association alone was not persuasive evidence of collusion because "the regulatory scheme permit[ted], and in places *require[d]*, the very actions the Shepherds contend[ed] support the inference of a conspiracy."[160] The statute governing the admission of H-2A workers into the United States explicitly allows agricultural associations to file applications for workers and to transfer workers among their producer members.[161] The implementing regulations also authorize associations to file master applications—applications filed on behalf of more than one member employer—when acting in their capacity of joint employer.[162] To the *Llacua* court, these provisions undermined the plaintiffs' assertions that the mere use of a trade association to assist in hiring shepherds constitutes evidence of a

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153 *Llacua*, 930 F.3d at 1168 & n.3.
154 *Id.* at 1168.
155 *Id.* at 1171.
156 *Id.*
157 15 U.S.C. § 1.
158 8 U.S.C. § 1188(d)(1)–(2).
159 *Llacua*, 930 F.3d at 1181.
160 *Id.* (emphasis in original).
161 8 U.S.C. § 1188(d)(1)–(2).
162 20 C.F.R. § 655.131 (2020).

conspiracy to control wages, as the association was following practices condoned by Congress.[163]

Coordination among members of an association is not necessarily an antitrust violation. Courts have acknowledged that "organizational decisions sometimes are § 1 concerted action," but such a finding requires "direct evidence of an alleged conspiracy via an association's express regulation of its members' market."[164] For example, the Supreme Court has found an engineering association's prohibitions on competitive bidding to be a violation of the Sherman Act.[165] The Court similarly found a violation for a bar association's rules proscribing minimum fees for legal services.[166] By themselves, however, associations are not always enough to prove antitrust conspiracy. In fact, although a "trade association by its nature involves collective action by competitors[,] . . . a trade association is not by its nature a 'walking conspiracy.'"[167] As the *Llacua* court mentions, "assistance in locating and hiring H-2A shepherds as permitted under federal statutes and regulations does not amount to evidence of a conspiracy that is beyond inference or dispute."[168] Even if the court in *Llacua* had accepted the argument that "all members of an association could be deemed to have entered into an antitrust conspiracy simply because they joined the association, participated in its governance, and agreed to abide by its rules," it concluded that the immigration statute conflicts directly with this argument because it explicitly allows members to be part of an association in this way.[169] In the court's view, the immigration statute prevailed.

In *Llacua*, the court emphasized that because immigration laws allowed associations to "act[ ] as joint employer[s]," their existence did "not give rise to a plausible inference of an improper agreement."[170] This interpretation of immigration laws functionally implies that immigration laws could generally exempt anticompetitive conduct from the Sherman Act. Such an exemption,

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163 *See Llacua*, 930 F.3d at 1171 n.16, 1181–82.

164 N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc., 883 F.3d 32, 40 (2d Cir. 2018); *see also* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 773 n.21 (1984) ("[S]ubstance, not form, should determine whether a separately incorporated entity is capable of conspiring under § 1.").

165 Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692–93 (1978).

166 Goldfarb v. Va. State Bar, 421 U.S. 773, 782–83 (1975).

167 *N. Am. Soccer League*, 883 F.3d at 40 (alterations in original) (quoting Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 293–94 (5th Cir. 1988)).

168 *Llacua*, 930 F.3d at 1178.

169 *Id.* at 1181–82.

170 *Id.*

by implication, runs contrary to the longstanding interpretations of the Sherman Act. Indeed, exemptions are "not to be implied, but . . . furnished only when and as directed by the legislature."[171] Even when such exemptions are explicitly provided by statute, they "are to be narrowly construed."[172] Indeed, the policies of the Sherman Act are so important that "immunity from antitrust laws 'is not lightly implied'" from a subsequent legislation.[173] In the context of immigration law, the H-2A program does not explicitly provide an exemption from antitrust enforcement.[174] Although § 1188(a) leads to anticompetitive behavior from farmers and ranchers, it is not condoned—explicitly or implicitly—by the statute.

Instead of implying a conflict between immigration and antitrust statutes, courts should inquire as "to what extent is the [ ] action permissible as not contravening the federal antitrust laws," and for federal actions, "the proper inquiry would seem to be to what extent Congress has knowingly adopted a policy contrary to or inconsistent with the previously established antitrust laws."[175] Therefore, the inquiry is not about whether the immigration regulation supersedes the Sherman Act. The Sherman Act is applicable in conjunction with the immigration statute. For example, even if agricultural associations can hire workers and jointly represent employers under immigration laws, they cannot become a vehicle to garner monopsonistic power and artificially deflate wages in violation of the Sherman Act.

2. A conspiracy's "economic sense" as a determinant of antitrust enforcement.

Courts cannot infer the existence of a conspiracy from specific conduct if defendants "had no rational economic motive to conspire, and if their conduct is consistent with other, equally

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171 Pac. Seafarers, Inc. v. Pac. Far E. Line, Inc., 404 F.2d 804, 819 (D.C. Cir. 1968).

172 Grp. Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979); *see also* Abbott Lab'ys. v. Portland Retail Druggists Ass'n, 425 U.S. 1, 12 (1976) ("Implied antitrust immunity is not favored."); Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975) (emphasizing that "nonstatutory exemption from antitrust sanctions" for agreements between labor unions and businesses are "limited").

173 United States v. First City Nat'l Bank, 386 U.S. 361, 368 (1967) (quoting California v. Fed. Power Comm'n, 369 U.S. 482, 485 (1962)).

174 This is unlike, for example, the McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011–1015), in which healthcare insurers enjoyed a narrow exemption to antitrust challenges until it was repealed in January 2021.

175 Hecht v. Pro-Football, Inc., 444 F.2d 931, 935 (D.C. Cir. 1971).

plausible explanations."[176] Analyzing whether ranchers in *Llacua* had an economic motive to conspire is therefore important to determining their antitrust liability. According to the court's opinion in *Llacua*, the conspiracy "[did] not make economic sense" because ranchers did not have a rational economic motive to "depress wages paid by their competitors in other states."[177]

Here, the court misunderstood the market delineations set out in § 1188(a). Naturally, ranchers in Colorado were not trying to depress wages paid by their competitors in other states because they are not competing to hire the same workers. For example, in *Llacua*, even if wages ended up decreasing in other states, it would not have hurt ranchers in Colorado. In § 1188(a)(1), the provision makes clear that the "time and place" of the worker is important.[178] The labor market for ranchers is the county, or—at most—the state. Naturally, ranchers have an interest in depressing wages within their own market—if the cost of labor is low within their market, they can make more profit. This is a rational economic motive that makes economic sense from an employer's profit-maximizing perspective.

Additionally, assuming ranchers' wage-setting behavior in Colorado led to lower wages for the same occupation in other states, there would still be an economic motive for an employer to depress wages. Surely, ranchers' competitors in other states would have increased profits because they would be paying their employees lower wages, but it would not take away any profits from Coloradan ranchers. Essentially, all ranchers across the country would be making more profit. Either way, the ranchers in *Llacua* have strong economic incentives for keeping wages below the competitive level.

The court in *Llacua* seems to believe that "a conspiracy that locks in substantial advantages for their competition is implausible."[179] However, this is plainly inconsistent with how the Supreme Court and lower courts have reviewed price-fixing cases. For example, a Section 1 Sherman Act violation can be found even in a concentrated industry where a few firms have agreed to set prices above the competitive level, regardless of the fact that the increased price benefits firms that are not part of the agreement.[180]

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176 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596–97 (1986).

177 *Llacua*, 930 F.3d at 1181.

178 8 U.S.C. § 1188(a)(1)(A).

179 *Id.*

180 *See* Todd v. Exxon Corp., 275 F.3d 191, 207–14 (2d Cir. 2001).

Therefore, Coloradan ranchers have a rational economic motive for depressing wages. The court in *Llacua* weakened antitrust enforcement by arguing that wage fixing would not make economic sense if it would potentially benefit competitors.

* * *

This Part has demonstrated that the statutory framework underlying the H-2A program perpetuates labor market failures and has significant negative consequences for the labor market. For instance, the H-2A program allows employers to create submarket conditions for domestic and foreign workers. To make matters worse, the H-2A program, like other nonimmigrant programs, is contractual work that prevents workers from switching jobs to evade bad working conditions. Plus, farmers' associations act jointly as employers and contribute to entrenching those submarket working conditions. Lastly, a close reading of *Llacua* suggests that courts have interpreted immigration laws to limit the scope and the force of antitrust laws. The next Part offers some recommendations to tackle these issues.

III. FIXING THE LAW TO CORRECT LABOR MARKET FAILURE

As discussed in Part II, the text, the courts' interpretation, and the practical application of § 1188(a)(1) exacerbate farmers' and ranchers' labor market power. This Part will first provide courts with recommendations for addressing H-2A labor monopsony disputes through every step of an antitrust analysis. Second, it will suggest ways to reform § 1188.

A. In Court: A Judge's Guide to Analyzing H-2A Labor Monopsony Disputes

The lack of Section 1 labor monopsony cases stems in part from the uncertainty caused by both complex economic concepts and the dearth of labor monopsony precedent.[181] As discussed in Part II.A, immigration law exacerbates farmers' and ranchers' labor market power. The recommendations below are not meant to be all-purpose recommendations. Instead, their objective is to provide judges with some interpretive suggestions through jurisprudential analysis.

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[181] *See* Marinescu & Posner, *supra* note 45, at 1377–79.

1. Defining market power in H-2A labor monopsony cases.

Courts have determined that "the first step in a court's [antitrust] analysis must be a definition of the relevant markets."[182] Adequately defining market power allows courts to determine whether an employer exerts dominance over a specific market and "provides the basis on which to balance competitive harms and benefits of the restraint at issue."[183] Similarly, in labor market monopsony cases, courts have highlighted the importance of properly defining market power and "showing defendants' percentage share of that market."[184] In H-2A labor monopsony cases, like the *Llacua* case, because there are many farmer-employers, it is not obvious that any one individual would have market power. However, since associations of farmers file applications to recruit H-2A workers and hire a significant number of workers, these associations should be considered as employers. Given that they concentrate farmers' hiring efforts, their market share is a sum of their member farmers' individual market shares. The effect of this combination gives associations, such as the WPA and the MPAS in *Llacua*, considerable market power. Courts and parties should thus be mindful of the actual role played by associations in the H-2A program when defining the market. By clearly outlining market power and associations' market share, courts can analyze whether these associations exert dominance over that specific market and whether such dominance could lead to anticompetitive effects.

2. Analyzing the market's susceptibility to anticompetitive conduct.

After having adequately defined the relevant market, "a court must analyze the structure of that market to determine whether it is 'susceptible to the exercise of market power through tacit coordination.'"[185] Courts have determined that "[s]usceptible markets tend to be highly concentrated—that is, oligopolistic—and to have fungible products subject to inelastic demand."[186] Essentially, courts have to determine whether a market has a few

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[182] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 268 (2d Cir. 1979).

[183] L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1392 (9th Cir. 1984).

[184] Todd v. Exxon Corp., 275 F.3d 191, 199 (2d Cir. 2001).

[185] *Id.* at 207–08 (quoting Todd v. Exxon Corp., 126 F. Supp. 2d 321, 326 (S.D.N.Y. 2000)).

[186] *Id.* at 208 (alteration in original) (quoting *Todd*, 126 F. Supp. 2d at 326).

firms that hold a large market share (which would give those firms market power) and whether goods are similar enough to be interchangeable, or fungible. When goods—or workers in labor monopsony cases—are interchangeable, it "facilitate[s] coordination of pricing in a concentrated industry because it is easier to determine and monitor a consensus on some competitive variable."[187]

Economists and legal scholars have determined that "a labor market is concentrated when a few firms dominate hiring in the market."[188] In the *Llacua* case, the WRA and the MPAS were responsible for hiring 91% of herders in the Colorado labor market for herders. That is a very concentrated market. Almost no herder will find work within this region without going through either the WRA or the MPAS. The fact that the market for shepherds is very concentrated in Colorado makes it more susceptible to anticompetitive conduct. If the associations decide to lower wages, workers will have no choice but to accept those wages since there are few other employers.

Further, courts rightly note that "[w]here market power is exercised by buyers, it is the elasticity of the sellers' *supply* that is at issue."[189] In turn, "'[l]abor supply elasticity' refers to the sensitivity with which workers react to changes in wages."[190] If, despite low wages, workers do not quit, then employers have considerable market power and the elasticity of labor supply is low.[191] For migrant workers, because of the structure of the H-2A visa, workers cannot switch jobs.[192] If a competitor decides to pay more, H-2A workers cannot respond by applying to this new job. If wages go down, or stagnate, they cannot change jobs. Dissatisfied H-2A workers can only quit and leave the country. So, in *Llacua*, the elasticity of labor market supply is probably very close to zero.

When a court finds that the labor market is structurally susceptible to anticompetitive conduct through tacit coordination—

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187 *Id.* at 209 (quoting Brian R. Henry, *Benchmarking and Antitrust*, 62 ANTITRUST L.J. 483, 496 (1994)).

188 José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, J. HUM. RES. at Abstract (2020), https://perma.cc/QDQ7-MF65; *see also id.* at 14 (making use of an inverse relationship between labor market concentration and the number of firms in the occupational market).

189 *Todd*, 275 F.3d at 211 (emphasis in original).

190 Naidu et al., *supra* note 24, at 557.

191 *See id. See generally* Raj Chetty, *Bounds on Elasticities with Optimization Frictions: A Synthesis of Micro and Macro Evidence on Labor Supply*, 80 ECONOMETRICA 969 (2012) (critiquing existing studies of labor supply and estimating very low labor supply elasticity).

192 *See supra* Part II.

because it is highly concentrated and the elasticity of labor supply is close to zero—it should examine the conduct of market actors very closely. Such a labor market provides fertile ground for anticompetitive conduct.

3. Scrutinizing the conduct of associations.

The analysis above has established that associations of employers that act as a single employer have considerable market power, which further concentrates the labor market and makes it more susceptible to anticompetitive behavior. Courts should consider the associations' behavior in the H-2A context as an agreement to restrain trade among employers.

Although agricultural associations that hire H-2A workers are allowed by Congress,[193] they are not exempt from antitrust laws. Instead, courts have held that "exemptions from the antitrust laws are to be narrowly construed";[194] exemptions should not be inferred but "furnished only when and as directed by the legislature."[195] As such, even if "the antitrust laws shall not be construed to prevent the existence and lawful operation of agricultural cooperatives"[196] when such existence is allowed by Congress, congressional authorization does not "completely exempt such cooperative associations from the Sherman Act."[197] The immigration statute does not explicitly exempt agricultural associations from antitrust law enforcement. Therefore, agricultural associations are allowed to hire H-2A workers but are not allowed to form agreements to restrain trade.

An agreement is formed when "two or more entities that previously pursued their own interests separately . . . combin[e] to act as one for their common benefit."[198] An association of distinct competitors (farmers and ranchers) is an ongoing "combination" or "agreement" that potentially violates Section 1 of the Sherman

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193 *See* 8 U.S.C. § 1188(d).

194 Grp. Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979).

195 Pac. Seafarers, Inc. v. Pac. Far E. Line, Inc., 404 F.2d 804, 819 (D.C. Cir. 1968); *see also* Abbott Lab'ys v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1, 12 (1976); Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975).

196 Mktg. Assistance Plan, Inc. v. Associated Milk Producers, Inc., 338 F. Supp. 1019, 1023 (S.D. Tex. 1972) (holding that milk cooperatives are not exempt from antitrust laws); *see also* Md. & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 463 (1960) (rejecting the contention that Congress exempted agricultural associations from the antitrust laws).

197 *Id.*

198 Gregory v. Fort Bridger Rendezvous Ass'n, 448 F.3d 1195, 1200 (10th Cir. 2006) (alterations in original) (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984)).

Act whenever it restrains trade on behalf of its members.[199] To be sure, "assistance in locating and hiring H-2A shepherds as permitted . . . does not amount to evidence of a conspiracy"[200] unless it amounts to an unreasonable restraint of trade.

Ranchers and farmers have given complete control to the associations to hire and set wages and employment conditions on their behalf. This is enough to satisfy the "combination" requirement.[201] The Supreme Court in *Anderson v. Shipowners Ass'n of the Pacific Coast*[202] found concerted conduct without any evidence that the shipowners had entered into any agreement apart from the conduct of their association. It was enough that they had entered into "a combination to control the employment, upon [their] vessels, of all seamen upon the Pacific Coast."[203] Similarly, it should be enough that farmers' and ranchers' associations control employment of herders within a specific region by leading hiring efforts. Associations of farmers and ranchers act "as a body" when they are allowed to make hiring and wage-setting decisions.[204] Coupled with their market dominance, these associations effectively restrain trade. In sum, hiring workers is not problematic—the association would be acting just like any other employer. However, because associations end up hiring almost all workers in certain regions and for certain occupations, they may have monopsonistic power that raises antitrust concerns.

4. Assessing the effects on competition and antitrust injury.

The last step in the analysis is to assess the effects of the anticompetitive conduct on competition. Plaintiffs must allege a harmful effect on themselves and "an adverse effect on the competition market-wide."[205] In H-2A wage-fixing disputes, there is an adverse effect on competition within the labor market that courts should consider in their analysis.

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199 *See id.*

200 *Llacua*, 930 F.3d at 1178.

201 *Cf. Gregory*, 448 F.3d at 1202 (noting that an association with the authority "to decide at what price to sell their products" would run afoul of the Sherman Act).

202 272 U.S. 359 (1926).

203 *Id.* at 361.

204 Nanavati v. Burdette Tomlin Mem'l Hosp., 857 F.2d 96, 117–18 (3d Cir. 1988) (showing that an association, in this case the Executive Committee of hospital staff, triggers Section 1 when it "acts as a body").

205 *Todd*, 275 F.3d at 213.

For instance, in *Llacua*, herders alleged that the associations of ranchers fixed wages at very low rates to create a labor shortage and recruit H-2A workers.[206] Presumably, if wages were competitive, domestic workers would take the herding jobs, and H-2A workers would be hired only when there is an actual labor shortage. The fact that associations are allowed to set wages creates a made-up labor shortage. In effect, it keeps domestic workers away from H-2A jobs—jobs that should be available to them at a competitive wage rate. The current framework is thus harmful, as it reduces competition for a given job.

Even if wages are high, it does not mean that they are competitive. Over the years, the DOL has raised the AEWR.[207] Under the AEWR, California crop harvesters, for example, earn more than the state's minimum wage. Still, rising wages do not preclude the possibility of an antitrust injury. As the Second Circuit rightly pointed out, "The fact that [the corporation] increased its salaries each year would not defeat an allegation that those increases were lower than they would have been but for a conspiracy to stabilize prices."[208] For H-2A workers, showing that there is a difference in wages between U.S. workers and H-2A workers—a large wage differential for workers in similar job categories—could be evidence enough of a conspiracy.

If the *Llacua* court had applied this particular framework of analysis, it most likely would have ruled in favor of Llacua and the other shepherds. The crux of the problem was the court's failure to understand the role that associations play in hiring decisions and the considerable market power created by that role. The rest of the analysis would have flown smoothly from fixing this problem. For instance, the market definition and market power analyses would have revolved around a fact-intensive debate about associations' market share. The court may or may not have determined that associations' conduct amounted to an agreement, which also would have been a fact-intensive debate. In any case, it is highly likely that it would have survived a motion to dismiss.

B. In Congress: A Legislator's Guide to Reforming § 1188

The guidance presented in Part III.A could help solve part of the problems associated with the legal framework and labor

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206 *See Llacua*, 930 F.3d at 1168.

207 *See, e.g.*, 84 Fed. Reg. 69,768, 69,769 (Dec. 19, 2019) (setting the AEWR for 2020).

208 *Todd*, 275 F.3d at 214.

market dynamics. However, § 1188 suffers from flaws that legislators can and should correct.

1. Changing the requirements of § 1188(a)(1)(A).

Section 1188(a)(1)(A) requires domestic workers to be "able, willing, and qualified," but it adds the constraint that they must be available "at the time and place needed."[209] Effectively, this statutory provision does not promote labor mobility, thus stifling competition.[210] For example, if there are other unemployed workers in a neighboring region or state, a grower or a rancher is nonetheless allowed to import H-2A workers under § 1188(a)(1)(A).

Legislators should consider analyzing the economic literature to guide the definition of "place." Perhaps a commuting zone[211] is an appropriate measure of "place" under § 1188(a)(1)(A).[212] If no domestic worker is available in that commuting zone, then growers and ranchers would be allowed to hire H-2A workers. However, the commuting zone definition could be unsatisfactory, particularly for seasonal work. Presumably, if herders are needed for the winter season, or harvesters for the harvesting period, then domestic workers, given the proper incentives, could relocate to Colorado or California for a few months to do the job. In that case, legislators might consider removing the "time and place" constraint.

Section 1188(a)(1)(A) requires a showing that no worker is "available at the time and place needed[ ] to perform the labor or services involved in the petition." Courts' interpretation of "available" has been problematic. For example, in *Hernandez Flecha*, the First Circuit held that if workers are not willing or able to come work under the conditions required by the employer, then they are "not available."[213] In this case, Puerto Rican workers were "able, willing, and qualified" to do the jobs but were not deemed "available" because Puerto Rican law required that their working conditions be slightly above those of foreign temporary

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209 8 U.S.C. § 1188(a)(1)(A).

210 *Cf.* José Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data*, 66 LAB. ECON. 101886, at 4 (2020) ("The economic literature shows that there are substantial frictions associated with transitioning between labor markets.").

211 Commuting zones are geographic units of analysis intended to more closely reflect the local economy where people live and work. *See Commuting Zones and Labor Market Areas*, U.S. DEP'T OF AGRIC. (last updated Mar. 26, 2019), https://perma.cc/H8UE-BQ4S.

212 *See id.* (using commuting zones to define markets).

213 *Hernandez Flecha*, 567 F.2d at 1157.

workers.[214] It is unclear whether *Hernandez Flecha* would have resulted in the same ruling if U.S. workers had bargained for better conditions. "Availability" should not be dependent on fulfilling the employer's working conditions or the DOL's minimum working provisions blindly—stripping domestic employees of any bargaining power. Maintaining a healthy bargaining power between domestic employers and domestic workers would allow courts to more precisely identify whether domestic workers are genuinely not "available" under the statute. This would strike a proper balance between the interests of growers and workers.[215]

2. Changing the requirements of § 1188(a)(1)(B).

Section 1188(a)(1)(B) presents other challenges that are more practical and tied to the fact that job postings are often misleading and that the methodology for calculating wages is erroneous. This Section discusses ways to improve job postings and wage determination methodology.

Misleading job postings as described in Part II.A.1 decrease labor demand, creating artificial labor shortages and a need for foreign workers. One obvious and practical solution is for government officials to establish strict guidelines for job postings. For example, any signs that a job posting is intended solely for migrant workers—such as "H-2A" in the title of the job posting—should be prohibited. The statute could include guidelines for appropriate job postings or delegate this determination to an administrative agency.

Additionally, the AEWR should be reformed. The law makes clear that a farmer must be unable to find workers willing to do the job in order to recruit and sponsor H-2A workers to work for her. It is understandable that the United States is giving priority to U.S. workers and protecting its labor market from outside competition. However, if there are no U.S. workers willing to do the job for the wage offered, there are two possibilities. Either the wage is too low and not competitive for domestic workers so that only foreign workers are willing to do those jobs—wages would presumably be higher than in their home country. This could happen if ranchers are setting or maintaining low wages to maximize their profits. Or there is a real shortage of U.S. workers. If there

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[214] *Id.* at 1155–56.

[215] The courts have recognized the importance of balancing the interests of employers and domestic workers on numerous occasions. *See, e.g.*, *Rogers*, 563 F.2d at 626.

is a shortage of U.S. workers, usually wages rise because farmers will attempt to attract labor by increasing wages.

As this Comment has shown in Parts I and II, there are systemic problems that make it difficult to know if there is a real shortage of domestic workers or if the labor market is monopsonistic. So far, the analysis points to monopsonistic patterns. One solution would be to set the AEWR to the nationwide wage level within a specific industry. U.S. workers would still have priority over migrant workers for the job, but if no "able, willing, and qualified" U.S. worker wants the job and a H-2A visa holder fills the post, then she would be entitled to the competitive nationwide wage. Setting the AEWR at the nationwide wage level would thus disincentivize employers from importing migrant labor just to reduce cost and would instead allow more domestic workers to compete for these jobs.

3. Changing the requirements of § 1188(d).

Under § 1188(d), an association of farmers or ranchers can act as an employer on behalf of its members. As this Comment has discussed in Part II.A.3, not only might such associations behave anticompetitively, but they also have labor market power. Although courts may interpret antitrust laws as prohibiting the anticompetitive conduct of agricultural associations, Congress should prohibit associations from hiring on behalf of employers to prevent any anticompetitive conduct stemming from agricultural associations.

It is worth noting that these associations serve an important purpose for farmers and ranchers. They have knowledge of immigration practices and can navigate immigration procedures on behalf of their members. In other words, they potentially reduce farmers' administrative and legal costs for hiring H-2A workers. But the associations do not need to have the power to hire H-2A workers on behalf of their members to achieve these important functions.

Alternatively, farmers can navigate the complicated visa procedures with legal counsel, as is often the case already. For instance, farmers could rely on the many local law firms that specialize in providing comprehensive services for H-2A employers instead of hiring workers through associations.[216] Additionally, government funded nonprofit organizations could help farmers

[216] *See, e.g., About H-2A*, MÁSLABOR, https://perma.cc/HL4G-KUB3.

with the H-2A petitioning process and H-2A workers in finding a suitable job. Another possibility is for H-2A petitioners and farmers to use the services of third-party visa processing companies, as is the norm for other immigrant and nonimmigrant visa applicants.

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This last Part has highlighted some of the potential solutions to address the problems of the H-2A program. These solutions include a tailored interpretation of immigration law to account for potential anticompetitive conduct, and avenues for legislative reforms to limit labor market power. Individually, these solutions can only marginally improve the current situation. Taken together, however, they might be able to provide a more competitive labor market for both employers and employees.

CONCLUSION

This Comment has shown that the H-2A program has exacerbated the lack of antitrust enforcement in labor monopsony cases, particularly in the agriculture sector. The H-2A program, the existence of associations of employers that dominate the labor market, and the barriers created by a system of contractual work constitute some of the legal causes preventing adequate antitrust enforcement.

Courts and Congress have the power to offset some of these effects. Careful interpretation of precedent shows that associations of employers that dominate a labor market and behave anticompetitively are violating the Sherman Act. In H-2A labor monopsony disputes, courts should rigorously define the labor market, determine whether it is structurally susceptible to anticompetitive behavior, carefully scrutinize hiring associations' conduct, and assess the existence of anticompetitive effects. The H-2A program, in turn, should be redefined to fit current labor market dynamics. The statutory requirements of § 1188 should be reformed: associations of ranchers and farmers with market power should not be able to make hiring decisions, and provisions preventing labor market flexibility should be removed.

Future research could propose a reform of the H-2A program and a rewriting of § 1188 with welfare-maximizing goals in mind. If successful, such reforms could contribute to a more competitive agricultural labor market—one that is sensitive to the demands of society as a whole and not the profit-maximizing interests of a few.