SCRAMBLED STANDARDS: RETHINKING NO-POACH AGREEMENTS IN RULE 23(B) CLASS ACTIONS

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I.
INTRODUCTION

No-poach agreements are contracts between or among employers who agree not to hire each other's employees. These agreements have recently received attention in the franchise context.[1] No-poach agreements between franchisors and franchisees contribute to wage suppression and restrict worker mobility, often affecting workers who already have low wages.[2] It is often difficult for employees to pursue legal action against companies that use no-poach provisions in their franchise agreements because employees may lack the resources or access to information to demonstrate harm and seek relief.[3] For this reason, class actions, which allow a large group of private litigants to pool their resources to pursue legal action, should be encouraged in this context.[4] Instead, courts hinder class actions by using substantive decisions on the antitrust legal standards to address the procedural hurdle of class certification.[5] Specifically, courts make it difficult for plaintiff classes to satisfy the predominance requirement for class certification under Federal Rule of Civil Procedure 23(b).[6]

In this Note, I argue that courts should (1) use a per se standard (i.e., hold the agreement to be unlawful without an inquiry into procompetitive justifications) when adjudicating franchise no-poach agreement cases, (2) if a per se standard is difficult to adopt, use the quick-look standard, or alternatively, (3) avoid determining which standard to use when evaluating an agreement until after the class certification phase has concluded. All of these approaches would allow plaintiff classes to more easily satisfy the predominance requirement in class certification than under the current approach of examining franchise no-poach agreements under the rule of reason.

In Part II, this Note delves into the role of antitrust law in labor markets, the relevant business aspects of franchises, and the mechanics of class actions in antitrust litigation. Part III then explains why franchise no-poach agreements are difficult to challenge via class actions by exploring the current conversations and cases concerning this issue. Part IV proposes three approaches courts can use in

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1. *See* Michael Lindsay & Katherine Santon, *No Poaching Allowed: Antitrust Issues in Labor Markets*, ANTITRUST, Summer 2012, at 73, 73–74.

2. *See infra* Section II.A.

3. *See infra* Section II.C.

4. *See infra* Sections II.C, III.B.

5. *See infra* Section III.A.

6. *See id.*; Steven B. Pet, Note, *Preserving Antitrust Class Actions: Rule 23(b)(3) Predominance and the Goals of Private Antitrust Enforcement*, 12 VA. L. & BUS. REV. 149, 153 (2017).

franchise no-poach cases when deciding whether a class of employees should be certified. Part IV also addresses substantive rebuttals to arguments that favor defendant franchise companies in such cases.

II.
ANTITRUST LAW IN LABOR MARKETS AND CLASS ACTIONS

A. Antitrust Law and Labor Issues

Labor monopsonies can harm workers in a labor market (which can be defined by geography, type of job, or other characteristics of the pool of workers) because employers are able to suppress wages and opportunities for employment mobility. A labor monopsony results from a lack of competition in the buyer market for labor (i.e., employers).[7] Concentration in the labor market (which occurs when there are only a few employers that hire a specific type of worker in a given area where workers live and commute), search frictions for workers, and differentiation in job amenities can reduce competition.[8] The existence of only a few employers in a market makes it difficult for employees to switch employers to earn higher wages, thus allowing incumbent employers to suppress wages.[9] Employers can overtly or tacitly collude more easily when there is high employer concentration.[10] This further limits workers' abilities to switch employers in pursuit of higher wages.[11] Workers face greater difficulties, known as search frictions, in finding alternative employment after termination of their current employment due to a lack of transparency in the labor market, which makes it difficult to find and compare jobs.[12] Job differentiation distinguishes the amenities and benefits offered in a specific job—including shift flexibility, childcare, vacation time, and cultural environment.[13] In addition to

7. Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 Cornell L. Rev. 1343, 1345–46 (2020).

8. *Id.* at 1349–50.

9. *Id.* at 1349 ("Concentration means that only one or a few employers hire a particular kind of worker in an area where workers reside and commute. When few employers exist, workers who are underpaid by their existing employer are limited in their ability to quit and work for an alternative employer for a higher wage. This allows the incumbent employer to suppress the wage." (footnote omitted)).

10. *Id.* For instance, "one firm acts as a 'wage leader' by periodically announcing wage increases that other firms match[,]" thus reducing competition across the firms to pay the highest possible wages. *Id.*

11. *Id.*

12. *Id.* at 1349–50; *see also* James Albrecht, *Search Theory: The 2010 Nobel Memorial Prize in Economic Sciences*, 113 Scandinavian J. Econ. 237, 237 (2011).

13. Marinescu & Posner, *supra* note 7, at 1350.

employer concentration and search frictions, job differentiation disincentivizes some employees from leaving a given position in which they prefer the job-specific benefits, similar to the way product differentiation may encourage consumers to opt for a more expensive product over an inexpensive substitute.[14] While economists used to consider labor markets to be highly competitive,[15] this view has been refuted because of employer concentration and other factors that affect these markets.

Many labor markets are rural or semi-rural, where only a few employers cover a sparse population that is spread out over a large area, causing employer concentration in these regions.[16] Agreements between employers further exacerbate the problem of employer concentration. "A no-poach agreement is made between two or more entities (including franchisees of the same company or competitors within an industry) not to compete for each other's employees, either during their active employment or for a period after termination of their employment."[17] These include, among other things, agreements not to recruit, solicit, or hire employees from participating employers. In more densely populated areas, where employer concentration is less of an issue, non-competes and no-poach agreements make it harder for workers to switch employers, thus reducing robust competition in the market for labor.[18]

Economically, labor monopsonies and product market monopolies pose similar threats—mispricing of resources, material or human, which results in the underemployment of those resources, and consequently, inequitable outcomes.[19] Labor markets are different from product markets because workers are less mobile than goods.[20] The lack of worker mobility often leads to more fragmentation in labor markets because workers are unlikely to move to different

14. *Id.* ("Workers sort themselves across employers according to the amenities that are offered, but as a result they may become vulnerable to wage suppression because they cannot credibly threaten to leave one job for another where the amenities are quite different."); *see* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 554 (2018) (comparing workplace amenities in labor markets to product differentiation in product markets).

15. Marinescu & Posner, *supra* note 7, at 1346.

16. *Id.*; *see* José Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, LAB. ECON., Oct. 2020, at 1, 5–9, https://doi.org/10.1016/j.labeco.2020.101886.

17. Jason Hartley & Fatima Brizuela, *The Complexities of Litigating a No-Poach Class Claim in the Franchise Context*, COMPETITION, Fall 2019, at 1, 1.

18. Marinescu & Posner, *supra* note 7, at 1346.

19. *Id.*

20. Suresh Naidu & Eric A. Posner, *Labor Monopsony and the Limits of the Law*, 57 J. HUM. RES. (SPECIAL ISSUE) S284, S298 (2022).

employers that are further away from where they live, even if those employers offer slightly better wages.[21] While there are similarities between labor and product markets, the Clayton Act (stating that labor is not a commodity or an article of commerce) demonstrated congressional intent that labor markets be distinguished,[22] and in practice, courts have treated labor differently from products and commodities in the antitrust context.[23] Despite the harmful effects of concentrated employer market power on workers, there has been less government enforcement to address labor market monopsonies compared to product market monopolies.[24] Increased antitrust litigation is necessary to ensure competition in labor markets.

Antitrust litigation may be brought under the Sherman Act, an antitrust statute that was passed to preserve competition.[25] Section 1 of the Sherman Act provides that restraints of trade are unlawful.[26] Plaintiffs may plead an unreasonable restraint of trade under Section 1 of the Sherman Act under one of three standards: per se, quick-look, or rule of reason.[27]

The per se standard applies to nakedly anticompetitive agreements (e.g., price-fixing and wage-fixing) and is the most plaintiff-friendly standard because the plaintiff only needs to show that the defendant took part in unlawful activities; the defendant cannot make arguments about procompetitive justifications for their unlawful actions.[28]

The rule of reason standard is the most defendant-friendly. After the plaintiff proves an anticompetitive agreement, the burden shifts to the defendant to present procompetitive justifications, and if these are accepted, the burden returns to the plaintiff to rebut these justifications by showing that the anticompetitive harms outweigh the justifications or that there is a less restrictive alternative

21. *See id.* at S298–99.

22. 15 U.S.C. § 17 ("The labor of a human being is not a commodity or article of commerce.").

23. *See, e.g.*, Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 30 F.4th 306, 314–15 (1st Cir. 2022) (distinguishing between antitrust labor disputes and antitrust disputes over the sale of products for the purposes of applying the labor exemption).

24. Naidu & Posner, *supra* note 20, at S297.

25. *See* 54 Am. Jur. 2d *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 1, Westlaw (database updated Oct. 2024).

26. 15 U.S.C. § 1.

27. *In re* Ry. Indus. Emp. No-Poach Antitrust Litig., 395 F. Supp. 3d 464, 478–81 (W.D. Pa. 2019) (citing Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., No. 17cv205, 2018 WL 3032552, at *8 (S.D. Cal. June 19, 2018)).

28. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

that the defendant could have taken.[29] The rule of reason applies when an agreement is ancillary to a business (i.e., "reasonably necessary" to achieving a pro-competitive purpose).[30] Plaintiffs rarely prevail in rule of reason cases. One study showed that 96.8% of rule of reason cases resulted in plaintiffs losing at the first step of the three-step framework.[31]

Lastly, the quick-look standard is an intermediate mode of analysis between the per se standard and the rule of reason, in which courts acknowledge that the defendants' agreement "so obviously threaten[s] to reduce output and raise prices that they might be . . . rejected after only a quick look."[32] But recognizing their limits on mastering an understanding of efficiencies in an entire industry, courts still consider procompetitive justifications.[33] This standard is considered an abbreviated form of the rule of reason, but it relieves the plaintiff of the initial burden of showing market power and anticompetitive effects of the challenged restraints.[34] It applies when conduct falls short of the kind that is labeled per se anticompetitive but that is also not subject to a complete rule of reason analysis.[35] The quick-look analysis is used when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[36] In practice, judges condemn agreements under the quick-look standard when the agreements involve price restraints that judges hesitate to condemn as per se illegal.[37] Further, "[a] firm that enjoys monopsony power over a labor market and uses that power to pay its workers below the competitive rate is not liable under the antitrust laws, as long as the firm did not take intentional

29. *See* Ohio v. Am. Express Co., 585 U.S. 529, 541–42 (2018) (describing the "three-step, burden-shifting framework" but omitting balancing in the third step); *id.* at 554 (Breyer, J., dissenting) (articulating the third step of the framework).

30. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 280–81 (6th Cir. 1898), *aff'd & modified*, 175 U.S. 211 (1899).

31. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827, 829 (2009).

32. NCAA v. Alston, 594 U.S. 69, 89 (2021).

33. Christopher R. Leslie, *Disapproval of Quick-Look Approval: Antitrust After* NCAA v. Alston, 100 Wash. U. L. Rev. 1, 11 (2022); *see also Alston*, 594 U.S. at 89 (listing reasons courts should be cautious in applying the quick-look standard).

34. Michael Iadevaia, *Poach-No-More: Antitrust Considerations of Intra-Franchise No-Poach Agreements*, 35 ABA J. Lab. & Emp. L. 151, 160–61 (2020).

35. Leslie, *supra* note 33, at 10–11.

36. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

37. Leslie, *supra* note 33, at 13.

actions to obtain that power[;]"[38] this protects employers that unilaterally exercise market power by suppressing wages.

It is important to highlight that the quick-look standard has received some criticism due to the lack of clarity regarding when it applies. The quick-look standard originated in *NCAA v. Board of Regents*, in which two universities challenged the NCAA's policy of limiting the number of televised football games for each member school, creating a horizontal restraint, "an agreement among competitors on the way in which they will compete with one another."[39] While this agreement had characteristics of per se illegality due to its horizontal nature, the Supreme Court declined to apply a per se rule because the NCAA needed to impose some horizontal restraints "if the product [of college football] is to be available at all."[40] The Court examined the horizontal restraint by considering the procompetitive justifications because the horizontal agreement to limit output (of televised games) could have been an intrinsic aspect of operating a sports league.[41] Here, one scholar has referred to the quick-look approach as "neither rule of reason nor per se, but rather a muddle."[42] Later, in *NCAA v. Alston*, the Court affirmed that limits on education-related benefits that schools could offer student athletes constituted a Sherman Act Section 1 violation but expanded the quick-look standard to be more defendant-friendly by holding that "a quick look is sufficient for *approval* or condemnation."[43] While the quick-look standard was meant to be plaintiff-friendly, the birth of quick-look approval in *Alston* created an "evil doppelganger of quick-look condemnation" by allowing courts to exonerate defendants' agreements more easily.[44] Quick-look approval, as it appears in *Alston*, diverges from the pre-*Alston* standard of quick-look condemnation that "recognized a presumption of anticompetitiveness" for defendants' agreements.[45]

38. Alan B. Krueger & Eric A. Posner, A Proposal for Protecting Low-Income Workers from Monopsony and Collusion 9 (2018), https://www.hamiltonproject.org/wp-content/uploads/2023/01/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp-1.pdf [https://perma.cc/EX9Q-SX5D].

39. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88, 99 (1984).

40. *Id.* at 101.

41. *See* Leslie, *supra* note 33, at 7–8. Ultimately, the Court found the procompetitive justifications to be insufficient and held that the agreement was unlawful. *See Bd. of Regents*, 468 U.S. at 120.

42. Leslie, *supra* note 33, at 9.

43. *See* NCAA v. Alston, 594 U.S. 69, 88, 107 (2021) (emphasis added).

44. Leslie, *supra* note 33, at 3.

45. *Id.* at 22–23.

Antitrust plaintiffs usually have more favorable outcomes when a per se, or at least quick-look, standard is used instead of the rule of reason to assess an agreement under Section 1 of the Sherman Act. However, the three legal standards for antitrust adjudication are not always clear-cut. There are no bright lines to distinguish conduct that falls in one category as opposed to another.[46] The Supreme Court has described the three standards as lying on a continuum, reflecting the lack of distinct categories for antitrust modes of analysis.[47]

To pursue a Sherman Act Section 1 claim, plaintiffs face the often-difficult task of showing (1) the existence of an agreement (i.e., a "contract, combination . . . [,] or conspiracy")[48] and (2) that the aforementioned agreement is between economically separate actors.[49] Employee classes need to show a "meeting of minds or a conscious commitment to a common scheme" in order to prevail in no-poach cases,[50] which is often difficult because communications between employers may be inaccessible when initially pursuing a case. Further, plaintiffs must show that the agreement or conspiracy is between separate entities without a "unity of interest," which can be complicated when the entities have shared interests but also compete with each other.[51] Hence, many potential labor-related antitrust cases may not get litigated because plaintiffs have trouble pleading the existence of an agreement between different entities at the start.[52]

A notable subject of potential antitrust litigation in labor markets comes from no-poach agreements. No-poach agreements are agreements between employers (horizontal agreements), whereas non-compete agreements are agreements between an employer and employee (vertical agreements) that limit the employee's ability to

46. *Id.* at 19.

47. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779–80 (1999).

48. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984) (quoting 15 U.S.C. § 1).

49. Am. Needle, Inc. v. NFL, 560 U.S. 183, 195 (2010) (citing *Copperweld*, 467 U.S. at 769).

50. *See In re* Ry. Indus. Emp. No-Poach Antitrust Litig., 395 F. Supp. 3d 464, 486 (W.D. Pa. 2019) (quoting *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010)); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (explaining that evidence must "tend[] to exclude the possibility that the [parties] were acting independently").

51. *See Copperweld*, 467 U.S. at 771 (articulating how the coordinated activities of a parent company and its subsidiaries should be viewed as a single enterprise that has a complete unity of interest).

52. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–57 (2007). While *Twombly* sets out pleading standards in the product market context, its general holding applies to labor market antitrust cases as well.

work for a different employer.[53] Traditional non-compete agreements have been considered lawful under antitrust law, but this has been challenged by the FTC's proposed ban on non-competes.[54] No-poach agreements are likely unlawful, whether entered into directly or through a third-party intermediary.[55] As a result, State Attorneys General have been filing lawsuits to curtail no-poach agreements.[56] Nonetheless, franchise no-poach agreements are difficult for private plaintiffs to challenge as a result of the complexity of the franchise business model.

B. Franchises as Separate Entities

Franchising is

> [a] contractual relationship between the franchisor and the franchisee in which the franchisor offers or is obliged to maintain a continuing interest in the business of the franchisee in such areas as know-how and training; wherein the franchisee operates under a common trade name, format or procedure owned by or controlled by the franchisor, and in which the franchisee has made or will make a substantial capital investment in his business from his own resources.[57]

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53. James H. Mutchnik, John H. Johnson IV & Charles Fields, *The Evolution of DOJ's Views on No-Poach Litigation*, Antitrust, Summer 2022, at 35, 36.

54. Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 Santa Clara L. Rev. 663, 678, 695–96 (2020); Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912). The rule was recently set aside by a district court, and the FTC appealed the decision to the Fifth Circuit. Ryan, LLC v. FTC, No. 3:24-CV-00986, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024); Notice of Appeal, *Ryan*, 2024 WL 3879954 (No. 3:24-CV-00986).

55. U.S. Dep't of Just., Antitrust Div. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals 3 (2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/B722-R3HL]; *see infra* Section III.C.

56. *See, e.g.*, Press Release, U.S. Dep't of Just., Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses (Mar. 30, 2021), https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses [https://perma.cc/5T6Y-44S2]; Angel A. Perez & Brian E. Spang, *Illinois Attorney General's Office on the Lookout for Unlawful No-Poach Agreements*, Epstein Becker Green: Trade Secrets & Emps. Mobility (June 23, 2021), https://www.tradesecretsandemployeemobility.com/2021/06/articles/non-compete-agreements/illinois-attorney-generals-office-on-the-lookout-for-unlawful-no-poach-agreements [https://perma.cc/FGM5-99WA] (noting that the Attorney General of Illinois filed suit).

57. *What Is Franchising? Learn the Basics of This Popular Business Method*, Franchise Direct, https://www.franchisedirect.com/ultimate-guide-to-franchising/what-is-franchising/ [https://perma.cc/H833-ZRL7].

Franchising entails "a relationship between franchisors and franchisees of mutual interdependence and reliance[,]" which involves sharing common goals.[58] However, the franchisee has to work independently to grow their own branch of the business and run the day-to-day operations.[59] The fast-food franchising segment is the most common type of franchising segment, constituting about 25% of total U.S. franchise establishments across all industries.[60] It has been claimed that, as of 2018, about 80% of fast-food franchisors used no-poach provisions in their standard franchise agreements.[61] From an antitrust lens, it is not always clear whether individual franchises that operate under the same brand are direct competitors, creating a gray area for courts dealing with franchise no-poach agreements.

While no-poach agreements are clearly illegal across competitor employers, the law is less clear on how franchises should be treated. There are a handful of factors that have been used to evaluate whether a franchise no-poach agreement violates antitrust laws. One factor is whether the no-poach provision is unilateral—only the franchisee has the obligation not to poach—or mutual—the franchisor and the franchisee agree not to poach.[62] Another consideration is whether the obligation is limited to employees of other franchised units (e.g., other restaurant locations) or if it extends to units owned by the franchisor.[63] Though most agreements apply to solicitation and hiring, if an agreement is limited to just one of those activities, there might be less likelihood of government scrutiny for antitrust violations.[64] Another factor that weighs in favor of reduced government

58. *See* William S. Wincent, *The Basics of Franchising: The Relationship*, Int'l Franchise Ass'n (Apr. 12, 2019), https://www.franchise.org/franchise-information/the-basics-of-franchising-the-relationship [https://perma.cc/WL5A-3RJ3].

59. *The Franchise Business Model 101 – Introduction and How Does It Work*, Franchise Bus. Rev. (Nov. 30, 2021), https://franchisebusinessreview.com/post/franchise-business-model/ [https://perma.cc/PB65-RSS9].

60. Renee Bailey, *Food Franchise Industry Report 2021*, Franchise Direct (Dec. 30, 2020), https://www.franchisedirect.com/information/food-franchise-report-2021 [https://perma.cc/D9XC-XVCT].

61. Anthony Noto, *New York AG Joins Coalition to Go After Fast-Food Franchisors*, N.Y. Bus. J. (July 9, 2018), https://www.bizjournals.com/newyork/news/2018/07/09/new-york-ag-joins-coalition-to-go-after-fast-food.html [https://perma.cc/CUX5-ZHD7] (citing Letter from Cynthia Mark, Fair Lab. Div. Chief, Mass. Off. of the Att'y Gen., et al. (July 9, 2018), https://www.mass.gov/doc/npnhletter [https://perma.cc/K665-CX8X]).

62. Josh M. Piper & Erik Ruda, *Employee "No-Poaching" Clauses in Franchise Agreements: An Assessment in Light of Recent Developments*, 38 Franchise L.J. 185, 186 (2018).

63. *Id.*

64. *See id.*

scrutiny is a limitation of the no-poach restriction to a specific type of employee, like managers with extensive training and possible access to trade secrets, instead of all employees.[65] Moreover, no-poach agreements generally apply for a specified number of months after termination of employment, so this time period can also be taken into consideration.[66] Finally, no-poach agreements may have a specified geographic scope or can apply to all locations.[67] These factors all play a role in plaintiffs' arguments against no-poach agreements.

C. Class Actions

Class action lawsuits utilize procedural devices that allow groups of plaintiffs to litigate claims of absent members and bind all class members with the exception of those who opt out.[68] Private antitrust litigation can be pursued through a class action or by corporate rivals.[69] In labor-related antitrust class actions, the plaintiffs tend to be a small class of employees, specific to a geographic area.[70] A court must certify a class under Federal Rule of Civil Procedure 23 for such a case to proceed; otherwise, the case continues as individual actions, which are generally not economically feasible for the plaintiffs. Per Rule 23(a), a proposed class must exhibit the following: (1) numerosity: the class must be so numerous that joinder is impractical; (2) commonality: there must be questions of law or fact common to the class; (3) typicality: the claims or defenses of the representatives must be typical of those of the class; and (4) adequacy: the representatives must fairly and adequately protect the interests of the class.[71]

Generally, numerosity is straightforward to satisfy if there are more than forty individuals in the class.[72] After *Wal-Mart Stores, Inc. v. Dukes*, courts have become more demanding with respect to the commonality requirement, requiring that a common question must be present *and* the question must be essential to the case's outcome.[73] Typicality and adequacy can be complex to satisfy depending on the

65. *See id.*
66. *Id.*
67. *See id.* at 187.
68. Karen L. Stevenson & James E. Fitzgerald, Federal Civil Procedure Before Trial: National Edition ¶ 10:250 (2024), Westlaw NATFCIVP.
69. Marinescu & Posner, *supra* note 7, at 1379.
70. *Id.* at 1380.
71. Fed. R. Civ. P. 23(a).
72. Stevenson & Fitzgerald, *supra* note 68, ¶ 10:261 (citing Ansari v. N.Y. Univ., 179 F.R.D. 112, 114 (S.D.N.Y. 1998)).
73. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

context. In no-poach antitrust actions however, typicality is satisfied when claims "are based on the same alleged facts and legal theory—that a no-hire agreement existed between the defendants and that the agreement injured the [employees] by suppressing their compensation and causing monetary damages."[74] Generally, adequacy is satisfied when "named plaintiffs' claims are not antagonistic to the class and . . . the attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class."[75] Typicality and adequacy can introduce complexity into class certification decisions in no-poach cases, but those inquiries are beyond the scope of this Note.

Next, the class must satisfy the requirements for one of the subsections in Rule 23(b). Antitrust cases are often brought under Rule 23(b)(3), which sets out two additional requirements: superiority and predominance.[76] The predominance inquiry assesses whether the proposed class is "sufficiently cohesive to warrant adjudication by representation."[77] The predominance standard in particular poses a challenge for plaintiffs seeking to certify class actions, as it demands a "rigorous analysis" that "will frequently entail 'overlap with the merits of the plaintiff's underlying claim.'"[78] Courts hesitate to certify classes without this rigorous analysis because courts do not want to risk erroneously certifying a class, which would put "unwarranted settlement pressure" on the defendant.[79] A defendant facing a class action is likely to agree to a large settlement to avoid incurring the costs of litigation and "potentially ruinous liability."[80] Hence, the requirements of Rule 23 can pose a notable hurdle to plaintiffs seeking to pursue a class action.

Class actions help courts and defendants avoid multiplicity of similar individual actions; allow individuals to assert small claims that would not have been otherwise litigated due to the magnitude

74. Seaman v. Duke Univ., No. 1:15-CV-00462, 2018 WL 671239, at *10 (M.D.N.C. Feb. 1, 2018).

75. Baby Neal for & by Kanter v. Casey, 43 F.3d 48, 55 (3d Cir. 1994).

76. Fed. R. Civ. P. 23(b)(3) (requiring that class actions be "superior to other available methods for fairly and efficiently adjudicating the controversy"); *id.* (requiring that "questions of law or fact common to class members predominate over any questions affecting only individual members").

77. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997).

78. Comcast Corp. v. Behrend, 569 U.S. 27, 33–34 (2013) (quoting *Dukes*, 564 U.S. at 350–51); *see* Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 187 (3d Cir. 2001).

79. Pet, *supra* note 6, at 168 (quoting *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008)).

80. *Id.*

of litigation costs; and serve a deterrence function.[81] Class actions are economical for plaintiffs and beneficial for defendants because defendants do not have to face separate lawsuits for similar claims, which could lead to inconsistent judgments.[82] Private citizens benefit from using class actions as a tool to pool their limited resources.[83] Without class actions, many individuals would not have the incentives to sue even when their claims are valid because their potential recoveries would be overshadowed by the cost of litigation.[84] When class certification is denied in labor-side antitrust cases, plaintiffs typically cannot afford to continue the case individually, because they likely lack the resources and incentives to sue employers, thus allowing labor monopsony power to go unchecked.[85] In practice,

> [s]o-called procedural decisions about class certification are decided in the shadow of the fact that everyone . . . knows that the decision frequently is not between class certification and individual litigation. The real decision is between class certification and no recovery at all, since most plaintiffs seeking small damages will never pursue their claims in any other form.[86]

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81. *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 349 (1983); Wallach v. Eaton Corp., 837 F.3d 356, 374 (3d Cir. 2016); Robert H. Lande, *Class Warfare: Why Antitrust Class Actions Are Essential for Compensation and Deterrence*, Antitrust, Spring 2016, at 81, 81, 83 (discussing the compensation and deterrence functions of antitrust class actions).

82. Stevenson & Fitzgerald, *supra* note 68, ¶¶ 10:250, :252; *see* Fed. R. Civ. P. 23(b)(1) (noting a risk of "inconsistent or varying adjudications with respect to individual class members" as one of the reasons to proceed a class action).

83. John J. Dvorske et al., Federal Procedure: Lawyer's Edition ¶ 54:247 (2024), Westlaw FEDPROC; *see* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 266 (1972).

84. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))).

85. *See* Krueger & Posner, *supra* note 38, at 9 ("Individual employees will almost never have the resources or incentives to sue employers for antitrust violations because of the vast cost of an antitrust suit along with the relatively small sums at stake. Private wage suppression suits therefore require a class action . . . .").

86. Spencer Weber Waller & Olivia Popal, *The Fall and Rise of the Antitrust Class Action*, 39 World Competition 29, 29 (2016).

Since class certification is so crucial, the losing party is allowed to immediately appeal a class certification decision, underscoring the importance of this step.[87]

In the antitrust context, class actions can accomplish the congressional goals behind Section 4 of the Clayton Act: deterrence of anticompetitive activity and compensation for those affected.[88] Further, the Clayton Act provides for treble damages, prejudgment interest, and cost of suit, including attorney fees,[89] underscoring legislative encouragement of private antitrust litigation; this further incentivizes plaintiff classes to pursue antitrust cases.

There have been some recent victories for private plaintiff classes in no-poach lawsuits, indicating courts' inclinations to view no-poach agreements critically. In July 2022, Papa John's paid out $5 million to settle class claims over its franchise no-poach agreements.[90] Likewise, Jiffy Lube agreed to pay out $2 million to settle claims over a franchise no-poach agreement that prevented franchisees from hiring workers who had been employed by another Jiffy Lube franchisee within the past six months.[91] Outside of the franchise context, a major class action against Duke University and the University of North Carolina regarding a no-poach agreement that applied to faculty resulted in a $19 million settlement.[92] An aerospace company reached a $7.4 million settlement in a class action filed by former workers alleging antitrust violations from no-poach

87. *See* Fed. R. Civ. P. 23(f).

88. Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15); Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977) (stating that Congress passed Section 4 to "deter[] violators and . . . compensate victims of antitrust violations for their injuries"); Lande, *supra* note 81, at 81.

89. 15 U.S.C. §§ 15–15a.

90. Bryan Koenig, *Papa John's to Pay $5M to End No-Poach Class Action*, Law360 (July 28, 2022, 4:25 PM), https://www.law360.com/articles/1515935/papa-john-s-to-pay-5m-to-end-no-poach-class-action [https://perma.cc/JG5L-FK34]; *see generally In re* Papa John's Emp. & Franchisee Emp. Antitrust Litig., No. 3:18-CV-00825, 2019 WL 5386484, at *12 (W.D. Ky. Oct. 21, 2019) (denying motion to strike class allegations).

91. Laura Pennington, *Jiffy Lube Inks $2M Settlement with Workers over No-Poach Rule*, Top Class Actions (July 27, 2022), https://topclassactions.com/lawsuit-settlements/employment-labor/jiffy-lube-class-action-lawsuit-alleges-illegal-no-poach-agreement [https://perma.cc/VU8E-NRH7].

92. Mike Leonard, *Duke's $19 Million Faculty No-Poach Settlement Gets Judge's Nod*, Bloomberg L. (Aug. 31, 2021, 10:53 AM), https://news.bloomberglaw.com/antitrust/dukes-19-million-faculty-no-poach-settlement-gets-judges-nod [https://perma.cc/W5FG-3GS2].

agreements.[93] These lawsuits and settlements show a trend of using class actions as tools to end the no-poach practice.

III.
FRANCHISE NO-POACH AGREEMENTS ARE DIFFICULT FOR EMPLOYEES TO CHALLENGE THROUGH CLASS ACTIONS

A. Class Certification Hurdles in Labor-Side Antitrust Cases

While the predominance requirement used to be easily satisfied in antitrust class actions, courts today are more demanding.[94] Predominance has become a barrier to class certification in antitrust cases because substantive issues are assessed at the certification stage in determining whether common questions predominate.[95] The predominance inquiry now involves diving into the merits of the case.[96] The added requirement of "common proof across the class to calculate damages" as a part of the predominance requirement is chilling private antitrust litigation by creating barriers that prevent class certification.[97] Shifting from per se liability to the rule of reason in antitrust cases, as the Supreme Court has been doing, poses a difficulty for antitrust plaintiffs in class actions (especially in franchise no-poach cases) and leaves open questions regarding how this shift affects the predominance requirement for class certification.[98] A broad background trend of courts shifting away from class certification only exacerbates this problem for plaintiff classes, especially in "a variety of contexts where formerly class certification had seemed

93. Katie Arcieri, *Aerospace Company Settles No-Poach Suit for $7.4 Million*, Bloomberg L. (Jan. 25, 2024, 1:56 PM), https://news.bloomberglaw.com/antitrust/aerospace-company-settles-no-poach-suit-for-7-4-million [https://perma.cc/3N3A-MWVZ].

94. Pet, *supra* note 6, at 153 ("Though courts, until recently, found the predominance requirement 'readily met' in antitrust class actions, this is not the case today. Courts now conduct a 'rigorous analysis' of the evidence and require plaintiffs to show common evidence of antitrust injury, an inquiry that often requires resolution of disputed merits issues.").

95. *Id.*

96. *Id.* at 158.

97. Christine P. Bartholomew, *Antitrust Class Actions in the Wake of Procedural Reform*, 97 Ind. L.J. 1315, 1327–28 (2022) (citing Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013)).

98. Pet, *supra* note 6, at 155 ("Changes in *substantive* antitrust law—particularly the Supreme Court's decades-long shift away from per se liability and toward the rule of reason—have also complicated the task of obtaining antitrust relief through class actions."); *see also* Marinescu & Posner, *supra* note 7, at 1379 (discussing how the DOJ's shift towards analyzing franchise no-poach agreements under the rule of reason makes private actions harder to pursue).

automatic."[99] It has been argued that the tightening of the predominance standard is unwarranted, and that class actions, when permitted, help accomplish the goals of compensation and deterrence.[100] Previously, the predominance requirement was generally "satisfied in antitrust cases when a conspiracy [was] alleged."[101] Unfortunately, in more recent years, "[p]laintiffs can no longer show predominance by merely representing—either through class counsel or an expert economist—that key questions of liability may, at some later point, be proven with common evidence at trial."[102]

Furthermore, the class certification stage often involves a full evidentiary hearing in which plaintiffs need to demonstrate how they will prove class-wide injury and damages.[103] Today, courts increasingly consider the merits at the class certification stage. The Third Circuit promoted resolving merits disputes at the class certification stage, stating that "overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met."[104] Similarly, the Seventh Circuit gave license to judges to enter into factual inquiries early on, stating that "[b]efore deciding whether to allow a case to proceed as a class action . . . a judge should make whatever factual and legal inquiries are necessary under Rule 23."[105] This ongoing trend towards resolving factual and legal merits-based inquiries early on can stifle class actions that have the potential to result in meaningful settlements and deter anticompetitive activity.

The characteristics of employee classes in labor-related antitrust actions also contribute to the difficulties of pursuing labor-side class actions. Employees face greater difficulties with class certification than consumers in product-side antitrust class actions because employees in a class may differ along a multitude of qualitative dimensions (e.g., whether the employee's contract was a result of arms-length negotiation and the employee's willingness to relocate

99. John C. Coffee, Jr. & Stefan Paulovic, *Class Certification: Developments Over the Last Five Years 2002–2007*, *in* Class Action Litigation 2008: Prosecution and Defense Strategies 195, 195–96 (Joel S. Feldman & Keith M. Fleischman eds., 2008).

100. Pet, *supra* note 6, at 153.

101. *Id.* at 156 (quoting Alicia Swiatlowski, Note, *The Predominance Requirement: Antitrust Class Actions and the "Commercially Unique" Product*, 27 Syracuse L. Rev. 1257, 1261 (1976)).

102. *Id.* at 157 (citing Waller & Popal, *supra* note 86, at 34).

103. *Id.*

104. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316 (3d Cir. 2008).

105. Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001).

to a distant competitor).[106] Meanwhile, a class consisting of purchasers of the same product can show similarity in their injury if they bought the same product and paid the same unreasonably higher price, and subtle differences (e.g., volume discounts) can be algorithmically addressed more easily.[107] Informational asymmetry also hinders labor-side antitrust plaintiffs; employers generally keep wage data confidential, so it is difficult for class action lawyers to access necessary wage information to pursue an antitrust claim.[108]

The individualized nature of some of the questions about employee classes, the lack of transparency in wages, and the substantive shifts toward defendant-friendly standards in antitrust cases result in difficulty with class certification, and therefore litigation, in labor-side antitrust cases.

B. Antitrust Labor Class Actions Should Be Encouraged as a Matter of Policy

There has been increasing national concern over ending no-poach agreements. While antitrust law covers labor market monopsony, "[c]ourts rarely adjudicate section 1 labor market cases."[109] State and federal authorities are working towards addressing the under-enforcement of antitrust laws in labor markets.[110] Collusion also seems easier to accomplish in labor markets than in product markets due to greater concentration in labor markets, so courts should be at least as plaintiff-friendly in labor antitrust class actions as they are in product markets class actions, if not more so.[111] No-poach agreements have become more common in the franchise context. For example, in an empirical study of forty-four contracts between the top fifty fast-food franchisors and their franchisees, thirty-six of the contracts contained job mobility restrictions.[112] Similarly, other studies show that over half of major franchise companies have some

106. Marinescu & Posner, *supra* note 7, at 1380 (quoting Weisfeld v. Sun Chem. Corp., 210 F.R.D. 136, 144 (D.N.J. 2002), *aff'd*, 84 F. App'x 257, 257 (3d Cir. 2004)).

107. *Id.*

108. *Id.* at 1381.

109. *Id.* at 1365 n.103 (A Westlaw search suggested that there were about six Section 1 labor market cases a year between 2016 and 2018, "[b]ased on a Westlaw search for 'section /3 1 /3 sherman +1 act & labor +1 market' (January 18, 2019), which yielded 6 hits for the last year and 17 hits for the last three years.").

110. *See infra* Section III.C.

111. Marinescu & Posner, *supra* note 7, at 1389; *see also* U.S. Dep't of Just. & Fed. Trade Comm'n, Merger Guidelines 5 (2023) (discussing market concentration as a motivation for hostility towards mergers).

112. Kati L. Griffith, *An Empirical Study of Fast-Food Franchising Contracts: Towards a New "Intermediary" Theory of Joint Employment*, 94 Wash. L. Rev. 171, 191–93 (2019).

form of a no-poach agreement.[113] A study has shown that industries with a high new-hire rate (a proxy for turnover) and lower wages are more likely to have no-poach agreements, and there is little association between the likelihood of no-poach agreements arising in an industry and the extent of specific training, intellectual property, or employee education level.[114] Fast-food restaurants have one of the highest employee turnover rates, about 130–150% per year.[115] Mobility restrictions in no-poach agreements could plausibly hinder employees who otherwise would want to change jobs, shown by the high industry turnover rate combined with the industry's trend of using no-poach agreements.

When multiple franchisees exist in a single labor market and those franchisees collectively constitute a dominant employer in that labor market, a no-poach agreement can suppress wages.[116] Seven fast-food companies (Arby's, Auntie Anne's, Buffalo Wild Wings, Carl's Jr., Cinnabon, McDonald's, and Jimmy John's) entered into binding agreements to drop no-poach provisions from future franchise agreements and to stop enforcing no-poach provisions in existing franchise agreements at all of their locations nationwide.[117] The phenomenon also expanded to cover other industries like hotels,

113. Krueger & Posner, *supra* note 38, at 8 (finding that, in 2016, 53.3% of major franchise companies had a no-poaching clause, up from 35.6% in 1996); Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 57 J. Hum. Res. (Special Issue) S324, S327 (2022) ("A total of 58 percent of the franchise agreements contained some restriction on franchisees' ability to recruit and hire employees away from another franchise or corporate unit in the same franchise chain. If weighted by the total number of units in the chain, the fraction with a no-poaching agreement is 55 percent.").

114. Krueger & Ashenfelter, *supra* note 113, at S335–38.

115. Eric Rosenbaum, *Panera is Losing Nearly 100% of Its Workers Every Year as Fast-Food Turnover Crisis Worsens*, CNBC (Aug. 29, 2019, 9:58 AM), https://www.cnbc.com/2019/08/29/fast-food-restaurants-in-america-are-losing-100percent-of-workers-every-year.html [https://perma.cc/MZ8M-98ZP].

116. Krueger & Posner, *supra* note 38, at 5.

117. Press Release, Washington State Office of the Attorney General, AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide (July 12, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers [https://perma.cc/68R3-E9KE]; Jiamie Chen, "*No-Poach" Agreements as Sherman Act § 1 Violations: How We Got Here and Where We're Going*, Competition, Fall 2018, at 82, 99; Sean Higgins, *Corporations Targeted for Directing Franchise Hiring*, Wash. Exam'r (July 24, 2018, 4:01 AM), https://www.washingtonexaminer.com/news/2634590/corporations-targeted-for-directing-franchise-hiring/ [https://perma.cc/BH96-TVKC].

convenience stores, and child care.[118] The Washington State Attorney General also sued Jersey Mike's in 2018 when it refused to sign an agreement with the Washington State AG to remove no-poach provisions from its franchise agreements; Jersey Mike's ultimately settled for $150,000 and ended its no-poach provisions.[119] On a similar note, President Biden's executive order on competition encourages the FTC to exercise its rulemaking authority to curb non-compete clauses (which will be discussed later) and similar agreements.[120] These efforts show that federal and state governments want to eliminate no-poach agreements and other conspiracies that lower wages.

Notwithstanding some successful efforts to eliminate no-poach agreements, government enforcement of antitrust laws still falls short of what is necessary to reach a healthy competitive landscape in labor markets, so class actions can and should close this gap.[121] Moreover, class actions are crucial in labor markets because the government dedicates fewer resources to antitrust enforcement in the labor sector than to antitrust enforcement in product market cases.[122] Private plaintiffs in labor-side antitrust cases face an added obstacle because "[a] large portion of private product-side litigation piggybacks on government investigations and litigation, which both uncover otherwise unknown antitrust violations and establish useful precedents"—a phenomenon that does not similarly help labor-side plaintiffs.[123]

The government faces difficulty in pursuing labor-related antitrust actions because it is constrained by limited resources and avoids high risk actions.[124] Private actions are needed, especially in antitrust cases, because government enforcement is limited by, among other things, "budgetary constraints; undue fear of losing cases; lack of awareness of industry conditions; overly suspicious views about complaints by 'losers' that they were in fact victims of anticompetitive behavior[,]" and political motivations that interfere with enforcement.[125] By awarding treble damages to prevailing plaintiffs in antitrust cases, Congress demonstrated intent to encourage private

118. *See* Wash. State Att'y Gen.'s Off., No-Poach Initiative 5 (2020), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/NoPoachReport_June2020.pdf [https://perma.cc/5QKW-NJX3].

119. *Id.* at 10.

120. Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,992 (July 9, 2021).

121. *See* Marinescu & Posner, *supra* note 7, at 1379 (describing government neglect in enforcing antitrust law in labor markets until recently).

122. *See id.*

123. *Id.*

124. Krueger & Posner, *supra* note 38, at 9–10.

125. Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty* Cases, 42 U.S.F. L. Rev. 879, 906 (2008) (footnotes omitted).

citizens to take on the role of private attorneys general in antitrust cases specifically (as opposed to other types of class actions).[126] The fear of false positives, or the risk of holding innocent defendants liable, has been a primary driver in antitrust doctrine, but scholars argue that the risk of false negatives, which in part comes from class certification being unfairly denied, has been underemphasized.[127] The increasing application of quick-look approval to antitrust class actions (as suggested in *Alston*'s dicta) could add to the problem of false negatives, resulting in pro-defendant decisions at the expense of consumers.[128] Therefore, as a matter of policy, labor-side antitrust class actions need to be encouraged and promoted as a tool to check labor market power.

C. Current Discussion Around Franchise No-Poach Agreements

Courts have been harsher on claims against no-poach agreements in the franchise context compared to no-poach agreements across distinct companies. Outside the franchise context, Judge Koh in the Northern District of California found the predominance requirement to be satisfied and thus certified classes in two major no-poach cases involving skilled employees in tech and animation.[129] Likewise, Judge Davila held that the question of whether an alleged no-poach agreement regarding senior-level employees is subject to a per se or quick-look analysis, or whether it was ancillary to a legitimate business purpose, cannot be determined on a motion to dismiss.[130] A court has even considered no-poach agreements in non-franchise contexts to be per se illegal, sometimes even warranting criminal indictments.[131]

Courts have been inconsistent with their treatment of no-poach agreements in the franchise context. Two recent challenges against McDonald's and Jimmy John's, *Deslandes v. McDonald's USA, LLC* and *Conrad v. Jimmy John's Franchise, LLC*, were denied class certification at the district court level because the predominance requirement was

126. Bartholomew, *supra* note 97, at 1369.

127. *See* Leslie, *supra* note 33, at 27 (discussing the neglect of false negatives in the antitrust context more broadly).

128. *See id.*

129. *See In re* High-Tech Emp. Antitrust Litig., 985 F. Supp. 2d 1167, 1172–73, 1177, 1187 (N.D. Cal. 2013); Nitsch v. DreamWorks Animation SKG Inc., 315 F.R.D. 270, 287, 317 (N.D. Cal. 2016).

130. United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1033, 1039–40 (N.D. Cal. 2013).

131. *See* United States v. Patel, No. 3:21-CR-00220, 2022 WL 17404509, at *19 (D. Conn. Dec. 2, 2022).

not satisfied when applying the rule of reason to the agreements.[132] On appeal, the Seventh Circuit reversed the denial of class certification in *Deslandes*, in part because "the district judge jettisoned the per se rule too early."[133] The Eleventh Circuit recently reversed the dismissal of a class action against Burger King in the Southern District of Florida, holding that the plaintiff class sufficiently pled concerted action.[134] Since Burger King and its franchisees "separately pursue their own economic interests when hiring employees," the agreement was between distinct economic entities.[135] This recent decision shows a large step towards plaintiff-friendly treatment in franchise no-poach cases, similar to the trend in other no-poach cases.

1. *Deslandes v. McDonald's USA, LLC*

In *Deslandes*, Leinani Deslandes, a former McDonald's department manager in Florida, filed a putative class action against McDonald's in the Northern District of Illinois regarding its franchise no-poach agreements.[136] Plaintiffs alleged that McDonald's required franchisees to enter into no-poach agreements. The relevant language from the franchise agreement stated:

> Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph [] shall not be violated

132. Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2021 WL 3187668, at *14–15 (N.D. Ill. July 28, 2021); Conrad v. Jimmy John's Franchise, LLC, No. 3:18-CV-00133, 2021 WL 3268339, at *8–9, *12 (S.D. Ill. July 30, 2021); A. Christopher Young et al., *Class Certification Denied in Two Fast-Food Franchise No-Poach Antitrust Lawsuits*, Bus. L. Today (Sept. 15, 2021), https://businesslawtoday.org/2021/09/class-certification-denied-in-two-fast-food-franchise-no-poach-antitrust-lawsuits/ [https://perma.cc/S95X-9F3L]; *cf.* Marinescu & Posner, *supra* note 7, at 1379 (discussing how the DOJ's shift towards analyzing franchise no-poaching agreements under the rule of reason makes private actions harder to pursue).

133. Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703 (7th Cir. 2023) (emphasis omitted), *cert. denied*, 144 S. Ct. 1057 (2024).

134. Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247, 1250 (11th Cir. 2022).

135. *Id.* at 1256.

136. Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2018 WL 3105955, at *3 (N.D. Ill. June 25, 2018), *vacated & remanded*, 81 F.4th 699 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

> if such person has left the employ of any of the foregoing parties for a period in excess of six [6] months.[137]

Deslandes started as an entry-level employee with a wage of $7.00 per hour and worked her way up to a managerial position that paid $12.00 per hour.[138] Deslandes was signed up to take a training course to make her eligible for a General Manager position, but her supervisors canceled the training upon learning that she was pregnant, leading Deslandes to look for positions at other McDonald's franchises.[139] Deslandes was offered a position at a competing franchise, with a wage of $13.75 per hour and an expected raise to $14.75 upon conclusion of a 90-day probationary period. However, Deslandes could not start this position unless she was "released" by her current franchise employer.[140] The plaintiff moved to certify a class of "[a]ll persons who were employed at a McDonald's-branded restaurant in the United States from June 28, 2013 to July 12, 2018."[141] In denying class certification, the Northern District of Illinois emphasized that the predominance requirement was not satisfied.[142] However, the Seventh Circuit left open the possibility of per se treatment, since the no-poach agreement was horizontal and may not have been ancillary.[143] Specifically, Judge Easterbrook indicated that the district court's assumption that the franchise agreements expand the output of burgers and fries wrongly "treats benefits to consumers (increased output) as justifying detriments to workers (monopsony pricing)" and implies that "antitrust law is unconcerned with competition in the markets for inputs . . . ."[144] The Supreme Court denied certiorari after McDonald's appealed.[145]

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137. Amended Class Action Complaint at 22, Deslandes v. McDonald's USA, LLC, 2022 WL 2316187 (N.D. Ill. June 28, 2022), *vacated & remanded*, 81 F.4th 699 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024) (No. 1:17-CV-04857), 2017 WL 4481055 (alteration in original).

138. Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2018 WL 3105955, at *3 (N.D. Ill. June 25, 2018), *vacated & remanded*, 81 F.4th 699 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

139. *Id.*

140. *Id.*

141. Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2021 WL 3187668, at *2 (N.D. Ill. July 28, 2021).

142. *Id.* at *14–15.

143. Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703–04 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

144. *Id.* at 703.

145. McDonald's USA, LLC v. Deslandes, 144 S. Ct. 1057 (2024) (denying certiorari).

2. *Conrad v. Jimmy John's Franchise, LLC*

Similar to *Deslandes*, a class of employees sued Jimmy John's as a result of its franchise agreement, which provided that franchisees would not "solicit or initiate recruitment of any person then employed, or who was employed within the preceding twelve (12) months, by [Jimmy John's], any of [Jimmy John's] affiliates, or another Jimmy John's Restaurant franchisee."[146] Plaintiff Conrad moved to certify a class of "[a]ll persons in the United States who were employed at a Jimmy John's-branded restaurant at any time between January 24, 2014 to July 12, 2018, whether owned and operated as a corporate store or a franchise store."[147] Like the court in *Deslandes*, the Southern District of Illinois denied class certification, reasoning that the predominance requirement had not been satisfied.[148]

3. *Robinson v. Jackson Hewitt, Inc.*

In *Robinson v. Jackson Hewitt, Inc.*, plaintiffs were former employees who sued Jackson Hewitt and Tax Services of America for allegedly engaging in a conspiracy not to compete for employees and potential employees, in part by agreeing not to solicit, recruit, or hire each other's employees without prior approval.[149] In the franchise agreement, the franchisees acknowledged that they were independent contractors and that they had no fiduciary relation with Jackson Hewitt.[150] Further, the franchisees held themselves out as "independently owned and operated" and were notified that they might face competition from other franchisees or outlets that Jackson Hewitt owned or controlled.[151] Hence, the franchise agreements point to horizontal agreements between economically separate entities as opposed to agreements within the same entity. The plaintiffs moved for class certification for "[a]ll persons who worked in a tax preparer position at any company-owned Jackson Hewitt location in the United States at any time between December 10, 2014 and the present[,]" arguing that predominance would be established

146. First Amended Class Action Complaint at 18, Conrad v. Jimmy John's Franchise, LLC, 2021 WL 3268339 (S.D. Ill. July 30, 2021) (No. 3:18-CV-00133), 2019 WL 1806508 (alterations in original).

147. Conrad v. Jimmy John's Franchise, LLC, No. 3:18-CV-00133, 2021 WL 3268339, at *2 (S.D. Ill. July 30, 2021).

148. *Id.* at *9, *12.

149. Robinson v. Jackson Hewitt, Inc., No. 2:19-CV-09066, 2019 WL 5617512, at *1 (D.N.J. Oct. 31, 2019); Robinson v. C&B Tax Inc., No. 4:21-MC-2-RJ, 2021 WL 5632086, at *1 (E.D.N.C. Nov. 19, 2021).

150. *Jackson Hewitt*, 2019 WL 5617512, at *1.

151. *Id.*

regardless of which antitrust standard of review was used.[152] The Department of Justice and a group of State Attorneys General filed amicus briefs, arguing that the franchise no-poach agreements at issue were horizontal market allocation agreements that should be deemed per se unlawful.[153] Jackson Hewitt agreed to settle the lawsuit for $10.8 million, an amount that "reflected how much an expert for the plaintiffs said the tax prep workers were owed in damages."[154] The court's treatment of the class in this franchise no-poach case could have implications for similar classes, especially given the plaintiff class's arguments regarding predominance.

4. *Arrington v. Burger King Worldwide, Inc.*

In *Arrington v. Burger King Worldwide, Inc.*, the Eleventh Circuit reversed the Southern District of Florida's decision and took a plaintiff-friendly approach at the motion to dismiss stage. Since over 99% of Burger King's restaurants worldwide are independently owned franchises,[155] this decision could serve as a quintessential model for courts to consider when evaluating other franchise no-poach agreements. The standard Burger King franchise agreement included a no-hire agreement, which applied to employees for six months after leaving a Burger King franchise.[156] The agreement stated:

> Neither BKC nor Franchisee will attempt, directly or indirectly, to entice or induce, or attempt to entice or induce any employee of the other or of another Franchisee of BKC to leave such employment, or employ such employee within six (6) months after his or her termination of employment with such employer, except with the prior written consent of such employer.[157]

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152. Memorandum in Support of Plaintiffs' Motion for Class Certification at 18, 28–29, *Jackson Hewitt*, No. 2:19-CV-09066 (D.N.J. filed Aug. 30, 2022), 2022 WL 22632190.

153. Brief for States of New Jersey et al. as Amici Curiae at 11, *Jackson Hewitt*, No. 2:19-CV-09066 (D.N.J. filed Oct. 20, 2023), ECF No. 274-1; Brief for the United States of America as Amicus Curiae at 7–8, *Jackson Hewitt*, No. 2:19-CV-09066 (D.N.J. filed Oct. 20, 2023), ECF No. 282.

154. Mike Scarcella, *Tax Preparer Jackson Hewitt Settles 'No Poach' Case for $10 Million*, Reuters (Apr. 8, 2024, 12:57 PM), https://www.reuters.com/legal/litigation/tax-preparer-jackson-hewitt-settles-no-poach-case-10-million-2024-04-08/ [https://perma.cc/9L7K-YQY6].

155. Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247, 1251 (11th Cir. 2022).

156. *Id.*

157. Class Action Complaint at 3, Arrington v. Burger King Worldwide, Inc., 448 F. Supp. 3d 1322 (S.D. Fla. 2020) (No. 1:18-CV-24128), *rev'd & remanded*, 47 F.4th 1247 (11th Cir. 2022) (No. 20-13561), 2018 WL 4897041.

Consequences for breaching this provision included paying legal costs incurred in enforcing the agreement and the possibility of Burger King terminating the franchisee's right to operate the franchise.[158] The Eleventh Circuit began its analysis by comparing the Burger King franchisees to the NFL teams in *American Needle, Inc. v. NFL* to show that the franchisees could partake in concerted action because the franchises were separate decisionmakers.[159] The court found that the franchise agreement showed that each franchise separately pursued their own economic interests when hiring employees because the agreement explicitly stated that the franchisee "may face competition from other franchisees."[160] The agreement also characterized franchisees as independent centers of decision-making with respect to hiring or employment since franchisees retain the sole right to hire employees and establish terms and conditions of employment without approval from the corporation.[161] Evidence of different recruitment approaches, bonus structures for managers, and employee benefits bolstered the idea that the franchisees were independent decisionmakers in relation to hiring.[162] In light of these differences across franchisees, the court concluded that the absence of a no-hire agreement could have led the franchisees to try to entice employees from other franchisees to join their own restaurants by offering better employment conditions, so the existence of the agreement seemed to deprive the labor market of actual or potential competition for employees in the fast-food industry.[163] The Eleventh Circuit reversed and remanded this case to the district court without explicitly determining the applicable legal standard (per se, quick-look, or rule of reason).

5. Government Enforcement Efforts

State Attorneys General have pushed for plaintiff-friendly treatment of franchise no-poach agreements. Several states advocated for the per se standard in the *Deslandes* appeal, arguing that the Northern District of Illinois should have characterized the franchise agreement as a horizontal hub-and-spoke conspiracy in which McDonald's acted as the hub and the franchisees acted as the spokes.[164] The Washington

158. *Arrington*, 47 F.4th at 1251–52.
159. *Id.* at 1254 (citing Am. Needle, Inc. v. NFL, 560 U.S. 183, 195–96 (2010)).
160. *Id.* at 1256.
161. *Id.*
162. *Id.*
163. *Id.*
164. Brief of Amici Curiae Illinois, et al. in Support of Plaintiffs-Appellants and Reversal at 13, 17–20, Deslandes v. McDonald's USA, LLC, 81 F.4th 699 (7th Cir.

State Attorney General successfully undertook an initiative to eliminate franchise no-poach agreements with all companies that have three or more locations in the state.[165] This initiative serves as a "natural experiment" that demonstrates how eliminating no-poach agreements in franchises could help workers.[166] A study on this no-poach enforcement campaign suggests that the campaign increased annual salaries in posted job ads by 6.6% and increased worker-reported earnings by about 4%, highlighting the efficacy of the campaign.[167]

The federal enforcement agencies have been less friendly towards plaintiffs in the past but are now shifting towards the Washington State Attorney General's position. Previously, the DOJ "filed notices in several class actions in which it argued that the franchise no-poaching agreements being challenged should be evaluated under the rule of reason rather than the per se rule."[168] The DOJ's statement of interest in three Washington State franchise no-poach cases argued that hub-and-spoke conspiracies in franchise agreements are subject to the rule of reason.[169] This was because there was no "rim" to the franchise agreement to render the agreement horizontal across franchisees.[170] Instead, the arrangement is a set of vertical agreements that is subject to the rule of reason.[171] In contrast, the Washington State Attorney General's amicus brief in the same trio of cases argued that when an agreement restricts hiring among franchisees and a corporate-owned store, which is a clear horizontal competitor of the franchisees, the agreement is horizontal and should be considered a per se restraint.[172] However,

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2023) (Nos. 22-2333 and 22-2334) [hereinafter States Brief], *cert. denied*, 144 S. Ct. 1057 (2024). *See generally* United States v. Apple, Inc., 791 F.3d 290, 314 (2d Cir. 2015) (providing background on hub-and-spoke conspiracies).

165. Press Release, Washington State Office of the Attorney General, AG Report: Ferguson's Initiative Ends No-Poach Practices Nationally at 237 Corporate Franchise Chains (June 16, 2020), https://www.atg.wa.gov/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate [https://perma.cc/K8EC-U5TV].

166. Michael L. Sturm, *Franchise Anti-Poaching Provisions: After Four Years, What Have We Learned?*, Franchise Law., Winter 2022, at 3, 7.

167. Brian Callaci et al., *The Effect of Franchise No-Poaching Restrictions on Worker Earnings* 2, 27 (IZA Inst. of Lab. Econ., Discussion Paper No. 16330, 2023).

168. Marinescu & Posner, *supra* note 7, at 1379.

169. Corrected Statement of Interest of the United States of America at 13–16, Stigar v. Dough Dough, Inc., No. 2:18-CV-00244 (E.D. Wash. filed Mar. 8, 2019), ECF No. 34.

170. *Id.* at 15–16.

171. *Id.* at 12, 16.

172. Amicus Curiae Brief by the Attorney General of Washington at 6–7, *Stigar*, No. 2:18-CV-00244 (E.D. Wash. filed Mar. 11, 2019).

the FTC and DOJ jointly filed an amicus brief in the aforementioned *Deslandes* appeal to the Seventh Circuit arguing for per se treatment of franchise no-poach agreements unless defendants establish that the agreements are ancillary to a procompetitive purpose.[173] This argument aligns with the position taken by several State Attorneys General who filed an amicus brief arguing for per se treatment in *Deslandes* on appeal.[174] Lawmakers are also paying attention to the detrimental effects of franchise no-poach agreements. In 2023, the End Employer Collusion Act was reintroduced, which would give the FTC the power to enforce a ban on franchise no-poach agreements and other restrictive employment agreements between employers.[175]

6. Final FTC Rule on Non-Compete Clauses

The FTC's final rule to ban non-compete agreements demonstrates the growing view that worker mobility should be encouraged (albeit outside the franchise context).[176] The FTC "estimates that approximately one in five American workers"—about 30 million workers—are bound by a non-compete clause.[177] By banning non-compete clauses, the FTC predicts that competition in labor markets will be restored, leading to better job mobility and higher pay and benefits, amounting to a collective wage increase of nearly $300 billion per year.[178] Banning non-competes could also improve worker equity, potentially closing wage gaps between white men and other demographic groups by 1.5–3.8%.[179] Notably, the final rule classifies the use of non-compete clauses as an unfair method of competition.[180] The final rule also discusses a final consent order alleging that a

173. Brief for the United States of America and the FTC as Amici Curiae in Support of Neither Party at 14, 18, Deslandes v. McDonald's USA, LLC, 81 F.4th 699 (7th Cir. 2023) (Nos. 22-2333 and 22-2334) [hereinafter U.S. Amicus Brief], *cert. denied*, 144 S. Ct. 1057 (2024).

174. States Brief, *supra* note 164, at 11.

175. *See* End Employer Collusion Act, H.R. 4932, 118th Cong. (2023); End Employer Collusion Act, S. 2535, 118th Cong. (2023).

176. *See generally* Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912). The rule was recently set aside by a district court, and the FTC appealed the decision to the Fifth Circuit. Ryan, LLC v. FTC, No. 3:24-CV-00986, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024); Notice of Appeal, *Ryan*, 2024 WL 3879954 (No. 3:24-CV-00986).

177. Non-Compete Clause Rule, 89 Fed. Reg. at 38343.

178. *Id.* at 38467.

179. *See* Matthew S. Johnson et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31929, 2023).

180. Non-Compete Clause Rule, 89 Fed. Reg. at 38342.

firm's use of non-competes limited worker mobility and took advantage of unequal bargaining power.[181] Nonetheless, the rule explicitly states that the non-compete ban would not apply to franchisees, as "§ 910.1(f) . . . clarified . . . that 'non-competes between franchisors and franchisees remain subject to [F]ederal antitrust law as well as all other applicable law.'"[182] Hence, while this rulemaking effort could result in significant strides for worker mobility, it would not address the problem of franchise no-poaches.

7. Scholars' Approaches

Scholars have also advocated for a quick-look standard for franchise no-poach agreements.[183] Even if an agreement between a franchisor and a franchisee is considered vertical, it could still warrant a quick-look approach if the anticompetitive effects are obvious.[184] The no-poach provisions within franchises are not ancillary because they are not necessary to make the franchise effective, so it is improper to characterize them as restraints that fall under the rule of reason.[185]

Another approach proposed by scholars is that franchise no-poach agreements could be evaluated in line with the treatment in contract law of covenants-not-to-compete, which are typically unenforceable when they are not tailored toward specific employees and "almost always unenforceable when imposed on low-skill workers."[186] If the FTC's rule banning non-competes is upheld, this approach may be strengthened. In the franchise context, which often tends to involve fast-food restaurant businesses, this would mean that courts could allow no-poach agreements when they only involve managerial employees who have access to proprietary information or received comprehensive training at the franchise level.[187] In contrast, courts should evaluate franchise no-poach agreements under the per se rule when they are broad.[188]

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181. *See id.* at 38344.
182. *Id.* at 38369.
183. *See, e.g.*, Iadevaia, *supra* note 34, at 178.
184. *See* Butler v. Jimmy John's Franchise, LLC, 331 F. Supp. 3d 786, 793 (S.D. Ill. 2018) (citing Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999)).
185. *See* Hartley & Brizuela, *supra* note 17, at 8.
186. Marinescu & Posner, *supra* note 7, at 1388, 1388 n.219.
187. *Id.* at 1388.
188. *Id.*

IV.
PROCEDURAL CHANGES TO MAINTAIN PLAINTIFF CLASSES IN FRANCHISE NO-POACH CASES

A. Per Se Standard for Franchise and Other No-Poach Agreements

Courts should apply the per se illegality standard when evaluating no-poach agreements in the franchise context to eliminate the procedural inconsistency between class certification standards in franchise cases and other no-poach cases. Rule of reason treatment for an antitrust case inevitably creates procedural hurdles to class certification.[189] The added difficulty of bringing a labor antitrust case, as opposed to a product antitrust case, compounds the hurdle of pursuing class actions against franchise no-poach agreements under the rule of reason framework.[190] In the two major franchise no-poach class actions discussed, *Deslandes* and *Conrad*, the application of the rule of reason to the agreements made it harder to satisfy the predominance requirement because the courts needed to conduct individualized inquiries.[191] In *Conrad*, where the decision to apply the rule of reason was determined at the class certification stage, the court noted that the rule of reason "raise[d] more individualized issues precluding class certification" given the increasingly complex structure of business enterprise.[192] However, these issues, while relevant to the defendant's antitrust liability, showed little about whether individualized inquiry would similarly be required for members of the plaintiff class. The district court in *Deslandes* denied nationwide class certification in part because the plaintiffs did not show that corporate-owned stores compete with franchisees in every part of the United States. Thus, in locations where there was no competition between franchisees and corporate-owned restaurants, the agreement

189. *See* Pet, *supra* note 6, at 155 ("Changes in *substantive* antitrust law—particularly the Supreme Court's decades-long shift away from per se liability and toward the rule of reason—have also complicated the task of obtaining antitrust relief through class actions." (emphasis in original)).

190. *See* Marinescu & Posner, *supra* note 7, at 1380 (explaining that labor antitrust cases may be harder to bring because lawyers gravitate towards products-related class actions, and employee classes are more difficult to certify).

191. Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2021 WL 3187668, at *4 (N.D. Ill. July 28, 2021); Conrad v. Jimmy John's Franchise, LLC, No. 3:18-CV-00133, 2021 WL 3268339, at *10 (S.D. Ill. July 30, 2021).

192. *Conrad*, 2021 WL 3268339, at *10 (citing Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 773 (1984)) (explaining how the complexity of business structures makes antitrust law difficult to apply).

was not horizontal, creating the need for individualized inquiries based on location.[193]

On appeal, the Seventh Circuit held that Deslandes would not prevail under the rule of reason or quick-look approaches because the plaintiffs did not allege that McDonald's and its franchises have market power, rejecting the argument that the market power was obvious because workers at McDonald's could be treated as a single economic market.[194] However, the Seventh Circuit held that per se treatment may apply to the franchise no-poach agreements at issue because the agreements were horizontal and may not have been ancillary to a procompetitive purpose. This was because the lower court opinion (1) neglected antitrust's role in the input or labor market and (2) prevented workers from reaping the benefits of skills training that could be realized if they had opportunities to seek similar employment.[195]

While the Seventh Circuit's decision leaves open the possibility for franchise no-poach class actions to prevail on a per se standard of illegality, the unavailability of the rule of reason and quick-look approaches could have a chilling effect on these cases. If a quick-look approach is allowed based on allegations that the franchisor and franchisees have market power, courts adjudicating cases like *Deslandes* could also have plaintiffs certify a more limited class that only includes employees in locations with multiple restaurants where the franchise no-poach agreement is clearly horizontal. This way, the rule of reason inquiry will not cut into class certification so easily. If the court narrowed the plaintiff class to only the employees in locations with multiple competing McDonald's locations, this argument could have been circumvented, and the district court could have justified a quick-look approach more easily. This would be similar to narrowing the class from all employees to a technical class of employees in *In re High-Tech Employee Antitrust Litigation*,[196] or narrowing the class to just healthcare workers in *In re Geisinger Health &*

193. *Deslandes*, 2021 WL 3187668, at *10.

194. Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 702–03 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

195. *Id.* at 703–04 ("What we mean is this: People who choose to work at McDonald's or one of its franchises acquire business-specific (or location-specific) skills. Employees may choose to work for less . . . to compensate the employer for the training. In a competitive market, workers recover these investments as their wages rise over time, in response to their greater productivity. But if McDonald's specifies a limited number of classifications of workers . . . that may delay promotion and frustrate workers' ability to recoup their investments in training.").

196. Hartley & Brizuela, *supra* note 17, at 12–13; *In re* High-Tech Emp. Antitrust Litig., 985 F. Supp. 2d 1167, 1174, 1177 (N.D. Cal. 2013).

Evangelical Community Hospital Healthcare Workers Antitrust Litigation to satisfy the Rule 23 requirements.[197] Using a plaintiff-friendly legal standard would circumvent the extraneous individualized inquiries that cut against class certification in the predominance analysis.

Various parties have also supported the plaintiffs in the *Deslandes* appeal to the Seventh Circuit, arguing in favor of a per se rule against franchise no-poach agreements. The Open Markets Institute advocated for a per se standard for franchise no-poach agreements even if the agreements were considered vertical.[198] While vertical non-price restraints in manufacturer-distributor contexts are subject to the rule of reason, the Supreme Court in *Continental T.V., Inc. v. GTE Sylvania Inc.* set aside the possibility that some vertical restraints can be per se illegal when "based upon demonstrable economic effect."[199] The Open Markets Institute argued that franchise no-poach agreements, even if considered to be vertical restraints, constituted "airtight . . . customer allocation[,]" thus warranting per se treatment under *GTE Sylvania*.[200] The DOJ took a different approach in arguing for per se illegality. In its amicus brief for neither party, the DOJ argued that the franchise no-poach agreements across McDonald's franchises should be per se illegal "unless defendants establish ancillarity" because such employee allocations "inherently 'eliminat[e] . . . competition' by limiting employers' ability to compete."[201] Essentially, regardless of whether the no-poach agreements are horizontal or vertical, there is reason to hold these agreements per se illegal.

Normatively, it should be just as easy or difficult to certify a class for franchise no-poach cases as compared to other no-poach cases. The nature of the classes and the alleged injuries are the same in both types of cases, but for a distinction of legal form between an agreement across different corporate entities and one across franchisees of a single entity (with some, but not overpowering economic

197. *In re* Geisinger Health & Evangelical Cmty. Hosp. Healthcare Workers Antitrust Litig., No. 4:21-CV-00196, 2022 WL 1911375, at *4 (M.D. Pa. June 3, 2022).

198. Brief of Amici Curiae Open Markets Institute et al. in Support of Plaintiffs-Appellants at iv, *Deslandes*, 81 F.4th 699 (Nos. 22-2333 and 22-2334) [hereinafter Open Markets Amicus].

199. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977).

200. Open Markets Amicus, *supra* note 198, at xiv (quoting Robert Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev. 1, 22 (1978)).

201. U.S. Amicus Brief, *supra* note 173, at 19–20 (alteration in original) (first citing *In re* Outpatient Med. Ctr. Emp. Antitrust Litig., 630 F. Supp. 3d 968, 986–87 (N.D. Ill. 2022), and then citing Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995)).

substance).[202] Recently, the Eleventh Circuit articulated the independent nature of the franchisees' relationships with Burger King, highlighting provisions of the Burger King Franchise Disclosure Document implying that "Burger King and its franchisees compete against each other and have separate and different economic interests."[203] The independence derived from separate economic interests also extends to hiring decisions, so Burger King's franchisees were considered economically separate actors, just like the competing firms in *In re High-Tech Employee Antitrust Litigation* and *Nitsch v. DreamWorks Animation SKG Inc.*[204] Based on the conflicting views articulated by courts, the DOJ, and State Attorneys General, the question of what standard to apply remains in dispute and requires deeper factual inquiry that should not be done at the class certification stage.[205] Hence, the same substantive standard should be used to certify a class for franchise no-poach agreements and other no-poach agreements as a matter of procedural equity since the classes are experiencing the same injury. This would also remedy the lack of class certification for franchise no-poach agreements.

While there are some procompetitive arguments raised by franchise defendants in no-poach cases that have been used to justify a rule of reason standard (which has then been used to deny class certification), these arguments do not apply to the franchise context. First, the procompetitive effects asserted by franchisors fall in the *product* market and should not be considered valid justifications for restraints in the *labor* market.[206] The uniqueness of labor markets and the economics of ancillarity justified the rule of reason in *Aya Healthcare Services v. AMN Healthcare, Inc.*, where non-solicitation agreements were used to prevent a subcontracting staffing company

202. *Cf.* Am. Needle, Inc. v. NFL, 560 U.S. 183, 195 (2010) ("[S]ubstance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1." (second alteration in original) (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 773 n.21 (1984))).

203. Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247, 1256 (11th Cir. 2022).

204. *See In re* High-Tech Emp. Antitrust Litig., 985 F. Supp. 2d 1167, 1172, 1187–88 (N.D. Cal. 2013); Nitsch v. DreamWorks Animation SKG Inc., 315 F.R.D. 270, 274–75 (N.D. Cal. 2016).

205. *See* 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 3:12 (21st ed. 2024), Westlaw MCLAUGHLIN ("It is axiomatic that at the class certification stage a court may not resolve substantial, disputed factual issues concerning the merits unless those issues also are relevant to a Rule 23 determination.").

206. Iadevaia, *supra* note 34, at 179; Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703 (7th Cir. 2023) ("[I]t is equivalent to saying that antitrust law is unconcerned with competition in the markets for inputs, and *Alston* establishes otherwise."), *cert. denied*, 144 S. Ct. 1057 (2024).

from poaching travel nurses after they were identified and staffed on a project.[207] However, the labor market differs in the context of franchises.[208] While one can argue that operating through franchises should not change the way courts treat a single corporation for antitrust purposes, the economic reality is that unions cannot organize as easily against a corporation that runs through franchises.[209]

A second procompetitive argument is that no-poach restrictions address the free-rider problem created by the franchise model: franchisees are incentived to cut corners to boost their profits, which hurts the overall brand but benefits the individual franchisees.[210] This is especially a concern in the context of training, as individual franchisees would be less invested in training their employees if other franchisees could free-ride on the investment by hiring away their trained employees.[211] However, the procompetitive goal of protecting each restaurant's investment in its employees' training,[212] which was set forth in *Deslandes*, can be refuted because "most individuals in the low-skill employment market do not have the luxury of being unemployed by choice for six months," meaning the no-hire provision limited McDonald's stores and franchises from competing for workers.[213] Defendants in no-poach cases have focused this procompetitive justification on the loss of investments in training *management-level* employees,[214] but this does not justify using no-poach agreements that restrict other employees.[215] Bonuses could be offered as an incentive to keep strong employees with a particular franchise; this is a less restrictive alternative to no-poach agreements.[216] As a matter of policy and fair-

207. Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F.4th 1102, 1106, 1111 (9th Cir. 2021) ("This case involves the non-solicitation provision within [a] contract. We conclude that this provision is both ancillary to the parties' broader agreement to collaborate, and a reasonable, pro-competitive restraint.").

208. *Cf.* Mutchnik, Johnson IV & Fields, *supra* note 53, at 38–39 (citing *Aya Healthcare*, 9 F.4th 1102) (explaining the procompetitive justifications for restrictions in a non-franchise context).

209. *See* Marinescu & Posner, *supra* note 7, at 1386–87.

210. *Cf.* Catherine E. Schaefer, *Disagreeing over Agreements: A Cross-Sectional Analysis of No-Poaching Agreements in the Franchise Sector*, 87 Fordham L. Rev. 2285, 2307 (2019).

211. *See* Mary Strimel et al., *No-Poach Agreements Land Franchisors in Hot Water*, Bloomberg L. (Apr. 10, 2018, 6:43 PM) https://news.bloomberglaw.com/daily-labor-report/no-poach-agreements-land-franchisors-in-hot-water [https://perma.cc/95Q6-RET4].

212. *See* Iadevaia, *supra* note 34, at 174.

213. Marinescu & Posner, *supra* note 7, at 1387 (quoting Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2018 WL 3105955, at *1 (N.D. Ill. June 25, 2018)).

214. Schaefer, *supra* note 210, at 2307.

215. Iadevaia, *supra* note 34, at 174.

216. Krueger & Posner, *supra* note 38, at 13.

ness, courts should view no-poach agreements in franchises with more skepticism, especially since they tend to target low-wage employees, as opposed to managerial employees; this should uncover a clearer path to certification for employee classes and address the lack of enforcement in labor-side antitrust issues.

In sum, applying per se illegality to no-poach agreements in franchises would lead to consistency across no-poach cases and would accurately capture the economic realities of these restrictions. Courts should consider franchisee inputs and labor when applying antitrust law rather than focusing solely on product markets.[217]

B. Quick-Look Standard

While a per se standard would be ideal for addressing franchise no-poach agreements, a quick-look approach would be an appropriate alternative if courts hesitate to adopt a per se rule.[218] The quick-look approach, which has been described as "the per se rule with a pause button," may help courts arrive at similar results as the per se approach in practice.[219] Unlike the rule of reason, conduct under the quick-look standard will be viewed as inherently suspect, but defendants may still rebut this presumption by showing procompetitive justifications for their conduct.[220] This is more plaintiff-friendly than rule of reason cases, the vast majority of which get dismissed at the first step.[221] The Open Markets Institute advocated for a presumption of illegality, as delineated in *California Dental Ass'n v. FTC*, in its amicus brief for the plaintiffs in *Deslandes*, and argued that McDonald's should not be allowed to rebut this presumption by showing procompetitive effects in downstream product markets, "but only in the same labor market in which the restraints operate."[222]

On the other hand, the DOJ's amicus brief in *Deslandes* demonstrated a strong preference for the per se approach because of a key factual difference between franchise no-poach agreements and the restraints discussed in *NCAA v. Board of Regents*, a major quick-look case: no-poach agreements are not essential for labor markets to function, whereas the agreements in *Board of Regents* were necessary for making the product of televised college sports available.[223] The district

217. *See* Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

218. *See, e.g.*, NCAA v. Alston, 594 U.S. 69, 89 (2021).

219. Leslie, *supra* note 33, at 13.

220. *Id.* at 11–12.

221. *See* Carrier, *supra* note 31, at 828–29.

222. Open Markets Amicus, *supra* note 198, at xvii.

223. U.S. Amicus Brief, *supra* note 173, at 32–33.

court's rationale for applying the rule of reason over the abbreviated quick-look standard in *Deslandes* rested on a lack of experience with franchise no-poach agreements.[224] However, the DOJ argued that this reasoning was erroneous because judicial experience is only relevant when applying "a *new* per se rule," not an *existing* one.[225] While a quick-look approach is certainly preferable over a rule of reason approach, its power to help plaintiffs has diminished since *Alston*.[226]

C. Courts Should Refrain from Determining the Legal Standard for Franchise No-Poach Agreements During the Class Certification Inquiry

Alternatively, I argue that courts should determine the legal standard to apply to an agreement (per se, quick look, or rule of reason) only after a class has been certified; that is, courts should make the determination of class certification (a procedural question) before digging into the substantive arguments set forth by the defendant. This approach would help plaintiff classes because courts would be more likely to certify classes if they are not muddling the predominance inquiry with the procompetitive justifications from a rule of reason analysis, as they do now. The predominance requirement is particularly difficult to satisfy for no-poach cases involving franchises because courts have been prematurely determining that franchise no-poach agreements are subject to a rule of reason analysis, as opposed to a per se or quick-look standard.[227] However, the inquiries that go into determining the applicable standard for a franchise no-poach case may "require careful economic analysis" and can be complex.[228] The court in *In re High-Tech Employee Antitrust Litigation* refrained from deciding the legal standard at the motion to dismiss stage, deeming this decision to be more appropriate for the summary judgment phase.[229] In Judge Koh's later decision to certify the class,

224. Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2021 WL 3187668, at *7 (N.D. Ill. July 28, 2021) (citing NCAA v. Alston, 594 U.S. 69, 89 (2021)).

225. U.S. Amicus Brief, *supra* note 173, at 33 (quoting Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 349 n.19 (1982)).

226. Leslie, *supra* note 33, at 19 ("Before *Alston*, a consensus prevailed that the quick-look approach existed exclusively to condemn restraints, not exonerate them. The *Alston* opinion, however, distorts the quick-look apparatus." (footnotes omitted)).

227. *See supra* Section IV.A.

228. *See* Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 705 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

229. *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012).

she did not determine whether the per se or rule of reason standard would be used to assess the no-poach agreement between tech companies; instead, she certified the class based on a common antitrust violation, impact, and damages faced by the class.[230] It has been argued that courts' tendencies to weigh and resolve disputed merits issues at the class certification stage is "a task usually (and perhaps more appropriately) reserved for the jury."[231] Applying this idea to cases like *Deslandes* and *Conrad*, the legal standard should be determined during the summary judgment stage and not during the class certification stage, especially given that no-poach agreements in franchise contexts do not fall cleanly into one legal standard.

Although this approach goes against the trend among courts of evaluating the merits at class certification, it would be a viable way to make the class certification decision more procedural than substantive, consistent with the goals of Rule 23. While a predominance analysis involves some overlap with the merits of a plaintiff's claim, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."[232] In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, a major securities class action involving a heavy predominance inquiry, the inquiry into the merits was necessary "to ensure that the questions of law or fact common to the class will 'predominate over any questions affecting only individual members.'"[233] This type of merits-based inquiry differs from the standard of review inquiry in the antitrust context in terms of its relevance to predominance and common questions. In cases like *Amgen*, where the merits question related to the commonality of class members, the merits inquiries are inseparable from the procedural question of predominance. In cases like *Deslandes*, on the other hand, the merits inquiries relate to the defendant's conduct, not to the plaintiff class members, so the court does not need to decide the applicable legal standard before assessing predominance. Similarly, in *In re Initial Public Offerings Securities Litigation*, the Second Circuit conducted a merits-based inquiry into knowledge that a security price was affected by the alleged market manipulation.[234] Here, the court had a strong reason to inquire into the merits of the claim, since the individualized nature of the knowledge questions directly related to the inquiry of whether common questions predominated. The court

230. *See In re* High-Tech Emp. Antitrust Litig., 985 F. Supp. 2d 1167, 1226–27 (N.D. Cal. 2013).

231. Pet, *supra* note 6, at 161.

232. Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 465–66 (2013).

233. *Id.* at 467 (emphasis omitted) (citing FED. R. CIV. P. 23(b)(3)).

234. *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 43 (2d Cir. 2006).

found that lack of knowledge was too individualized of an inquiry and therefore did not satisfy predominance.[235]

The procompetitive justifications that arise in a rule of reason analysis should not be used to justify a deep merits inquiry at the class certification stage.[236] The text of Rule 23 does not authorize an inquiry into the merits of a case, so the procompetitive justifications must be pertinent to the class certification of a case in order to be relevant at this phase.[237] Although courts have shifted towards allowing merits inquiries during class certification, with the Supreme Court indicating that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'"[238] *Eisen v. Carlisle & Jacquelin*'s principle of avoiding unnecessary merits inquiries should be applied in franchise no-poach cases because determining the relevant antitrust standard is a merits inquiry that focuses on the defendants' conduct, not the commonality of the plaintiff class. The rigorous analysis that a court conducts in a class certification decision should preclude merits inquiries that are not necessary to determine a Rule 23 requirement, and in the spirit of the rule itself, which does not mention merits inquiries, courts should address merits issues only as necessary during class certification.[239] The district court in *Deslandes*, however, made the substantive decision to use the rule of reason at the class certification stage.[240] Rule 23 is supposed to focus on the plaintiff class, so the court should avoid conducting in-depth substantive inquiries when determining the procedural aspects of a case.

While the standard to satisfy Rule 23 is greater than a "mere pleading standard[,]"[241] the policy of the rule "is to favor maintenance of class actions."[242] Ideally, this should involve delaying

235. *Id.* at 43–44.

236. Chen, *supra* note 117, at 87–88 (citing Weisfeld v. Sun Chem. Corp., 84 F. App'x 257, 260 (3d Cir. 2004) (unpublished table decision)).

237. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

238. Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) (quoting Mercantile Nat'l Bank at Dall. v. Langdeau, 371 U.S. 555, 558 (1963)).

239. *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316–17 (3d Cir. 2008).

240. Deslandes v. McDonald's USA, LLC, No. 1:17-CV-04857, 2021 WL 3187668, at *11 (N.D. Ill. July 28, 2021).

241. Conrad v. Jimmy John's Franchise, LLC, No. 3:18-CV-00133, 2021 WL 3268339, at *3 (S.D. Ill. July 30, 2021) (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011)).

242. *Id.* (quoting King v. Kan. City S. Indus., 519 F.2d 20, 25–26 (7th Cir. 1975)).

substantive inquiries about the applicable antitrust standard until after class certification has been determined because the policy of the rule leans toward a plaintiff-friendly application. Rule 23(b)(3) only sets out a requirement that the *questions* common to the class predominate; it does not require a showing that the answers to those questions will favor the class on the merits.[243] However, courts and defendants argue that in reality, the Rule 23(b)(3) predominance analysis "begins, of course, with the elements of the underlying cause of action."[244] While further merits-based inquiries are necessary to determine whether a class should be certified in some contexts, in *Weisfeld v. Sun Chemical Corp.*, the Third Circuit explicitly determined that the issue of whether the defendants' no-poach agreement was a per se violation or should be analyzed under the rule of reason was "irrelevant to whether the requirements of Rule 23(b)(3) [we] re met for class certification purposes."[245] Nonetheless, courts should adhere to the text and underlying policy behind Rule 23, balance the individualized questions with the common questions, consider the deterrence and compensation rationales for antitrust class actions, and determine whether the predominance requirement is satisfied accordingly, as opposed to prematurely using merits inquiries to find individualized issues and deny certification in franchise no-poach cases.[246]

V.
CONCLUSION

In summation, franchise no-poach agreements harm workers by depressing their wages and cementing labor market power, so they should be made easier to address via class action litigation. To accomplish this goal, courts should either presume that a per se or quick-look standard applies to these restraints or delay determining the legal standard for these restraints until after the class certification stage to avoid entangling substantive factual inquiries with the procedural question of predominance. Doing so would prevent a scrambling of procedural class certification standards and substantive antitrust standards, helping employees seek a fair opportunity to protect their interests as participants in the labor market.

243. Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 459 (2013).

244. Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011).

245. Weisfeld v. Sun Chem. Corp., 84 F. App'x 257, 260 (3d Cir. 2004) (unpublished table decision).

246. *See* Pet, *supra* note 6, at 171–72.