THE BROOKINGS INSTITUTION

FALK AUDITORIUM

A CONVERSATION WITH FTC CHAIR LINA KHAN AND DOJ ASSISTANT ATTORNEY GENERAL JONATHAN KANTER ON ANTITRUST ENFORCEMENT

Washington, D.C.

Thursday, October 5, 2023

PANEL:

LINA M. KHAN
Chair
Federal Trade Commission

JONATHAN KANTER
Assistant Attorney General, Antitrust Division
U.S. Department of Justice

MODERATOR:

BILL BAER
Visiting Fellow, Governance Studies
The Brookings Institution

* * * * *

BAER: Good morning, everybody, and welcome to Brookings. Welcome to those in person and those online and on C-SPAN. Before I introduce our distinguished guests, I thought I'd give you a little sense of how we propose to run the program today. We are going to do 60 minutes of discussion among the three of us. Then we'll open up for 30 minutes of questions from the floor, as well as questions submitted online. We do ask if you're going to ask a question, identify yourself, and identify any appropriate affiliation. Let's get on with the program. So, The Brookings Institution and the Governance Studies program, of which I am part — I'm Bill Baer, by the way, a visiting fellow here at Brookings and the Governance Studies program. We're honored to welcome back to Brookings, Chair Lina Khan of the FTC, Assistant Attorney General Jonathan Kanter from the Justice Department. Let me quickly introduce both. They need no introduction but I'm going to give them a short one here.

Lina Khan. Most recent job prior to the FTC was on the faculty of Columbia Law School. Before that, she was counsel of the House Antitrust Subcommittee. She, before that, was an attorney advisor to then Commissioner Chopra, who's now chair of the Consumer Financial Protection Board. She's a prolific contributor to the antitrust debate, including a widely read piece while she was a student at Yale, a law journal on tech platform dominance. She was nominated by President Biden to be a commissioner on the FTC. She was confirmed by the Senate in June of 2021. I think she set a record in terms of time as a commissioner before becoming chair, because a nanosecond after her confirmation, the president announced he was going to designate her as FTC chair.

Jonathan Kanter. He's been a partner in two different national law firms. Most recently, though, set up an antitrust boutique here in D.C. Like Chair Khan, he's been an advocate, a vocal advocate, for vigorous antitrust enforcement. Also like Lina, he's tough and determined, as demonstrated early in his legal career by surviving two years working for me. So let's get to the questions. Although, I should note that Assistant Attorney General Kanter was confirmed by the Senate in November of 2021. So he's coming up on two years, Lina's got almost two and a half years in position.

First of all, welcome. Thank you for coming. The first question really is at about 10,000 feet. Both of you, before assuming your roles in government, have been critical of underenforcement of the antitrust laws and judicial interpretation of the Sherman, the Clayton, and the FTC Act. I think the bottom-line position you both have articulated is that past antitrust enforcement maybe over the last 30 to 40 years has left a lot of consumer injuries unaddressed or under-addressed. And that means

harm to consumers, to workers that antitrust enforcement should be reaching and had not been doing. I think it's fair to say and you would embrace the notion that the president appointed you because you saw the need to be a game changer. So the first question is, is that an accurate characterization of the role, specifically as you approached the job upon Senate confirmation? What goals did you have in mind? And can you offer a little bit of a self-assessment of progress thus far? Lina, why don't we start with you as the more senior member of the Antitrust administration.

KHAN: Well, first of all, let me just say it's so great to be here. Thanks so much for Brookings for hosting, and this is just an honor to share the stage with Bill. As you all know, Bill is an antitrust legend, and I've just been so grateful for his friendship and counsel over the years. So, look, there's no question that, as the president noted in his 2021 executive order on competition, there's been a serious reassessment of antitrust and the need for a reinvigorated competition policy. I think there is a decent understanding that over recent decades we've seen waves of M&A, waves of consolidation across markets so that many markets across the U.S. are now dominated by a small number of companies, and that that lack of competition is harming the American people. It's resulting in higher prices. It's resulted in lower wages. It's led innovation to decline. It's made it more difficult for entrepreneurs and startups to really get a foothold in the market. And that this overall means that our economy is worse off. But also, as the president noted, it also means our democracy is worse off. And I think there's been a government-wide effort, a whole of government effort to reinvigorate competition policy. And it's been an honor to be part of that effort at the FTC.

At the FTC we have a whole set of law enforcement tools, but we also have policy tools. And we've really been seeking to fire on all cylinders to make sure that we're faithfully enforcing the laws that Congress passed. So we enforce the Sherman Act and the Clayton Act, but also critically, the FTC Act. And one of the things that we've been doing at the FTC is really going back to the statutes, including Section 5 of the FTC Act, and understanding what was Congress's goal when Congress wrote unfair methods of competition, how have courts interpreted that, and how can we make sure that across our enforcement, we are being entirely faithful to the text of the statutes and to the legal precedent that's on the books. So that's really what we've been engaged in. It's been so fantastic to be in close partnership with our colleagues at the Antitrust Division. And, you know, we always want to be moving with even greater urgency and greater speed, but we're really thrilled with the progress

we've already made. In the last month alone, we filed two major monopolization lawsuits. This past summer in conjunction with the DOJ, proposed draft merger guidelines.

BAER: That's where I'm going next but go ahead.

KHAN: Have a whole set of rulemakings underway, both on the consumer protection side as well as the competition side, including our rule that we proposed earlier this year that would eliminate non-compete clauses in contracts. So, we're really thrilled with the progress we've already made. The FTC is quite small, all things considered. We have around 1200 people, only half of which are really devoted to antitrust. We're smaller today than we were in the 1970s. And so we're small but mighty, and really looking to fire on all cylinders to to meet the moment because we recognize the urgency of the problems that we're looking to address.

BAER: Thanks. Jonathan.

KANTER: Sure, allow me to also echo the sentiments that Lina shared. When I started at the FTC as a bright-eyed summer intern summer of 1996 and, and eventually as a first-year lawyer in 1998, I looked up and saw two giants. I saw Bill Baer and then chair Bob Pitofsky, Bill as director of the Bureau of Competition. And I thought to myself, that if I'm fortunate, I will grow up to be like Bill and Bob and--.

BAER: But with more hair than Bill.

KANTER: Well, not, not much. Yeah. And so, you know, being here and being in this moment with you and with Chair Khan is unbelievably humbling for me and very meaningful and moving. So I do think that, you know, Lina encapsulated a lot of what it is we're trying to do, which is we're trying to go back to first principles. What is the goal? What are the goals of the antitrust laws? Well, Congress made a value judgment, and I think it was a wise value judgment, that competition matters. Why? Because a democratic society depends on opportunity, access to opportunity, the ability to start a business and realize the American dream, the ability to be upwardly mobile as a worker, as an entrepreneur, the ability to benefit from innovations, lower prices. All of these are core fundamental values to our society. And the antitrust laws are the cornerstone of protecting those values. And we have a very serious responsibility, which is to do that, and we take that very seriously. And we have to look at the world around us and not think about antitrust as this overly technocratic exercise, but instead think about antitrust as law enforcement. Congress wrote a law; courts have interpreted it. Our job is to enforce that law.

And so, first and foremost, when I had the great fortune and privilege of a lifetime to take the reins of the Antitrust Division, I started with the principle of, this is an exercise in law enforcement. And so we, we start with the facts, and we follow the law, and we see where it leads. And I've also, you know started with the appreciation, but have come to really appreciate that key to success is not what I do. The key to success is harnessing the talent of the Antitrust division. And that's something, you know Bill well as someone who sat in my chair as assistant attorney general. But the talent is overflowing. The dedication, the wisdom, the institutional knowledge, the fortitude, the commitment to the mission is unending. And so part of my job as I see it, and perhaps the most key ingredient to success, is making sure we can unleash that. Is-- I look back and think about President Biden's executive order, the support we received from Attorney General Garland in his dedication to reinvigorating antitrust enforcement.

We have a lot to do, but I'm really proud of where we've come. I see, you know, for example, we've challenged the first ever, and succeeded, in a monopsony case in Penguin Random House, Simon & Schuster, the first ever successful challenge to an airline transaction at trial. For the first time in over 45 years, we not only brought monopolization cases as criminal, but we brought two of them, including one conviction, one that's pending trial. We've had the first ever systematic enforcement of Section 8 of the Clayton Act, which involves interlocking directorates, which has forced nearly 20 directors to resign from boards with many more investigations ongoing. We've made it very clear that we are going to, "Follow the puck where it's going," to quote Wayne Gretzky, and enforce the law in light of how markets actually work. And as a result, we've seen a decline in problematic mergers that are coming to us in the first place. And that is a win-win. It means that we don't have to use unnecessary taxpayer resources to block transactions, because those transactions, to quote one of my predecessors who might be on stage here, "Some transactions should never leave the boardroom." Also, we've, we've seen many abandonments — over ten, not over a dozen — since we've started, and these are transactions that in the face of a challenge or the threat of a challenge, have abandoned.

So when I look back, you know, it's been a-- the first two years has been a long decade and-- but we're, we're we're excited. We have an amazing team. I am blessed to have — and I see a bunch of them out here today — an extraordinary team, both in the front office at the Antitrust Division at the

department more broadly, but most importantly, the Antitrust Division employees who are, with no offense to my friends at the FTC, second to none.

BAER: They can be tied.

KANTER: They can be tied.

BAER: But, Lina, let me just follow up on a point John Kanter made. I think the public perception, certainly the antitrust bar and the business community perception, is that the two agencies have dramatically increased the number of matters, particular in the M&A context they're investigating and the numbers they're challenging. Jonathan just suggested that's maybe not quite right. That, in fact, the percentage of problematic transactions is probably about the same or a little less than it had been previously. Is that your experience as well?

KHAN: So, I think overall it's true. When I first joined, the number of second requests that we were issuing went up. But, you know, as a law enforcer, a key goal is deterrence. And more and more, we're hearing from senior deal makers. I believe there was a head of M&A from a prominent investment banker on CNBC the other day who said that, previously, considerations around antitrust used to come in the middle of a deal or even at the end of a deal. And now he's seeing that antitrust considerations and assessment of antitrust risk is happening at the very start and that there are deals that are not being proposed because it's determined that from an antitrust perspective, there are serious legal concerns. And that those deals are, in fact, not getting out of the boardroom. And from a law enforcement perspective, that deterrence is absolutely a mark of our success. We're looking to continue building on that. But I think the more we can achieve deterrence, the more we can make sure that our resources are being deployed more effectively and not having to kind of go after the flagrant law violations that we're seeing and and really be able to shift attention to areas where we think there needs to be more efforts, including, for example, on the conduct side. And so overall, we think that's a really important advancement.

BAER: That's great. I like the way both of you frame up what you're doing as law enforcement as opposed to many people misuse the term antitrust regulation. There's not a lot of regulation and there's a lot of enforcement. But let me continue on the merger thing. For those who are not antitrust nerds like me, you may be aware that there are draft revised merger guidelines that have been out for public comment. Public comment period closed a few weeks ago. Merger guidelines have been around in various forums since the late sixties. They've been updated and revised. The most recent

revision is 2010. It's sort of attempts to provide the business community and really agency staff, I think, with a sense of what the framework of analysis should be. And just somewhat to people's surprise, the courts over the years have embraced these as a helpful and informative statement of what the analytical framework ought to be for looking at proposed M&A transactions. Earlier this summer, you issued new revised-- proposed guidelines, and I want to ask you some specific questions about what's in there. But you changed the format in a very significant way from the way they had been since 1982, when my old law professor, Bill Baxter, issued the first revision. But so, John, can you talk about what went into that thinking and why the framework has changed, and what significance we should draw from that?

KANTER: Sure, so let's start with 1982. I was nine years old with a full head of hair. So a lot has changed in 1982. For those of you who can remember back that far, think about what your lives were like in 1982, what cars looked like, what phones look like. They had rotors, documents were stored in file cabinets, not in clouds, and the world was very different. And so the idea that we're bringing a new format and new framework to how we think about mergers in 2023 versus 1982 should seem-- the reason for that should be self-evident. The world has changed, and that world has changed in many ways. World has changed in terms of how competition presents itself. And so that's how we started this project.

We said, well, if the goal of antitrust enforcement is to protect competition, then the first question shouldn't be overly technocratic, like is this horizontal or vertical? Terms that have lots of meaning to antitrust lawyers, but absolutely, in my 25 years of practice, I don't think I ever saw an executive refer to a market as horizontal or vertical. We have platform businesses, we have data, we have privacy issues. People pay with their privacy and their data just as much as they pay with their wallets now. How people pay, how people communicate has changed. The state of the art in terms of how we understand markets has changed. A lot of economics has shifted from theoretical abstract to applied research. We have data science, we have cognitive science, and behavioral economics. The world's changed. And so by starting with the question, how does competition present itself? And then saying, does this merger threaten to harm that competition by lessening it or tend to create a monopoly? We can be faithful to the statute.

And so we've laid out a number of ways that we see competition presenting itself, all of which are obvious to people in the business community. Is it a platform market while you look at it one way?

Is it a straight, you know, horizontal merger among retailers on the same corner? You look at it one way. Is it a merger that's likely to affect a traditional supply chain with a manufacturer, a distributor, a retailer? You look at it one way, but there are lots of different ways in which competition presents itself. And by organizing the guidelines around the realities of the market, it makes certain, we hope, that we don't miss those market realities as we enforce the law.

BAER: Thanks. Lina, in this proposed iteration, for the first time, the guidelines cite case law. What's the rationale behind deciding to refer to antitrust jurisprudence?

KHAN: So a core pillar of what we're looking to do is fidelity to the law. And so a key part of this exercise for both of our agencies at the front end was to say, "Let's go back and look at what the law says," both the text of the Clayton Act, but also the legal precedent that's still on the books, that's still routinely cited by the courts. And as we went through that exercise, we both identified instances in which, you know, there had been a bit of a gap between what some of the guidelines had laid out and what the law on the books had said, as well as just entire kind of doctrinal frameworks that hadn't really been front and center. And so as part of this exercise, we wanted to make sure we were closing that gap, making sure that the guidelines were fully faithful to the legal precedent on the books, and that we were also ensuring that this document was comprehensive. And so they were accounting for different ways that mergers may threaten competition, even if these hadn't been top of mind in recent years. So as part of that exercise, we wanted to make sure that we were showing our work, to make sure that, you know, if these guidelines are going to look different, the burden is on us to explain how they're grounded in the law. And citing to legal precedents seemed like an actual part of that exercise.

It's actually been really striking to me to see the sharp reaction to that fact. And I think reflecting more generally, it seems like in antitrust over the last few decades, there's been, you know, greater, greater reliance on a whole set of tools, including economic tools that are really important. But ultimately, this is a law enforcement exercise, and the law is the core anchor. And so we wanted to make sure that we were giving due respect and appreciation to the law on the books. I'll say more generally one thing that I think the current structure of the guidelines also does really nicely is it does a lot of analytical work on the front end. And so you look at the document and there are at least 12 different ways that you can analyze mergers on the front end. And I'll just say, internally, as we think about how does our staff, with the very limited resources they have on a very expedited timeline, assess mergers? It's already providing a lot of kind of analytical efficiency on the front end because

you can look at a deal and say, "This is raising concerns under guideline two, seven, and eight," you know, whatever combination. And that just anchors the analysis and provides a lot more efficiency and effectiveness in knowing what are going to be the key dimensions that we're going to be looking at. And so both from a fidelity to law perspective, but also kind of ease of use for our teams, hopefully for the business community. I think it's going to, you know, mark a big step forward.

BAER: Thank you. I'd just add a comment and I've seen some of the comments that have been filed, and what are there, over 4,000 or something? I've not read them all — most of them, of course — but have suggested that you're citing old Supreme Court cases. Well, the challenges there aren't all that many new Supreme Court cases involving mergers. And if you look back, I think Jonathan, one of your colleagues did a little research and found that in the last 10 years, 50 different merger decisions have cited to those old Supreme Court cases. They remained good law. They relied upon the courts. It's not as though the agencies have kind of resurrected them from the grave. They are alive and functioning, right?

KANTER: So in a in a law enforcement exercise, you have to look at the law. Has anyone out here heard of the case, Brown versus Board of Education? No, seriously, raise your hand if you've heard of it. Do you think we should still cite it as valid case law? Raise your hands. Let the record reflect that most people are raising our hands. I want to talk to those who are not. That was decided, what, 1954? My recollection from law school — it's been a while — is that Supreme Court cases don't expire. And so the question is, how do you take those questions of law and apply them to facts on the ground today? And as you point out, Bill, these are the cases not only that we're citing to in our guidelines, these are the cases that the courts are citing to. And in-- and the cases stand for key legal principles, like mergers shouldn't increase concentration to a certain level, mergers shouldn't take a firm that already has monopoly power and entrench it further, mergers shouldn't cut off supply of key inputs to rivals. These are core principles. Questions of law, as they're often referred to in law school, that's separate from questions of fact. And so how you analyze the fact at any particular merger depends on the facts of any particular merger, but the key principles are still sound.

The other thing I'd point out is a lot of the seminal cases in merger enforcement were decided — and this is actually, I think an important point historically — right after the Celler-Kefauver amendments, the Anti-Merger Act, right? So the Clayton Act which governs mergers was actually updated in the fifties to strengthen it to close some loopholes, to make sure that not just horizontal

mergers, as we call them, were covered. And so what followed, as you might expect after a statute is updated or written, there were a bunch of cases that were decided to determine what that statute meant. And so cases like Brown Shoe, and Philadelphia National Bank, and numerous others were decided in the following decade in order to determine what Congress meant when it revised the statute. And they went back, and they looked at the text of the statute. They went back and they looked at what Congress said when they were enacting the statute. And they decided that certain legal principles applied.

So, it is not surprising to me that a lot of the key cases interpreting the law were decided right after the law was updated. But-- and and for that reason, among others, perhaps there have not been a lot of Supreme Court cases in the last 20 or 30 years. I think the last one didn't even involve-- involving a merger was California-American stores, probably in the early nineties. And before that, it might have been the seventies. Merger cases just don't go to the Supreme Court that often because a lot of the key questions around the scope of the statute have already been decided, or at least the court has determined, do not need clarification or don't get appealed up. That's the reality of what we have. We have tried to take those principles, embed them into the law, into the merger guidelines, and then figure out what analytical tools, using the state-of-the-art thinking today, state-of-the-art economics, state-of-the-art data science, state-of-the-art investigation tools, to figure out how best to apply the law as written by Congress, interpreted by courts to the facts as they present themselves today. Certainly, the tools we use today are different than the tools we would have used in the fifties or sixties, but the legal principles underlying how to-- what principles we're applying. still remain intact.

BAER: Okay. Let me go to some of the specific criticisms or feedback that appear in the comment. One I'll hand in myself, which is people, some people seem to perceive the new guidance as a commitment to when you're going to go to court as opposed to a statement of when you're going to look and examine the opportunity to go to court. And that misperception isn't, isn't helpful, I think. But there is one recurrent theme among a fair number of mainstream academicians and others with a serious interest in effective enforcement. They're trying to understand whether these guidelines are suggesting that increasing-- increases in concentration in a market, is in and of itself, sufficient to initiate an investigation to go to court. That showing threat of substantial economic harm, showing a-- the risk that market power will be obtained or enhanced, isn't part of what the government needs to do when it challenges an acquisition. Is that a fair reading of the way the draft is intended to work?

KHAN: So look, the structural presumption has been longstanding, and the guideline honors that. The first 13 principles that we lay out are really about what the government is going to be doing as part of its prima facie assessment. There is a separate section of the guidelines that's devoted to rebuttals, laying out what opportunity firms have to say, "Okay, I understand government, this is your initial case, but hey there's all this additional evidence that you should take into account." And so I think there's also been a misunderstanding about what we're saying relating to the opportunity to provide rebuttal evidence, and the first 13 guidelines really laying out what is it that the government will be using as key templates as we make our initial assessments. So that's the core a core part of it.

I think another key feature of these guidelines is that we recognize that no single set of analytical tools are necessarily going to be the right ones, right? There's no one-size-fits-all all. The right analytical tools to assess what competition looks like is going to vary depending on the market. And so the guidelines honor that fact. We say there's no single tools that are going to have primacy. Here are a whole set of tools, some of which are going to be looking at direct evidence of market power, some of which are going to be relying on more kinds of econometric tools that we've been using. And we're gonna use the right tools depending on the context. And so, I think that's actually a really important step forward because, you know, we've seen all too often, and I think the courts have kind of said this back to us, that we need to be mindful about what are the right tools for a particular context. And so that's what the document's also trying to reflect.

BAER: Jonathan, can you also give your sense of when we can expect a final version?

KANTER: Oh, that's a great question that I won't answer. No, we're somewhere working as quickly as we can to ingest the comments. I've read a lot of them. Let me start by saying that I think one of the things that's absolutely remarkable about the process this time around — and I'd be interested in your observations, Bill, because I know you lived through earlier revisions both in the agencies and around the agencies — but a lot of the comments are from people, workers, farmers, emergency room nurses, small business owners, and they're writing in in their own name and in their own words. And they're making sense. They're talking about their concerns. They're talking about how concentration and mergers have affected their lives and their-- the opportunities that they believe should be available to them to compete and to work and to benefit from competitive economies, not only in certain parts of the country but throughout the country. And I think this, to me, encapsulates

the moment. One, the moment of-- the country's watching. The country cares about competition in a competitive economy because it affects so many aspects of our lives and our democracy. But also, and this was a deliberate choice on our part, to write the guidelines in a way that's accessible to the broader public.

And I think one of the concerns I had — and I've talked about this — is that the language we use in antitrust has become exclusionary and it's become overly technocratic in many instances when it's not necessary. And by using words that people can relate to, terms that resonate with people who actually have important experiences to share, increases participation. And I think we're seeing that in the public comment process. And I think that's a really important part of what we're doing. And I will say — and I haven't seen all of them, but I've read more than half of the comments, every single one, and I'm gonna read them all before we finalize this — the overwhelming majority are not critical of the merger guidelines, more of the majority support the direction we're going. And that means a lot.

I think the idea about concentration is a little bit head-scratching to me. Almost every case the agencies have brought going back-- going back to the sixties has cited Philadelphia National Bank, as Lina mentioned, which stands for the proposition that increases in concentration can be a proxy for showing competitive harm. And so the idea that we are continuing to rely on those cases and those binding Supreme Court precedents shouldn't come as a surprise to anybody. And the statute says transaction can be anti-competitive if the effect may be, may, to substantially lessen competition or tend to create a monopoly. And so that's what the guidelines focus on. But rather than being overly doctrinal and rigid, and I'll again, I'll-- you know, particularly to folks who are not antitrust lawyers, but you know, that the previous horizontal merger guidelines were focused on this framework around things called coordinated effects and unilateral effects as the way in which harm presents itself.

These are terms that have been effectively made up by the antitrust institutions. And all of these cases that were being brought were being shoehorned into these narrow paradigms that probably, you know, are important but not fully reflective of how competition presents itself. And the idea that we would continue to rely just on those paradigms without thinking about all the other ways in which competition presents itself, I think would be a major disservice to the public.

KHAN: If I could just underscore one point that Jonathan made, which is about the public participation here. And we made a very concerted effort to do listening sessions with, you know, health care workers, just ordinary people who've lived through consolidation. The other week I had the

chance to go out to Las Vegas with the AG there to do some listening sessions around the potential effects of a big grocery merger that's being considered. And it's just been so humbling to hear directly from people who have seen firsthand how consolidation and mergers all too often have meant that prices are higher. They're having-- having to drive further for basics like hospital care or groceries. Their jobs have gotten worse. And to be honest, you know, what I sense is that there's also been a deep disillusionment with government, and a sense that government isn't out there fighting for them and protecting them from monopoly power and corporate power.

And so, I also think, you know, the burden for us is getting this right from a competition perspective, but, I think, also showing people that we have cops on the beat that are fighting to protect people from these forms of private coercion and abuse of monopoly power. And that's really what I worry about as well, is the kind of maintaining the democratic legitimacy of antitrust, making sure we have the right feedback loops in place to be understanding how is the work that our agencies are doing affecting people out there in the real world. And so, you know, the merger guidelines are going to be really important for us from an enforcement perspective. But I think as part of this broader exercise to make sure we're fully serving the public; it carries that burden as well.

KANTER: So, I will add that now that I no longer work for you, Bill, and in the spirit of this being an organic conversation, maybe I'm going to ask you a question.

BAER: Uh oh.

KANTER: This is genuinely unrehearsed. But you've seen the guidelines iterated over numerous versions, including 1997, which was the first time the guidelines really added efficiencies. I think a lot of folks often try to portray it as efficiencies being embedded by the framers in the U.S. Constitution, but I don't think that's really true-.

BAER: I think it was the Declaration of Independence--.

KANTER: Yeah. And so I guess I would be curious about your observations because, you know, you've seen the evolution of the guidelines going back, and what you think of those criticisms.

BAER: Well, let's talk about efficiencies because that-- I was working with Bob Petrovsky when he and his fellow commissioners concluded that there needed to be a discussion of efficiencies in the merger guidelines. The courts were beginning to talk about it, even though there wasn't a lot of precedent saying it was, it was a legitimate defense to an otherwise anti-competitive merger. And so we put together some principles that basically said, you know, you can assert them, we will look at

them, they're not going to be outcome determinative in a merger where there's serious risk of anti-competitive harm. They need to be unique to the merger, not achievable through other means, that sort of stuff. And while we were talking about what to say and how to say it, I flew out to Stanford to see my old law-- law professor, Bill Baxter, and I--.

KANTER: Who is Bill Baxter?

BAER: Bill Baxter, I'm sorry, a leading antitrust professor, and in 1981, Ronald Reagan's choice to be head of the Antitrust Division where Jonathan and I had both been privileged to serve. He was a friend. We went out, we actually played a round of golf and then spent three hours over lunch talking about efficiencies. And he said, "You guys are out of your mind to consider putting efficiencies in the merger guidelines. Why? Because they're bullshit. That people will assert them. You're not going to be able to verify them. And very often mergers don't produce the efficiencies that are asserted." A few months later, we were in district court challenging the first Staples/Office Depot case and the-- I mean, his words were prophetic. The defense in that case was that the efficiencies dwarf any anti-competitive concern.

And somehow, by the time we got to what was a five day trial, the defendant, Staples and Office Depot, had upped their efficiency claims by five X over what they had presented to the respective boards at the time the transaction was authorized. And Judge Thomas Hogan, in an extraordinarily well-written opinion, said it's just B.S. They also claimed that that these efficiencies inevitably are going to be passed through to consumers in terms of lower prices and said, "We're going to pass through 80% of these efficiencies. Consumers will benefit. Let this deal combining three of the-- two of the three office supply superstores of the country into, into one." We presented evidence showing that on prior transactions by Staples and Office Depot buying up competitors, the pass-through was about 15 to 16 percent. And Hogan just said, "I just can't trust any of this." So there is, I think, reason to be-- to scrutinize carefully, to be skeptical about what are-- what the parties are asserting the particular benefits are. But let me-- I wanna move on, if I can, to a related point.

Since, what, 1976 for those who are not-- merger aficionados, you know, there's been a a pre-merger reporting requirement for transactions of a certain size. What is it, about 90 million? Now, if your transaction is that big, you've got to file a Hart-Scott-Rodino premerger notification form. Just about the same time these draft revised merger guidelines came out, the FTC, with the consent or concurrence of the Antitrust Division, proposed a dramatic rewrite of the form. That form had basically

been unchanged for about 45 years. And having been both in private practice and in the government, it was not capturing the data that was most important to understanding what the deal rationale was and what the potential antitrust risks were. So, if you wouldn't mind, talk a little about what you're trying to achieve through the rewrite of the form and then also about the concerns that, that-- of what 3,000 or so, 3,500 transactions looked at a year. You're only seriously investigating three or four percent. And how do you weigh the burden on that 96, 97 percent of transactions, which you're not going to look at because you don't see a problem, although maybe it goes up when the new form is in place? But how do you balance burden on those deals versus legitimately asking the tough questions of the deals that may have problems?

KHAN: So the revision of the HSR form is really animated by the fact that on the front end, we're not getting even remotely a fraction of the information that we need to really do a reasonable and sound competition analysis. As Bill noted, this form has not been challenged effectively for, you know, 4 to 5 decades. And it's important to remember that when a merger filing comes in, our teams have just 30 days to assess, is this deal problematic? And when you went-- when we went through the merger wave of 2021, where, you know, filings were up 70%, I mean, our teams were just drowning and you were having to look at these filings and make very quick assessments about what are we even gonna take a look at to do an initial investigation. And that process really highlighted for us that this form is not functioning as even a remotely effective screen to surface, are there competition problems or not?

The economy has changed dramatically in the last few decades. Deals have become more complex. We're seeing all sorts of unique investment vehicles. And there's just basic information that other jurisdictions request, including relating to deal rationale, you know, narratives relating to what the effects of the deal will be that we were just missing out on. So the proposed revision is really designed to mitigate blind spots on the front end. A lot of the information that we request is-- we expect information that the parties already have. There's not going to be a tremendous amount of burden, we assume, of actually providing that, in part because other jurisdictions already have the information. In other instances, we're looking for, for example, a list of prior acquisitions. This is in part designed to address the types of serial acquisitions that we've seen.

BAER: And you've recently brought a case on that.

KHAN: And we recently brought a case, yes. A few weeks ago, the FTC brought a case alleging that this company, USAP, and its private equity owner, Welsh Karson, had engineered a roll-up scheme buying out the largest anesthesiology practices across Texas, jacking up the price. And then ultimately, Texas patients and businesses were paying millions of dollars more for anesthesia. And this scheme was engineered in part through these serial acquisitions, no single one of which will necessarily raise competition problems. But in the aggregate, you can really have a roll-up of a market. And so the form is going to allow us to be able to screen for those types of dynamics on the front end.

The form also ask questions about labor markets. This is an area of merger analysis that we're really doubling down on because we've heard a lot about how all too often mergers among firms have left workers worse off. We're still really building up the muscle to figure out what's the right data that we need on the front end. But we think the data that we capture in the renewed HSR form will help expedite some of that analysis. So, we think this is a really just important and honestly overdue step forward for the HSR analysis. We've gotten a lot of comments. and so our teams right now, we're reading through those, carefully digesting those. But ultimately, we think that this has the prospect of actually making our analysis more efficient in ways that will benefit businesses as well. Sometimes we will, through this additional information, be able to determine actually there are no problems, actually. And previously we may have issued a second request to get this additional information, but now we have that on the front end. So we're not going to tie up the deal any longer. So, those efficiency benefits could pay off internally, but also externally.

KANTER: If I may add on that--.

BAER: Of course.

KANTER: Incredibly important explanation, which I completely agree with. For the antitrust nerds, a little humor, but the the form and the issues that that Chair Khan just talking about line up nicely with the new draft guidelines, their guidelines for all those concerns she just raised, that is a cognizable efficiency. Thank you to the two people who left. So, the other thing I would say is I really would encourage people to look at the old form because it's not like-- and I, when I started in the mid to late nineties, the form wasn't relevant then either, right? The, the, you know, the the perhaps the untold truth or, or the truth that wasn't discussed too broadly and has been in this way for a long time, is that most of the form, if not almost all of it with the exception of one or two document requests, has

no bearing whatsoever on the substantive antitrust analysis. And so if we had proposed the form as it exists today, the criticism would have been, "Why are you proposing a form and creating all this work that has no relevance whatsoever to an antitrust analysis?" And so, when people ask about the new form, I say, "Well, the best way to understand the new form is to look at the old form." And the fact that we're asking questions that are relevant to the analysis actually is far more faithful to the direction of Congress and the intention of the Hart-Scott-Rodino Act, which mandates merger filings. And I think it's really important for people to understand that the purpose of the form is to give us the information that we need to make an efficient determination about whether there needs to be an investigation. And if the form has no information that's relevant, that makes the process less efficient and undermines the intent of Congress, which was to provide notification.

KHAN: Interestingly, Congress, when passing the Hart-Scott-Rodino Act, believed that around 150 mergers would need to be reported every year. We're now at a stage where we get 150 filings, you know, every month sometimes. And so just the volume of transactions that we're getting is dramatically off the charts, and that requires us to be getting more information.

BAER: Right. You had mentioned looking at labor market effects as, as part of what the guidelines do, and what the information the new form would require. But let's talk about your respective involvement in labor markets not related to M&A activity. Jonathan, towards the end of the Obama administration, we announced at the Antitrust Division that we were going to pursue no-poach agreements between competitors as criminal violations of the antitrust laws going forward. You have been saddled with that responsibility, for which I apologize, and have brought a number of cases. The courts have generally said, these are legitimate-- it's legitimate to treat these no-poach agreements as criminal violations of Section 1 of the Sherman Act. But juries haven't quite gone along with the prosecutions you've done. What have you learned from what's happened out there in the real world, and is that affecting willingness to bring those cases or willingness to rethink how you bring those cases? What's going on?

KANTER: So, thank you for that question. Let me start by reiterating, as I did a few weeks ago, that this remains a high priority for the Antitrust Division, protecting workers from criminal behavior that harms their ability to get better wages, to realize upward mobility in their lives by getting access to better jobs, better training, and opportunities to provide for their families is fundamental and foundational to the work we do as antitrust enforcers. And we continue to take it as seriously as we

ever have. And we're committed to enforcing the law both as criminal enforcement, as well as civil enforcement, depending on the facts and circumstances. I will also say that it is our job to make sure that we are learning from every experience. And certainly, there are, as you described, Bill, courts have essentially agreed with our characterization of the law, but we have an obligation to present cases to juries, and that's a burden that's on us. And we need to make sure that we are looking at our cases and how we bring them with fresh eyes and fresh perspective

. The one thing I can assure you is that we constantly do that, win or lose, and that we are always learning from our experiences. And if we are fighting to protect the rights of workers, and the facts and the law support prosecution, we will bring those cases and make sure that we are benefiting from all of our experiences, win or lose, to ensure that we are presenting cases the right way to juries. A lot of our experience historically has been consumer criminal antitrust cases where we talk about price fixing and other kinds of per se agreements. And, you know, there are things that we can and should learn about how we explain effects on workers because they're different and they present differently than they do to consumers. And so, again, those are deep learnings that we have been able to ingest, that we've been able to take into account, and that we will factor in both as we try cases going forward and make charging decisions. But this is fundamental and foundational to our mission. And when the facts and the law support bringing a case, we will not hesitate to do so.

BAER: Thanks. Meanwhile, down the street at Federal Trade Commission, you've been shining — you and your fellow commissioners — a spotlight on non-compete agreements, which are really quite pervasive throughout the economy, affecting all different levels of workers. Can you tell the audience a little about the rulemaking you have pending, what its status is, and and why that ought to be a subject of concern to antitrust enforcers?

KHAN: Absolutely. So, as you alluded to, non-competes have really expanded across the economy. Their use, you know, they started in the boardroom, but increasingly they've been applied in all sorts of sectors ranging from, you know, fast food workers to security guards, to engineers to doctors. And, you know, before I joined the commission, actually under my predecessors, there were efforts to start studying what is the impact of non-competes. And one interesting-- you know, there have been certain states that de facto have rendered non-competes not enforceable for many, many years, such as California and Oklahoma. But over the last couple of decades, we've seen more and more states introduce certain state-level policies to further curb the use of non-competes. And what

that has done is actually created nationally a natural experiment that allowed us to really isolate the empirical effects of non-competes.

And so there's been a whole set of empirical scholarship finding that non-- non-competes are bad for workers. They result in lower wages and fewer opportunities. Interestingly, not just for the workers that are directly bound by non-competes, but even work for workers who aren't, which is really quite striking but makes sense, right? If there are few, if there are workers who are kind of locked into their jobs and not moving as much, that's creating fewer openings even for the workers who are not directly affected by non-competes. We also found that employers actually continue to use non-competes even in states when they're non-enforceable or they'll use, you know, choice of forum clauses to make sure that they're getting the advantages of different states.

And so there was a whole set of empirical work showing that these are bad for workers. Interestingly, there's also now been empirical evidence suggesting that non-competes have a negative effect on competition and on economic growth as a whole. And so, you know, if you have new startups or entrepreneurs or businesses that are looking to enter a market, sometimes they find that even if they're able to secure capital, they're not able to secure the necessary talent because the talent pool is locked up from non-competes. And so our teams looked at that evidence as a whole and determined that we should issue a rule.

So earlier this year in January, we proposed a rule that would eliminate non-compete clauses in employment contracts. That proposed rule followed certain enforcement actions that we had brought. One of which was in the context of security guards. These are people who make close to minimum wage who were subject to non-compete clauses. The Michigan State Court actually ruled that these non-competes were not enforceable, but the security guard company continued to enforce them, threatening security guards with having to pay hundreds of thousands of dollars. And so, you know, these are people who are making close to minimum wage, who are blocked from seeking better opportunities. Because of the FTC's enforcement action, these non-competes were dropped for thousands of workers.

And we similarly brought a different case in the context of the glass manufacturing industry, an industry that's fairly concentrated. And here we said the harmful effects were not just to workers, but actually on competition, because there had been newer firms that were looking to enter and inject competition that ultimately couldn't because the relevant talent pool was locked up. And so we've

been moving forward, both on the enforcement front as well as the rulemaking. We got over 26,000 comments as part of our non-compete rulemaking, an overall warming number of which were from healthcare workers who were sharing that, you know, some of the justifications that you hear about why you need non-competes really don't apply in healthcare. They were saying they themselves are the ones who invest in their training, not their employers. They shared how non-competes can actually also impair patient care. We heard stories about how, for example, during the pandemic, healthcare workers wanted to be mobile and move around. So if you had an outbreak in one city, they wanted to go over and help out. But ultimately, many of them weren't able to do so because of non-competes. And so you had, during a pandemic, enormous need for healthcare workers, healthcare workers willing and able and wanting to jump in, but they weren't able to because of the non-competes. So, you know, the real-life effects are quite significant here. And we're really excited about this effort, are still processing the comments, but we'll move forward as appropriate.

BAER: Thank you. Let me turn next to a narrative out there that appeared a lot in the press, particularly in The Wall Street Journal, that the two agencies are losing cases left and right, and that suggests a degree of overreach in civil enforcement. I suspect you don't agree with the narrative. And Jonathan, why don't you tell me why or not?

KANTER: Yeah, because it's wrong.

BAER: Okay. Well, actually that's a good start.

KANTER: Yeah. So we blocked and won in court, challenging a merger involving some of the largest book publishers in the country. We went to court and challenged a merger transaction involving, effectively, a merger transaction involving airlines. And we won in court decisively in both cases, one of which is now pending on appeal, I will note. And that's-- those are pretty big victories, I would think. And it was the first time ever we've challenged successfully in court an airline transaction and the first time we've ever successfully challenged a merger based on harm to workers, in this case, authors, and as opposed to just higher book prices. And so those are pretty extraordinary victories and I'm really proud of our team. We're in court litigating monopolization case. We have another case going to trial in a month, and there have been instances where we haven't succeeded. But but they're not overwhelming in terms of the numbers. And I also note that we've had a number of transactions, one that settled in court and one that-- and numerous transactions that were abandoned after we filed. So when I look at our record, I see, frankly, quite a bit of success, and I'm quite proud of

it. And I think it reflects on the amazing work at the Antitrust Division. So, I think that narrative is not just unfair, it's inaccurate.

BAER: Lina.

KHAN: I would echo that. I mean, look, within the first year the FT-- that I joined the FTC, we challenged two major vertical deals, Nvidia's attempted acquisition of ARM, Lockheed's attempted acquisition of Aerojet. Two major vertical deals. It's no secret that, you know, we have not challenged as many vertical deals in recent decades. In both instances, the parties walked away and, you know, we were excited to litigate those cases. We think we would have won. But ultimately, the parties walked away and obviated the need to do so. It's also been interesting to see the aftermath of that. You know, Nvidia and ARM have continued to be enormously successful as standalone entities. We've — separate from that — blocked close to 20 deals altogether, have not always won in court, but we always look at those instances very closely in the matter within decision.

For example, the court offered some really important propositions relating to how merger law applies in digital markets. Noted, for example, that even if you have high levels of entry and exit in a market, if you have high concentration that can signal, you know, a presumption of market power despite the ongoing degrees of entry and exit, which is really important in digital markets, also ratified potential competition as a doctrine that's alive and well, including in digital markets. We have another case that's pending, both on appeal in the Ninth Circuit as well as an administrative adjudication, so I won't go into that. We're, you know, are litigating a whole set of monopolization cases. Last summer, the FTC sued two pesticide giants, Syngenta and Corteva, for engaging in pay-to-block schemes that ultimately kept generic pesticide manufacturers off the market, resulting in farmers across the country paying billions of dollars more for pesticide, this essential input, than they would otherwise. That's still pending.

Two monopolization cases that we brought in the last month, one's USAP and Welsh Carson. the other against Amazon. The Facebook case that was filed before I joined the agency and then we've refiled, is probably going to go to trial next summer. And we're excited for that in terms of, you know, explaining to the judge how competition in digital markets works and why it was that these two acquisitions that the company made were unlawful. So, we have a very, very active program underway. We think we've already had significant success in instances where we haven't. We look at

that closely and see how we can learn from it. But, you know, I think the deterrence value also speaks for itself.

BAER: Thank you. Let me ask one more question and then we'll turn it over to the audience. We've seen play out in the Google litigation in district court here, this conflict between companies, both defendants in government lawsuits, and third parties, businesses who are asked to provide data through the discovery process, claiming broad confidentiality protection over that information. And it's resulted in the Google case, a number of days in which testimony is taken all behind closed doors, exhibits aren't available to the press and the public. The government, I appreciate, is in a bind in these cases.

You know, your first principle is to get to trial, see that justice is done. If there's economic harm out there, to challenge it, get the court to block it. And often judges don't want to be in the middle of a fight over what's confidential and what's not. And say they say to your litigators, "Just work it out." Well, if the judge wants you to work it out, it, and not personally be involved in deciding what's confidential, what's not, that tends to skew towards keeping it confidential. Otherwise, you have to get the judge involved, and who wants to anger judges about to decide your case? At the same time, there's a huge value here in the public's right to know. And I know as public officials, you respect that. But how do you advance the public's right to know in these cases where you have extraordinarily broad claims of privilege and a judge who just doesn't want to get involved in it? Do you have an obligation to force that issue?

KANTER: Well, I think, you know, we certainly believe in the public's right to know, and we want to fight to protect it when appropriate. We adhere to and we respect very much the role that courts play in administering protective orders and other confidentiality requirements. In my experience, and I can talk about any specific case, certainly nothing that's pending, but that most courts are equally interested in, in protecting the right of the public to know. And I think that's, you know, something that I think we value, that we share with the court system. And it's important to our democratic process that our cases be tried in daylight. At the same time, there are instances where part of what we're trying to do is keep competitively sensitive information, competitively sensitive. And, and so there may be instances where it is appropriate for minor redactions or closed sessions. But, you know, we do what we think is appropriate under the circumstances and-- but very much share and support the importance of public access.

BAER: Thanks. Lina, anything to add to that.

KHAN: Similarly, you know, maintaining access to the public has been a key value for us. We started doing regular open commission meetings where anybody from the public can come up and speak to us and share with us issues that they're seeing in the marketplace. We've also, over the last couple of years, opened up a whole set of dockets inviting public information. And so making sure we're regularly engaging with the public, hearing from the public has been a core goal at the FTC, and we're really thrilled about the progress we've been able to make.

BAER: That's great. All right, so we're going to go to questions. We've got some that have come in online. The first question I'll pose is something that was submitted ahead of time. What I think we'll do then is go to one side of the room, get a question, opportunity for a question to be asked, another question from the other side of the room, and then you guys can fight over who answers what, okay? But so the first question online is from Randy Marks, a retired attorney at the Federal Trade Commission, that, Jonathan, you remember, a good guy. He asks, "Don't we need new antitrust laws given the hostility of the courts to aggressive enforcement? Lina, you want to start?

KHAN: So as enforcers, our obligation is to enforce the laws on the books do so faithfully, both with regards to Congressional mandate and legal precedent. It's been enormously exciting to see Congress reassert itself in antitrust. The historic investigation that Congress did in the House a couple of years ago looking at digital markets, and really laying out in that report instances where Congress thought there may be a gap between how competition needed to work in digital markets and what the antitrust laws were delivering. We've of course seen over the last few years a whole set of bills introduced relating to antitrust enforcement. And so we at the FTC always stand ready to be good partners to Congress. And so if they're looking at proposed legislation, we provide technical assistance. We're able to share with them where we think the potential updates need to be made. At the FTC, though, we're just squarely focused on using the tools we already have.

BAER: Anything to add to that?

KANTER: Yes.

BAER: Okay, go ahead.

KANTER: Oh, no, no, no. I think, as always, Chair Khan nailed it.

BAER: All right. Let's go to some questions. Why don't we start over here in front? If you can identify yourself and any organizational affiliation, that'd be helpful.

AUDIENCE MEMBER: I'm Dave Michaels with The Wall Street Journal. You've both, Chair Khan and Attorney General Kanter, both voiced criticisms are concerned about practices and outcomes, even in private equity ownership. So, as Chair Khan mentioned, a lot of these individual deals that are part of a roll up would not require HSR reporting, of course, you proposed updating the filing. But the question is, what are you doing today to look into private equity's potential role in concentration and potentially monopolization? Do you have other active conduct investigations of PE-owned or backed companies in addition to the USAP-Welsh Carson case that you brought? And if so, would you expect to bring more cases like that one?

BAER: Let's, let's just go to the question. It's a good question.

KANTER: Sure. Let me start by saying so, as we were talking about earlier in the conversation, you know, making sure that we are using tools that are fit for purpose in today's economy is important, and making sure that we understand how competition presents itself and the realities of a modern economy are really important. And so the role of private equity today is different than it certainly was when I started practicing, and unrecognizable relative to, for example, the 1982 guidelines. So, these are business commercial realities. And our goal is to make sure we understand those commercial realities and just enforce the law as we see it based on the facts presented today. And so, you know, sometimes a private equity transaction doesn't raise a concern, and sometimes it does. But how it might present itself might be different than in previous generations. We might see roll-ups. We might see board interlocks. The kinds of issues that surface in an antitrust context might be a little different in a private equity transaction than in a standard public company transaction. Those are just differences, and our goal is to make sure we understand those differences and then apply the law based on the facts as we see them.

BAER: Anything to add?

KHAN: I think that summed it up.

BAER: Okay, good. All right, up here on the left.

AUDIENCE MEMBER: [Inaudible].

BAER: All right. We got another one coming, Sam.

AUDIENCE MEMBER: All right, round two. Great. Sam Thorpe, Economic Studies here at Brookings. So one word that's come up only intermittently so far has been monopsony. And it seems to me like one of the really important innovations of this new antitrust regime has been treating labor

market concentration as an end that's worth enforcing. I'm curious to hear two specific things. First, what you feel the legal basis is for treating labor market power as sort of on par with product market power. And second, what each of your agencies are intending to do specifically on monopsony-related antitrust in the coming years?

KHAN: So, look, the Clayton Act, you know, prohibits mergers that may substantially lessen competition or tend to create a monopoly. They don't specify that justice with regards to consumers. And so we interpret that to mean that it protects all Americans, consumers, but also workers, but also businesses, but also entrepreneurs. So, we think the statutory hook is very clear. This also isn't a new issue, right? I mean, we've seen over decades that antitrust enforcers have recognized that harm to workers can be problematic. You know, the Supreme Court in the Alston case recognized that as well, so we think the legal basis is clear.

Last year, the FTC challenged a hospital merger where my colleague, Commissioner Slaughter, and I noted that we would have also included a labor count because we believe there was a basis to allege harm to nurses there. And more generally, as we are doing, especially our merger investigations, we're looking at all sides, including on the worker side. We started hearing much more from worker organizations, from unions who are looking at these deals and sharing information with us about how it could be problematic. So, that's a muscle that we're continuing to build, and are very eager for continued engagement and information on that front. On the conduct side, we've had our non-compete enforcement work and are continuing to look at other ways that, you know, unfair methods of competition may be harming workers as well.

KANTER: Yeah, I mean, I would strongly encourage you to come away from this discussion with the impression that this is very top of mind for us. It's foundational to the work we're doing in the merger context, in the non-merger context. In monopsony has an important principle where concentration can create and exacerbate asymmetries of power and competitive market power over, over workers, over input suppliers, over content creators, industries that are the lifeblood of a functioning democracy. And so we care deeply about this. It is central to the work that we're doing.

KHAN: And this is also where interagency work is so important. So I know our agency, as well as the Justice Department, has entered into MOs-- MOUs with the Labor Department, with the NLRB, to make sure that we're sharing information. And if we see issues that seem problematic, but our tools don't necessarily apply, we're able to share that information and vice versa. So, I think

there's a whole of government effort right now to ensure that workers are protected under the law as well.

KANTER: I'd be remiss if I didn't acknowledge, I see in the back of our room, the principal deputy assistant attorney general from the Antitrust Division, Doha Mekki, who has been perhaps the world's leader on labor and antitrust, going back a decade, and has been a real pioneer in this area. And so seeing Doha reminds me that both agencies and, and the amazing work that's being done at the FTC, we have literally the best and the brightest thinking about how we bring these issues to protect opportunities for people to provide for themselves and their families and benefit from the American dream.

BAER: And I should add that just a couple of weeks ago, out of the Seventh Circuit, Judge Easterbrook authored an opinion that really enforced the notion that the antitrust laws apply in monopsony, monopsony markets.

KANTER: Thank you. I'm really proud of this. We we filed an amicus brief and oral argument advocating for this position in the Seventh Circuit, and we were just absolutely thrilled that Judge Easterbrook acknowledged that those harms are cognizable antitrust harms and per se illegal in the context of a no-poach agreement. And the facts matter here, right? The facts in that case involved a woman who was a fry cook and had the opportunity to become a manage-- manager at another McDonald's but was denied, deprived the opportunity to go from one McDonald's to another with a promotion in hand because of a no-poach agreement. And the Judge Easterbrook in the Seventh Circuit said unequivocally, that is a per se illegal restriction, and the harm to the ability of a worker to move from one McDonald's to the other is actionable under the antitrust laws.

BAER: There you go. Yeah. All right, down here upfront. Yep, you. We got the microphone on the way. Thanks, Catalina.

AUDIENCE MEMBER: Hi, Alan Loeb, Washington attorney. So, this question starts with Ms. Khan. You came to public notice when you published an article, and if I have it right, what you focused on was the harms that come from having market power that doesn't necessarily raise prices but allows companies to exert force over the way the market operates. And so I'd like to ask you, and actually, both of you, what that implies is that if we haven't been enforcing that for a long period of time, to look more broadly at the harms from antitrust, there would probably be cases back in the history that were never recognized. And I'd like to know if maybe you are, or maybe even in the

literature, there is a list of such cases that now are coming up and recognizing this broader sense of the harms?

KHAN: Yeah, it's a good question. And I think, you know, one of the key pillars of our efforts, in addition to fidelity to law, is making sure that we're mitigating blind spots and being honest to the way that competition is presenting itself and harm to competition is presenting itself. In addition to, you know, harm to consumer prices, we're looking at harm to wages, to quality of benefits. One of the comments that we got as part of our merger guidelines noted that a really important dimension of competition and quality for workers is actually having control and predictability over your schedule, right? And so, we're just-- through this process, I think, getting a much more granular understanding of what are the different dimensions of quality, for example, that really matter.

We also want to make sure that we're fully grasping the realities of how competition works in digital markets. I think the chapter in the guidelines that lays out platform market dynamics is incredibly important and notes, for example, that in platform markets, a key source of competition is not necessarily going to be from a direct replica, but oftentimes from a company that may be, say, depending on the platform, you know, the Microsoft case, I think is emblematic here.

And so we need to be mindful of the different sources of competition. We need to be mindful of the fact that in digital markets in particular, for example, multihoming can be a really essential mechanism of injecting more competition, because when you have economies of scale and network externalities that can tip markets, multihoming can be a really important path out of that. And so overall, I think we're really in the midst of an important exercise to be understanding deeply how competition is showing itself in a whole set of contexts in markets. And our case is already starting to reflect that. And I anticipate that in the coming, you know, 15 months or so, we'll continue to see more of that.

KANTER: Yeah, I'll add it's just been such a privilege to work with Chair Khan and the FTC on these issues. This is so important to the work we're doing. And for decades since I started practicing, we've heard people say, "Oh, of course, competition is more than just price," but we've, we've talked the talk as an industry, antitrust enforcement industry, but we haven't walked the walk, right? The fact of the matter is we haven't built the tool kit. We haven't built the analytical framework to adequately address that. But let's take a step back and think about why it matters, right? And this is, I think when Chair Khan so eloquently talked about in a very moving and meaningful way, the impact of

their non-compete rules. We've reduced human impact to grayed-out triangles and that's not an effective way for us to enforce the law.

The fact of the matter is competition can affect the quality of healthcare, which affects lives. My father just had life-saving surgery in a community hospital and the level of care was something I hadn't seen in decades. The attention, the willingness of the doctors to sit with, with the patient's family. Those are real benefits, not just real in a quantifiable sense, they're real in the human sense. When we think about the free flow of information we're talking about in journalism, and authors, and content creators, we're talking about the lifeblood of a functioning democracy.

This goes to the heart of of of what makes our country so wonderful. When we talk about the ability to get a job, we're talking of the American dream. The ability to have upward mobility, to start from nothing, and and grow to provide opportunities to your children that you never had the ability to realize yourself and leave the next generation better off. Those are real things that affect real people. And if we try, if we, if we are overdependent on just grayed-out triangles and price harms, we lose that connection to the human impact. And the law was written, it was written for farmers who are looking to to build thriving small businesses and provide for themselves by selling their cattle or other crops. These are real harms. These are real people. And these are exactly why the antitrust laws exist. And we have an obligation to make sure that we are protecting competition, enforcing the antitrust laws to preserve all of those benefits for competition.

BAER: Thank you. Steve?

AUDIENCE MEMBER: Hi, I'm Steve Pearlstein from the Washington Post. Sort of following up on what you both just said, giving district court judges 13 different analytical tools to use in assessing behavior or a merger. I think we've all observed that district court judges are somehow very reluctant to exercise their judgment, subjective judgment, to bring logic and just pure observation to their decisions. They're looking for a hard number. They're looking for something that is purely an objective reason why they might or might not take action. They seem to be reluctant to sort of get into it. And now you — and that was when they only had one tool or two tools — now you want them to give 13 tools. And I'm wondering about, realistically, their, their capacity and willingness to do that kind of complicated, and to some degree, subjective work that you're going to ask them to do by first choosing which tool to use and then having to to master using 13 different tools?

KANTER: So I-- let me start there, because I think that it's important to really read and digest the current draft guidelines and compare to previous guidelines. They're actually, in my view, much easier to use and easier to apply. And the, the tools, they're not-- the tools are, are how you look at the facts. Well, we're talking about our legal principles that have existed and continue to exist. We're talking about, does the merger entrench monopoly power. Does it raise a rival-- cost of a rival and in a way? Does it increase concentration? Does it harm workers? Those are fundamental legal principles. And I think they're written in a way that is-- that we think are accessible and understandable but also have foundation in the law.

And I think part of what's happened over the last 20, 30 years is that antitrust has become more complex, more in the weeds, more about, you know, quantifying to the fourth decimal point a criticism that has come from some of our predecessors and articulated quite well, and moved away from understanding whether this, the risk assessment framework that Congress laid out, which is, does this merger risk threatening competition or intending to create a monopoly? And we're going back to those first principles. And we're saying that if we're going to be relevant in 2023 and going forward, we have to understand the economy as it presents itself today.

AUDIENCE MEMBER: Yeah, I understand that. But the question is, are our judges willing to do what [inaudible]

KANTER: They're doing it--.

AUDIENCE MEMBER: [Inaudible] much more complex--.

KHAN: So, Steve, I think one really striking thing to me over the last few years has been actually sensing a lot of frustration from judges, including district court judges, when they effectively are saying, "Okay, here I am with this merger before me. The defendants have an economist, very fancy economist, with all these fancy models. The plaintiff has an economist, very fancy economist, with all these fancy models. They kind of cancel each other out for me right now. And so what am I really left with," right? And you see, actually, judges going back to those prin-- first principles saying, "Okay, I'm going to think about whose witnesses were more credible." And I think to us, especially as enforcers who end up having to pay millions and millions in dollars to economic experts, the fact that, all too often, judges are saying, "This is not actually providing a whole set of value add to me analytically," I think that's a major problem, right? We, as agencies, are spending millions of dollars of taxpayer resources to put forth economists in these trials. And judges are saying increasingly, "This is

not helpful to me." So, I think we're here seeing that problem loud and clear, and I think this document will help mitigate that.

KANTER: I'll also say 13 clearly articulated principles are easier to apply than two very difficult to understand principles. And so, I think how we write it is as important as how many we write.

KHAN: And I think this, you know, objectivity, subjectivity issue is very important. But I sometimes worry that the type of economics we've been using can actually look objective, that mask a lot of subjective decisions that are actually being made under the surface, and judges also realize that. So, you know, when you have clear bright line rules, clear administrative principles, I think those can more honestly be a basis for telling judges this is what we're doing, this is what the work that we're doing. We're not professing a certain objectivity that's actually masking subjectivity. And, you know, the burden ultimately is going to be on us and our agencies to go to courts, explain how do you apply these guidelines. But I think we have an enormous amount of confidence in the righteousness of that exercise.

KANTER: I think Lina hit the nail on the head. We're listening to the courts, we're listening to what they're saying and what they're asking for. When we bring cases, they're asking for, "What are the legal principles, what's the simplicity, and how are the facts present in this case?" And that's what we're trying to do with the guidelines, is we're trying to map to what courts are saying in their legal opinions, what courts are telling us in trial they're looking for, as opposed to trying to find some theoretical utopia.

BAER: Thank you. Look, I think we're we're running up against our time limit. I did have one question I was going to ask that does that need to be asked because you've answered already, which is, in a situation where you two agencies have overlapping jurisdiction and sometimes, historically, there's been competition among the the leaders about what to do and, you know, how they're two of you getting along. As I said, you've answered that question for this audience here today. No issue there. Before we thank Lina and Jonathan, I did want to acknowledge the hard work of the staff here at Brookings, the governance group. They really put together a wonderful forum, made sure we got massive online signup, were able to welcome a bunch of you here, and I want to thank them. But I do want to thank and ask the audience to join me and thank the two of you for taking the time for speaking English, not antitrust jargon to the audience here and and around the world. You do that in a

wonderful way, which makes the value of antitrust enforcement accessible to those of us who are not the nerds.

KANTER: Bill, you're a national treasure and we're delighted to be with you today.

BAER: All right. Anyway, thanks, folks. Thank you.