ALL FOR ONE, ONE FOR NONE: *ARRINGTON V. BURGER KING WORLDWIDE* AND THE SINGLE-ENTITY DEFENSE FOR FRANCHISES

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INTRODUCTION

Section 1 of the Sherman Antitrust Act (Sherman § 1) proclaims contracts, combinations, or conspiracies in restraint of trade or commerce to be illegal.[1] Thus, for an agreement to fall within Sherman § 1's boundaries, there must be a joining together of separate actors or entities.[2] However, for over a century since the Sherman Act's enactment, courts have struggled to draw the line between separate business entities and single entities.[3] This distinction became more defined with the Supreme Court's holding in *Copperweld Corp. v. Independence Tube Corp.* that parent companies are incapable of conspiring with wholly owned subsidiaries. But *Copperweld* failed to address business entities that do not fall so cleanly within the "parent company" and "wholly owned subsidiary" buckets, including franchised business entities and other joint ventures.[4]

Franchised businesses are typically independently owned by franchisees, and franchisees are both dependent on and independent from their franchisors. For example, franchisees may be dependent on franchisors for merchandising decisions, but independent with regard to hiring decisions.[5] In *Arrington v. Burger King Worldwide, Inc.*, the Eleventh Circuit clarified the Sherman § 1 analysis of franchisors and franchisees by correctly applying *American Needle, Inc. v. National Football League*, which guides courts to look to the activity at issue,

1 15 U.S.C. § 1.

2 *See, e.g.*, Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247, 1254 (11th Cir. 2022).

3 *Compare* Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 141–42 (1968) (holding that parent companies are capable of conspiring with subsidiaries under Sherman § 1), *with* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 777 (1984) (overruling *Perma Life Mufflers* and holding that parent companies are incapable of conspiring with their wholly owned subsidiaries under Sherman § 1).

4 *See Copperweld*, 467 U.S. 752.

5 *See infra* Section I.B.

instead of the formal structure of the entities engaged in the activity, to assess whether the actors are separate entities or a single entity under Sherman § 1.[6]

The Eleventh Circuit's application of *American Needle* led it to the proper conclusion that franchised fast food restaurants are separate actors in labor markets and may conspire for the purposes of Sherman § 1.[7] The Eleventh Circuit is the first circuit court to address the applicability of Sherman § 1 to franchisors and franchisees since the *American Needle* decision and its *Arrington* decision represents a shift from the Sherman § 1 leniency franchisors and franchisees enjoyed before *American Needle*.[8]

This Case Note argues that the Eleventh Circuit correctly applied *American Needle* to franchisors and franchisees and properly considered labor market competition within the scope of Sherman § 1. Part I of this Case Note explores the legal landscape relating to the Sherman Act, franchising agreements, and the single-entity defense.[9] This Part then presents the facts and procedural history of *Arrington* and explores the Eleventh Circuit's decision and its application of *American Needle*.[10] Part II begins with a defense of *American Needle*'s flexible approach toward antitrust liability.[11] This Case Note then argues that the Eleventh Circuit in *Arrington* correctly applied *American Needle* within the context of assessing concerted action between a franchisor and franchisee.[12] Next, this Case Note discusses Sherman § 1's application in the context of labor markets.[13] A portion of Part II is dedicated to contextualizing *Arrington* within recent trends in antitrust enforcement—particularly the Biden administration's aggressive approach toward antitrust enforcement.[14] Part II concludes with an argument that, on remand, the "no-hire

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6 *Arrington*, 47 F.4th at 1250; Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195–96 (2010).

7 *Arrington*, 47 F.4th at 1256–57.

8 *See, e.g.*, Search Int'l, Inc. v. Snelling & Snelling, Inc., 31 F. App'x 151 (5th Cir. 2001) (holding that a franchisor and franchisee were a single entity incapable of conspiring for Sherman § 1 purposes); Tarrant Serv. Agency, Inc. v. Am. Standard, Inc., 12 F.3d 609 (6th Cir. 1993) (holding that a manufacturer acted unilaterally when it forbade commercial sales offices, which were owned either by the manufacturer or as independently owned franchises, from selling the manufacturer's products to manufacturers classified as brokers); Williams v. I.B. Fischer Nev., 999 F.2d 445 (9th Cir. 1993) (per curiam) (holding that franchisors and franchisees are incapable of conspiring for the purposes of Sherman § 1).

9 *See infra* Sections I.A–I.C.

10 *See infra* Section I.D.

11 *See infra* Section II.A.

12 *See infra* Section II.B.

13 *See infra* Section II.C.

14 *See infra* Section II.C.2.

agreements" in *Arrington* should be held illegal regardless of the applicable standard of review.[15]

I. LEGAL FOUNDATIONS

A. *Pleading a Sherman § 1 Claim*

The Sherman Antitrust Act of 1890 aims to bar conduct that unreasonably restrains trade.[16] Sherman § 1 provides that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal," and that violators of § 1 may be subject to draconian monetary penalties or imprisonment.[17] Sherman § 1's broad command provides little guidance for courts; thus, the meaning of Sherman § 1, and the resulting doctrine of antitrust law, has chiefly depended on judicial discretion and line drawing.[18] This vague language of Sherman § 1 is intentional, representing the tension between protecting freedom of contract and maintaining a competitive economy.[19] While Sherman § 1 is designed to prevent the concentration

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15 *See infra* Section II.D. I will use the term "no-hire" to describe agreements between firms not to hire each other's employees. However, these agreements are sometimes also referred to as "no-poach" or "non-solicitation" agreements.

16 Ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1–7); *see* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59–60 (1911) ("That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation.").

17 15 U.S.C. § 1 ("[Violators of the Act] shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.").

18 *See* Derrian Smith, Note, *Taming Sherman's Wilderness*, 94 IND. L.J. 1223, 1227–28 (2019) ("It has always been true that Sherman Act cases are too complex for the judiciary to resolve with strict adherence to a literal reading of the text. Because the text itself provides little direction, the judiciary has spent more than a century smoothing a 'judicial gloss' over the Sherman Act's Constitution-like language." (footnote omitted) (quoting Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977))).

19 *See* William Kolasky, *Senator John Sherman and the Origin of Antitrust*, ANTITRUST, Fall 2009, at 85, 86 ("Sherman likely wanted to assure that the Democrats would not be able to ride the swelling public antipathy towards trusts to victory in November. . . . It was natural, therefore, for Sherman to have wanted to gain control over the issue, both to reduce the pressure to lower tariff barriers and also to assure that whatever legislation was passed was not too radical."); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 687–88 (1978) ("[R]estraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law." (footnote omitted) (first citing Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); and then citing United States v. Topco Assocs., Inc., 405 U.S. 596, 606 (1972))).

of economic power through contract, the Supreme Court has emphasized that the Sherman Act relies on the idea that free and unregulated trade and competition will nonetheless produce the best economic results.[20]

To plead a Sherman § 1 claim, a plaintiff must plausibly demonstrate three elements: (1) a contract, combination, or conspiracy that (2) restrains interstate or foreign trade and (3) is unreasonable.[21] The contract, combination, or conspiracy prong indicates that independent action is beyond the scope of Sherman § 1.[22] But, as discussed below, courts have routinely struggled to neatly draw the line between concerted and independent action under Sherman § 1.[23]

B. *Franchising: An Overview*

Franchising in the United States dates to the mid-1800s, when Isaac M. Singer sold licenses for the right to sell his sewing machines.[24] This practice exploded after World War II and expanded beyond licensing trademarks to licensing entire business models, including business plans and marketing strategies.[25] Business format franchising continues to be the primary method of franchising today and franchising has become a significant part of the American economy.[26] Given the Sherman Act's enactment in 1890, the drafters likely did not foresee the proliferation and resilience of business model franchising.[27]

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20 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("[The Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions.").

21 15 U.S.C. § 1; Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co., 917 F.3d 1249, 1260 (11th Cir. 2019).

22 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554 (2007) ("An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict; proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action . . . ." (citation omitted) (first citing Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954); and then citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984))). Independent action, for the purposes of antitrust law, is left to Sherman § 2. 15 U.S.C. § 2.

23 *See, e.g.*, *infra* note 50 and accompanying text.

24 Honey V. Gandhi, *Franchising in the United States*, 20 LAW & BUS. REV. AMS. 3, 5 (2014); George Ward, *Franchising in an Entrepreneurial Age*, MICH. BAR J., May 2017, at 42, 42.

25 Ward, *supra* note 24, at 42.

26 *Id.*

27 John Archer Thomson, Jr., Comment, Copperweld Corp. v. Independence Tube Corp.*: The Changing Complexion of Intra-Enterprise Conspiracy Under the Sherman Antitrust Act*, 19 GA. L. REV. 189, 197–98 (1984) ("The drafters of the Sherman Act intended to create this enforcement gap [between concerted action and monopoly power], because they did not wish to subject all the business decisions of a corporation to antitrust scrutiny. It is doubtful, however, that the drafters

The Federal Trade Commission (FTC) defines a franchise as a commercial relationship where: (1) the franchisee is given the right to operate a business or sell goods associated with the franchisor's trademark; (2) the franchisor exerts a significant amount of control over, or provides significant assistance in, the franchisee's method of operation; and (3) the franchisee is required to pay a fee as a condition of operating the franchise.[28] Franchising is particularly common within the fast food, hotel and motel, and convenience store industries, but is not limited to those industries so long as the business fits within franchise law's broad definition of "franchise."[29] In fact, certain business relationships, such as licensing agreements, can fall within the definition of "franchise" if the licensor exerts too much control over the licensee's operations.[30]

It can be useful to think of franchising arrangements as similar to some joint ventures.[31] To start a joint venture, two or more people agree to start a for-profit business, often limited to a single business purpose.[32] A typical joint venture model is one in which a partner provides the business model and intellectual property while the other partner contributes capital and labor.[33] In a franchising arrangement, the franchisor provides the business model and licenses the intellectual property, while the franchisee provides capital, labor, and market knowledge.[34]

Because franchisees are required to pay a (typically substantial) fee to operate a franchise, franchising presents franchisors with an opportunity to experience rapid growth without a significant capital investment.[35] Franchising is advantageous to vertically integrated

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envisioned the wide spectrum of corporate subsidiary arrangements that has arisen in the American economy during the last two decades." (footnote omitted)).

28 16 C.F.R. § 436.1(h) (2024).

29 Ann Hurwitz & David W. Oppenheim, *You Don't Want to Be a Franchise? Structuring Business Systems Not to Qualify as Franchises*, 34 A.B.A. ANN. F. ON FRANCHISING W3, at 12–13 (2011), https://www.americanbar.org/content/dam/aba/publications/franchising_past_meeting_materials/2011/w3.pdf (last visited Jan. 27, 2024).

30 *Id.* at 18.

31 *See, e.g.*, Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 COLUM. BUS. L. REV. 1, 61–64 (drawing a connection between incentive structures in joint ventures and franchises).

32 Hurwitz & Oppenheim, *supra* note 29, at 34 (defining a joint venture as "an association of two or more persons to carry on a single business enterprise for profit").

33 *Id.*

34 *Id.* at 36; *see* Roger D. Blair & Francine Lafontaine, *Understanding the Economics of Franchising and the Laws That Regulate It*, 26 FRANCHISE L.J. 55, 55 (2006).

35 Hurwitz & Oppenheim, *supra* note 29, at 1; *see* Michael Corkery, *Entry to Middle Class or False Promise? Franchises Face Scrutiny*, N.Y. TIMES (May 26, 2023), http://www.nytimes.com/

operations because a franchise arrangement combines the chain's brand recognition and ability to save costs in production, product development, and advertising with an independent entrepreneur's motivation and expertise of the local market.[36] Although franchisors and franchisees do not share revenue equally, the franchisee typically shares revenues with the franchisor from royalties based on the franchisee's revenue.[37]

Franchisors can use the threat of termination to exert significant control over franchisees.[38] Termination of a franchise is detrimental because it requires the franchisee to forfeit the entirety of its initial fees and investments, as well as the present value of future profits.[39] Thus, termination provides a strong incentive for franchisees not to breach the terms of the franchise agreement.

Franchises constitute a considerable portion of the U.S. economy. In 2017, there were 498,234 franchise establishments in the United States, representing 11.4% of all businesses in the industries covered by the 2017 Economic Census Franchise Statistics Report (Franchise Statistics Report).[40] Franchise establishments employed 9.6 million of the 63.3 million workers—about 15%—in the industries covered by the Franchise

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2023/05/26/business/burgerim-ftc-franchise.html [http://perma.cc/DX2S-7L9G] (noting that franchise fees are "typically tens of thousands of dollars").

36 Blair & Lafontaine, *supra* note 34, at 55.

37 Barry M. Block & Matthew D. Ridings, *Antitrust Conspiracies in Franchise Systems After* American Needle, 30 FRANCHISE L.J. 216, 221 (2011).

38 *See* Andrew Elmore, *Regulating Mobility Limitations in the Franchise Relationship as Dependency in the Joint Employment Doctrine*, 55 U.C. DAVIS L. REV. 1227, 1237 (2021) ("By selecting sole proprietors that cannot easily absorb the losses of franchise termination, and by limiting the ability of franchisees to operate independently, franchisors ensure compliance with exhaustive operational standards in franchise agreements.").

39 Blair & Lafontaine, *supra* note 34, at 64.

40 U.S. CENSUS BUREAU, ECONOMIC CENSUS FRANCHISE STATISTICS REPORT (2017) [hereinafter Franchise Statistics Report], https://data.census.gov/table/ECNFRAN2017.EC1700FRAN?y=2017&d=ECN%20Core%20Statistics%20Selected%20Sectors:%20Franchise%20Status%20for%20the%20U.S.%20and%20States&n=N0000.00&nkd=FRANCHISE~001:029 [https://perma.cc/K8Y3-J64R]; Bárbara Zamora-Appel & Nidaal Jubran, *Nearly 300 Industries Offer Franchise Opportunities*, U.S. CENSUS BUREAU (Dec. 1, 2021), http://www.census.gov/library/stories/2021/12/franchising-is-more-than-just-fast-food.html [http://perma.cc/THZ5-L5KR]. The industries covered by the report include construction; manufacturing; retail trade; transportation and warehousing; information; finance and insurance; real estate and rental and leasing; professional, scientific, and technical services; administrative and support, and waste management and remediation services; educational services; health care and social assistance; arts, entertainment, and recreation; accommodation and food services; wholesale; and other services except public administration. Franchise Statistics Report, *supra*. The Franchise Statistics Report does not include mining, utilities, and management of companies and enterprises. Zamora-Appel & Jubran, *supra*; *2017 Economic Census Planned Data Product Releases*, U.S. CENSUS BUREAU, http://www.census.gov/programs-surveys/economic-census/year/2017/economic-census-2017/about/release-schedules.html [http://perma.cc/9VH4-G4T9] (May 16, 2022) (listing industries covered by the 2017 Economic Census).

Statistics Report.[41] According to the report, in 2017, average sales per franchise establishment was $3.5 million, while average sales per nonfranchise establishment was $2.3 million.[42] In May 2022, approximately 3.3 million people were employed by fast food establishments.[43]

C. *The Single-Entity Doctrine*

The single-entity defense is the theory that two alleged conspirators should not be subject to Sherman § 1 because they are, in fact, a single business entity incapable of conspiring with itself.[44] Today, the two most pertinent Supreme Court cases addressing the single-entity defense are *Copperweld Corp. v. Independence Tube Corp.*, which categorized a parent company and its wholly owned subsidiary as a single entity,[45] and *American Needle v. National Football League*, which expanded the single-entity analysis beyond the formal structure of entities engaged in the action at issue.[46]

1. The Early Doctrine and *Copperweld*

In the early twentieth century, the Supreme Court construed Sherman § 1 broadly and entertained Sherman § 1 claims against anticompetitive agreements between parent corporations and commonly owned and controlled companies.[47] Then, in 1984, *Copperweld* heightened the standard for concerted action by holding that a parent corporation and its wholly owned subsidiary were not legally capable of conspiring for the purposes of Sherman § 1 on the ground that the firms enjoyed "a complete unity of interest."[48] Consequently, for Sherman § 1 scrutiny to be warranted after *Copperweld*, the agreement at issue must

41 Franchise Statistics Report, *supra* note 40; Zamora-Appel & Jubran, *supra* note 40.

42 Franchise Statistics Report, *supra* note 40; Zamora-Appel & Jubran, *supra* note 40.

43 *Occupational Employment and Wage Statistics*, U.S. BUREAU OF LAB. STAT., http://www.bls.gov/oes/current/oes353023.htm [https://web.archive.org/web/20240104185558/https://www.bls.gov/oes/current/oes353023.htm] (Apr. 25, 2023).

44 *See* Nathaniel Grow, American Needle *and the Future of the Single Entity Defense Under Section One of the Sherman Act*, 48 AM. BUS. L.J. 449, 451 (2011).

45 Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771–72 (1984).

46 Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195–202 (2010).

47 *See, e.g.*, Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 141–42 (1968) (holding that a parent corporation and its wholly owned subsidiary were capable of conspiring for purposes of Sherman § 1); United States v. Yellow Cab Co., 332 U.S. 218, 229 (1947) (finding that commonly owned and controlled companies were subject to Sherman § 1).

48 *Copperweld*, 467 U.S. at 771.

join together two or more independent decision-makers with conflicting interests.[49]

After *Copperweld*, lower courts were divided about how to handle single-entity defenses, particularly in franchise cases.[50] This was understandable because the *Copperweld* decision, despite being careful not to align choice of corporate structure with the applicability of antitrust laws, relied on corporate structure to hold that wholly owned parent companies and their subsidiaries constitute a single entity.[51] Twenty-six years later, the Court handed down *American Needle*. *American Needle* reframed *Copperweld*'s analysis, requiring courts to resolve single-entity questions by analyzing independence with regard to a specific activity instead of the entities' overall relationship.[52]

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49 *Id.* (holding that, for the purpose of Sherman § 1 scrutiny, there must be "a sudden joining of two independent sources of economic power previously pursuing separate interests").

50 *See, e.g.*, Search Int'l, Inc. v. Snelling & Snelling, Inc., 168 F. Supp. 2d 621, 626 (N.D. Tex. 2001) (holding that franchisors and franchisees are incapable of conspiring for purposes of Sherman § 1 due to a unity of interests), *aff'd*, 31 F. App'x 151 (5th Cir. 2001); St. Martin v. KFC Corp., 935 F. Supp. 898, 906 (W.D. Ky. 1996) (holding that franchisors and franchisees are incapable of conspiring for purposes of Sherman § 1); Williams v. I.B. Fischer Nev., 999 F.2d 445 (9th Cir. 1993) (per curiam) (holding that franchisor and franchisee were incapable of conspiring for the purposes of Sherman § 1). *But see* Blanton Enters., Inc. v. Burger King Corp., 680 F. Supp. 753, 763 (D.S.C. 1988) (although ultimately denying conspiracy claim, holding that plaintiff procured evidence that franchisor and franchisee were acting independently when franchisor denied franchise application pursuant to an opposing franchisee's veto); Trane U.S. Inc. v. Meehan, 563 F. Supp. 2d 743, 751 (N.D. Ohio 2008) (although ultimately not finding an antitrust violation, refusing to conclude that franchisor and franchisee "could not be . . . separate economic entit[ies] capable of conspiring"). *See generally* Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 58 n.8 (1st Cir. 2002) (recognizing that the criteria for determining whether a franchisor and franchisee constitute a "single entity" is "so general and so various . . . as to emphasize the lack of any developed body of law" (first citing *Search Int'l*, 168 F. Supp. 2d 621, 624–26; then citing *St. Martin*, 935 F. Supp. 898 at 906; then citing Hall v. Burger King Corp., 912 F. Supp. 1509, 1548 (S.D. Fla. 1995); and then citing Williams v. I.B. Fischer Nev., 794 F. Supp. 1026, 1030–32 (D. Nev. 1992))).

51 *Copperweld*, 467 U.S. at 772–73 ("Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability."); *see* Chris Sagers, *Why* Copperweld *Was Actually Kind of Dumb: Sound, Fury and the Once and Still Missing Antitrust Theory of the Firm*, 18 VILL. SPORTS & ENT. L.J. 377, 387 (2011) ("*Copperweld*'s heavy criticism of the old intra-enterprise doctrine's 'formalism' is therefore pretty obviously ironic. *Copperweld* itself took as a fundamental premise that a distinction of economic substance can be made to depend on a legal formalism."); Natasha G. Menell, *The* Copperweld *Question: Drawing the Line Between Corporate Family and Cartel*, 101 CORNELL L. REV. 467, 472–73 (2016) ("The *Copperweld* decision reflects a tension between [the] inclination [toward manageable legal standards] and the requirements of antitrust enforceability: the Court cautions that antitrust law should not manipulate the choice of corporate structure.").

52 Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 190–93 (2010) ("[W]e observed that 'corporate interrelationships . . . are not determinative of the applicability of the Sherman Act' because the Act 'is aimed at substance rather than form.'" (alteration in original) (quoting *Yellow Cab*, 332 U.S. at 227)); *see* Benjamin Klein, *Single Entity Analysis of Joint Ventures After* American

2. *American Needle*'s Refined Analysis

In *American Needle*, the Supreme Court was tasked with deciding whether the National Football League's thirty-two teams, whose licensing activities were conducted through a separate corporate entity, could avail themselves of the single-entity defense in a Sherman § 1 case.[53] The teams, each of which possesses distinct intellectual property rights in various trademarks and copyrights, among other things, had entered into a joint venture, National Football League Properties (NFLP), to license said intellectual property.[54] Petitioner American Needle, Inc. sued the National Football League, the teams, and NFLP, alleging that the defendants had violated §§ 1 and 2 of the Sherman Act by granting an exclusive license to Reebok International Ltd. to make and sell headwear for all thirty-two teams and declining to renew American Needle's nonexclusive license.[55]

The teams are competitors in the intellectual property market, making each team an "independent cente[r] of decision making."[56] Because each team constituted an independent decision-maker, decisions by NFLP regarding the teams' intellectual property joined together such independent decision-makers, thus constituting concerted activity for the purposes of Sherman § 1.[57] The Court emphasized that the teams could not evade Sherman § 1 liability by simply joining together to form a legally separate entity to manage their intellectual property.[58] Integral to the *American Needle* decision is the assurance that actors cannot manipulate corporate form to wash their hands clean of Sherman § 1 liability.[59]

American Needle, following *Copperweld*, dictated that the substance of an agreement—that is, whether the agreement brings together independent decision-makers—and not the corporate form,

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Needle*: An Economic Perspective*, 78 ANTITRUST L.J. 669, 674 (2013) ("Consistent with *Copperweld*, *American Needle* makes it clear that antitrust evaluation of a joint venture must separate the analysis of the formation of the joint venture from the analysis of its post-formation joint venture conduct.").

53 *Am. Needle*, 560 U.S. at 187–89.

54 *Id.* at 187.

55 *Id.* at 187–88.

56 *Id.* at 196–97 (alteration in original) (quoting *Copperweld*, 467 U.S. at 769).

57 *Id.* at 200–01.

58 *Id.* at 197.

59 *Id.* at 201 ("If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from [Sherman] § 1, then any cartel 'could evade the antitrust laws simply by creating a "joint venture" to serve as the exclusive seller of their competing products.'" (quoting Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring))).

determines whether an arrangement rises to the level of concerted action.[60] As such, *American Needle* may have marked the end of—or at least severely limited—the single-entity defense for franchisors and franchisees; this is illustrated by the fact that since *American Needle*, almost no district court has entertained single-entity defenses by franchisors and franchisees.[61]

D. Arrington v. Burger King Worldwide

1. Facts and Procedural History

From 2010 until at least late 2018, Burger King's standard franchise agreement included a no-hire agreement, pursuant to which the franchisees agreed not to hire any employees of another Burger King restaurant for at least six months after the employee left employment at another Burger King restaurant.[62] Violating the no-hire agreement is significant; by the terms of the agreement, the violating franchisee must pay all costs and attorneys' fees in any enforcement action, and the Burger King Corporation enjoys unilateral power to terminate the wrongdoer's right to operate its franchise.[63] As explained above, the threat of termination is a strong deterrent for franchisees, considering the significant effort and financial commitment required by franchisees to operate a franchise.[64]

An opportunity arose for the Eleventh Circuit to address the single-entity defense when plaintiffs, former Burger King employees employed

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60 *Id.* at 195–96.

61 *See, e.g.*, Robinson v. Jackson Hewitt, Inc., No. 19-9066, 2019 WL 5617512, at *6 (D.N.J. Oct. 31, 2019) (holding that plaintiffs plausibly pled that defendants and franchisees are separate economic entities for the purposes of Sherman § 1); Yi v. SK Bakeries, LLC, No. 18-5627, 2018 WL 8918587, at *3 (W.D. Wash. Nov. 13, 2018) (finding that franchisor and franchisee are capable of conspiring for purposes of Sherman § 1); *see also* Block & Ridings, *supra* note 37, at 220–21; Michael Iadevaia, *Poach-No-More: Antitrust Considerations of Intra-Franchise No-Poach Agreements*, 35 ABA J. LAB. & EMP. L. 151, 165 (2020) ("While franchises have raised the single-entity defense in current litigation, not a single judge has ratified the defense, perhaps signaling a shift towards embracing a broader, more functionalist view."). Iadevaia's article, of course, does not take into account the district court's decision in *Arrington*. *See infra* Section I.D.1.

62 Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247, 1251 (11th Cir. 2022). Such an agreement is common in the context of franchised businesses. Andrele Brutus St. Val, *No-Hire Provisions in McDonald's Franchise Agreements, an Antitrust Violation or Evidence of Joint Employer?*, 23 EMP. RTS. & EMP. POL'Y J. 279, 280 (2019) ("A recent study found that over half of major franchises include a no-poach clause in their franchise agreements, including those in the healthcare, automotive, and fast food industries.").

63 *Arrington*, 47 F.4th at 1251–52.

64 *See supra* notes 38–39 and accompanying text.

between 2010 and 2018, brought a class action in the Southern District of Florida, alleging that Burger King's no-hire agreements constituted a violation of Sherman § 1.[65] The plaintiffs asserted that the no-hire agreements restricted them from working at other Burger King franchises, resulting in artificially depressed wages, decreased benefits, and a deprivation of job mobility.[66] The district court dismissed the action, accepting Burger King's and its franchisees' single-entity defense.[67] Because the district court found that Burger King and its franchisees constituted a single economic entity, it did not reach the issue as to whether the no-hire agreement constituted an antitrust violation.[68] The Eleventh Circuit disagreed; it reversed the district court's opinion and remanded.[69]

The defendants in this action include Restaurant Brands International, Inc., Burger King Worldwide, Inc., and Burger King Corporation.[70] Restaurant Brands International owns Burger King Worldwide, which, in turn, owns Burger King Corporation.[71] Most Burger King restaurants—all but about fifty franchisor-owned restaurants in Miami—are independently owned by franchisees.[72] To obtain a franchise, a prospective franchisee typically enters into a twenty-year agreement and pays a franchise fee of $50,000; in total, opening a Burger King restaurant requires an investment ranging between $323,000 and $3.1 million.[73] On top of this initial investment, franchisees pay Burger King royalties, which may be as much as 4.5% of gross sales, as well as an "Advertising Contribution" of 4% of gross sales.[74]

In dismissing the action, the trial court focused on the payment of royalties and the payment toward the joint advertising budget, the uniformity of the operations manual, appearance, menu, service and manner of food preparation, training standards, hours of operations, and standardized equipment among the franchises to support its conclusion that Burger King and its franchisees were a single entity, and thus not

65 *Arrington*, 47 F.4th at 1252.

66 *Id.*

67 Arrington v. Burger King Worldwide, Inc., 448 F. Supp. 3d 1322, 1332 (S.D. Fla. 2020), *rev'd*, 47 F.4th 1247 (11th Cir. 2022).

68 *Arrington*, 47 F.4th at 1253.

69 *Id.* at 1255–57; *see infra* Section I.D.2.

70 *Arrington*, 47 F.4th at 1251.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

subject to Sherman § 1.[75] The plaintiffs then appealed to the Eleventh Circuit.[76]

2. The Eleventh Circuit's Review

The Eleventh Circuit disagreed with the trial court and, relying on *American Needle*, concluded that the plaintiffs plausibly pleaded that Burger King and its franchisees were separate entities for the purposes of Sherman § 1.[77] Reviewing the district court de novo, the Eleventh Circuit began by invoking *American Needle*, emphasizing that in *American Needle* the thirty-two National Football League teams and NFLP had removed from the marketplace independent decisions regarding licensing by agreeing to use one exclusive vendor to sell trademarked merchandise for all teams, and had thus exposed themselves to Sherman § 1 scrutiny.[78] The Eleventh Circuit pointed out that, like the National Football League teams and NFLP in *American Needle*, Burger King and its franchises compete against each other—here, for labor.[79] Therefore, similar to the licensing agreement at issue in *American Needle*, the no-hire agreements at issue here removed from the marketplace independent decision-making in the context of hiring decisions, and were thus subject to Sherman § 1 scrutiny.[80]

Instead of focusing on the general abstract independence of the franchisees, as the district court did, the Eleventh Circuit focused its analysis on the activity at issue.[81] Thus, even though the franchisor and franchisees may have *some* common economic interests, the court must consider such common interests in the context of the alleged anticompetitive conduct.[82] Returning to *American Needle*, the court emphasized the fact that, although the National Football League teams

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75 Arrington v. Burger King Worldwide, Inc., 448 F. Supp. 3d 1322, 1330 (S.D. Fla. 2020), *rev'd*, 47 F.4th 1247 (11th Cir. 2022).

76 Plaintiffs' Notice of Appeal at 1, *Arrington*, 448 F. Supp. 3d 1322 (No. 18-cv-24128).

77 *Arrington*, 47 F.4th at 1250.

78 *Id.* at 1250, 1253.

79 *Id.* at 1250. In fact, Burger King's "Franchise Disclosure Document" states that "[o]ther BURGER KING Restaurants may compete with your Restaurant or may affect customer trading patterns." *Id.* at 1253 (alteration in original); *see infra* Section II.C.

80 *Arrington*, 47 F.4th at 1250 ("[T]he No-Hire Agreement, like the exclusive-licensing agreement in *American Needle*, deprives the marketplace of potentially different hiring decisions by each of the separate restaurant owners that they might make in their own economic interests in the absence of the No-Hire Agreement.").

81 *Id.* at 1255–56 ("*American Needle* teaches that the concerted-action inquiry is a focused one, and we do not consider whether actors engage in concerted activity for all purposes; we evaluate only whether the decision or decisions *in question* involved concerted action.").

82 *See id.* at 1255.

had a common interest in NFLP and in the promotion of the National Football League, they compete against each other for ticket sales, fans, managers, and players.[83] The court noted that because the National Football League teams in *American Needle* were not necessarily acting in the common interest of the entire National Football League by licensing their intellectual property to a single corporation, and instead in were acting in the interests of each separate team, the action at issue was exposed to Sherman § 1 liability.[84]

Like the National Football League teams in *American Needle*, Burger King's franchisees enjoy some commonality of interest, such as promotion of the franchisor's enterprise.[85] Nonetheless, the court emphasized that the Burger King franchisees do in fact compete and act to further their individual interests.[86] The Eleventh Circuit listed ways in which Burger King and its franchisees are independent, including that the Burger King restaurants are "independently owned and operated"; there is "no fiduciary relationship between" Burger King and its franchisees; and franchisees must "indicate independent ownership" on public records.[87] Further, the *Arrington* court found that Burger King and its franchisees acted according to their own independent economic interests within the realm of employment decisions.[88] Although the nature of the interest itself may be the same across employers—that is, to hire competent employees who will adequately serve the restaurant and chain—employers compete with each other to hire the best individual employees for their franchise.[89]

The Eleventh Circuit concluded that, because franchisees are entrusted with complete control over their hiring decisions and employee relations, each franchisee is an independent decision-maker with regard to employment agreements for the purposes of antitrust scrutiny.[90]

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83 *Id.*

84 *Id.* at 1255–56 (discussing *American Needle*).

85 *Id.*

86 *Id.* at 1256 ("[T]here's just no question that Burger King and its franchisees compete against each other and have separate and different economic interests.").

87 *Id.* at 1252.

88 *Id.* at 1252–53 ("[E]ach franchisee agrees that it is 'solely responsible for all aspects of the employment relationship with its employees,' and . . . enjoys 'the sole right to hire, discipline, promote, demote, transfer, discharge, and establish wages, hours, benefits, employment policies, and other terms and conditions of employment for its employees without consultation with or approval by [the Corporation].'" (alteration in original) (quoting Burger King's standard franchise agreement)).

89 *See* U.S. DEP'T OF THE TREASURY, THE STATE OF LABOR MARKET COMPETITION 3 (2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf [https://perma.cc/NA9S-JBBA].

90 *Arrington*, 47 F.4th at 1256–57.

Because the no-hire agreements impinged upon franchisees' ability to act as independent decision-makers, they deprived the marketplace of competition, satisfying Sherman § 1's threshold question of concerted action.[91]

Turning to the issue of whether Burger King's restraint on trade was unreasonable, the Eleventh Circuit declined to opine, finding that the issue was best left to the district court in the first instance.[92] Instead, the Court of Appeals limited itself to deciding whether Burger King and its franchisees were subject to Sherman § 1 scrutiny.[93]

II. DISCUSSION

In order to fully review the *Arrington* decision, this Case Note assesses the reasoning of the *American Needle* holding, considers that holding in the context of franchising agreements, and evaluates the role of antitrust law in labor markets. This Case Note then discusses potential impacts of the *Arrington* holding.

A. *In Defense of the* American Needle *Doctrine*

Because of the variety of corporate structures utilized today, it is appropriate for courts to treat Sherman § 1 cases on a case-by-case basis.[94] However, the *American Needle* Court's flexible approach toward determining antitrust liability has been criticized as unworkable because it eliminates clear-cut rules, like the *Copperweld* rule, in favor of abstract concepts, like "independent centers of decisionmaking."[95] As a result,

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91 *Id.*

92 *Id.* at 1257.

93 *Id.* As of March 14, 2024, the case is on remand in the Southern District of Florida.

94 *See* Klein, *supra* note 52, at 688 ("Advances that have been made in antitrust rule of reason analysis over the last thirty years have substantially reduced the organizational distortion costs associated with antitrust law, and *American Needle* should be interpreted in a manner consistent with that trend so as not to preclude the continued reasonable application of the single entity doctrine.").

95 Grow, *supra* note 44, at 479–80 (quoting Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195 (2010)) (arguing that, in the case of major publicly traded corporations that are owned and controlled by multiple individuals who may be competitors in some market or industry, *American Needle* provides insufficient guidance as to when the concerted activity amounts to a Sherman § 1 conspiracy).

critics say, *American Needle* fails to provide guidance to courts as to what constitutes concerted or independent action.[96]

This argument is misplaced, however, since analytical flexibility, instead of clear-cut rules, is necessary to account for the nuances of modern business relationships.[97] Because franchisees may be independent from franchisors and other franchisees within certain markets, such as labor, but united on other fronts, such as intellectual property, granting courts flexibility better equips them to stay true to the intent of the Sherman Act—to preserve competitive markets—when applying the Act to franchises or other joint ventures.[98]

B. American Needle *Applies to Franchise Cases*

We now turn to whether *American Needle*, a case about joint ventures, applies to cases involving franchisors and franchisees. The answer is a resounding yes. First, as explained above, franchising arrangements are similar to some joint venture arrangements.[99] Second, *American Needle* itself highlighted that the single-entity defense does not depend on the formal business structure of the alleged conspiring parties but rather the activity at issue.[100] Thus, there is no reason to limit the *American Needle* holding to exclude franchising arrangements.

American Needle held that a common interest in promoting the National Football League did not bring the teams together as a single entity within the market for trademarked headwear.[101] In the same vein, although franchisees and franchisors have a shared interest in promoting the franchise brand, this broad interest is insufficient to remove

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96 *See, e.g.*, *id.* at 479–81 (criticizing the *American Needle* decision for "failing to fully appreciate the unique nature of cooperation necessary among teams in a professional sports league as well as for overstating the extent to which NFL teams compete with one another economically").

97 *See* Suzanne E. Wachsstock & Erika L. Amarante, *Antitrust and Franchising: Conspiracies Between Franchisors and Franchisees Under Section I*, 23 FRANCHISE L.J. 7, 7 (2003) ("A properly thoughtful determination of the limits of antitrust liability in franchising is necessarily a highly fact-intensive one, which requires an appreciation of the scope of the franchise relationship, the business justifications for the alleged restraint, and an understanding of what 'hat' the franchisor is wearing when it imposes particular restrictions upon its franchisees."); *see also supra* Section I.B. This point is underscored by the fact that lower courts were divided in applying the single-entity doctrine post-*Copperweld*. *See supra* note 50 and accompanying text.

98 *See supra* Sections I.A–I.B; *see also* Hiba Hafiz, *The Brand Defense*, 43 BERKELEY J. EMP. & LAB. L. 1, 39–40 (2022).

99 *See supra* notes 31–34 and accompanying text.

100 *Am. Needle*, 560 U.S. at 195–96.

101 *See id.* at 198.

franchisors and franchisees from the purview of Sherman § 1 within labor markets.[102]

Here, absent the no-hire agreement, the franchisees would actually compete against each other for labor.[103] The Burger King Franchise Disclosure Document (Document) expressly states that franchisees may compete against each other.[104] The Document also states that franchisees do not enjoy exclusive or protected territory.[105] Since the characteristics and skill levels of employees impact the quality of food and customer experience, and since such factors impact individual restaurants' profitability, franchisees undoubtedly want better employees than their competitor franchisees—even if those competitors belong to the same chain.[106] In fact, the skills accrued by an employee at one Burger King franchise are best transferred to another Burger King restaurant as opposed to a different fast food chain, since franchisees are bound to a prescribed business model.[107] Franchisees thus have a strong incentive to seek out employees with work experience at another Burger King restaurant.[108] Therefore, absent the no-hire agreements, franchisees would compete against each other not only for employees generally, but for employees *with Burger King experience*.[109] In this way, the no-hire agreements violate Sherman § 1 by preventing franchisees from making competitive hiring decisions.[110]

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102 Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247, 1255–56 (11th Cir. 2022).

103 *Id.* at 1253.

104 *Id.* at 1256.

105 *Id.* at 1253.

106 *See* Hisham Makki Hanafi & Siddig Balal Ibrahim, *Impact of Employee Skills on Service Performance*, 7 INT'L J. SCI. & RSCH. 587, 591–92 (2018) (finding that employee skill level has a "direct and positive impact on" customer service); INT'L LAB. OFF., A SKILLED WORKFORCE FOR STRONG, SUSTAINABLE AND BALANCED GROWTH: A G20 TRAINING STRATEGY 4–5 (2010), https://www.oecd.org/g20/summits/toronto/G20-Skills-Strategy.pdf [https://perma.cc/HV8Z-AMLM] ("A rich literature exists on the links between education, skills, productivity, and economic growth. Estimates for European countries show that a 1 per cent increase in training days leads to a 3 per cent increase in productivity, and that the share of overall productivity growth attributable to training is around 16 per cent.").

107 *See* Herbert Hovenkamp, *Competition Policy for Labour Markets* 12 (Inst. for L. & Econ., U. of Pa. L. Sch., Research Paper No. 19-29, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3421036 [https://web.archive.org/web/20220707092759/https://one.oecd.org/document/DAF/COMP/WD(2019)67/en/pdf] ("As a general matter franchising is developed in order to create a system where all the stores of a particular franchisor are more or less the same. As a result, one would not expect to find that a particular franchisee . . . had trade secrets or specialised training that was not communicated to all franchisees.").

108 *See id.*

109 *See id.*

110 *Arrington*, 47 F.4th at 1256.

C. *Sherman and Labor Antitrust*

While *American Needle* instructs courts to consider the activity at issue to determine the availability of the single-entity defense, the *Arrington* court overlooked whether the activity at issue—labor—was one that antitrust law seeks to address. Courts especially struggle when applying Sherman § 1 to labor market cases like *Arrington* because antitrust doctrine is unclear as to how to weigh anticompetitive effects in the labor market against benefits to consumers in product markets.[111]

Sherman § 1 applies to anticompetitive conduct in labor markets with the same force as it applies in product markets.[112] The Sherman Act's legislative history demonstrates that the drafters were focused on protecting competition, not the competitors themselves.[113] This congressional concern with protecting competition suggests that anticompetitive conduct cannot be permitted simply because it has a competitive benefit to the actors engaged in the conduct.[114] Therefore, although labor restraints may help to reduce labor costs for franchisees, such restraints are nonetheless the kind of anticompetitive conduct that the Sherman Act seeks to deter.[115]

It is also widely accepted that courts have the power to define the scope of Sherman § 1.[116] Therefore, courts are free to apply the Sherman

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111 Hafiz, *supra* note 98, at 37 ("Courts rarely adjudicate Sherman Act section 1 and section 2 labor market cases, and the emerging case law is incoherent in trying to square antitrust law's consumer welfare focus with worker welfare."); Eugene K. Kim, Note, *Labor's Antitrust Problem: A Case for Worker Welfare*, 130 YALE L.J. 428, 434–35 (2020) ("Worker rights under the antitrust laws have received more attention recently, particularly within the context of labor monopsony, or concentration in labor demand; but there is no judicial, political, or scholarly consensus around how or whether regulators should consider the welfare of workers when conducting antitrust analysis." (footnotes omitted)); *see infra* Section II.C.3.

112 Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1365 (2020) ("[Sherman § 1] applies to agreements to restrain competition in labor markets in the same way as it applies to product markets."); *see also* Hovenkamp, *supra* note 107, at 7 ("Just as antitrust law distinguishes price fixing from various joint purchasing and selling activities on the sell side of the market, it needs to develop similar distinctions respecting the purchase of labour.").

113 Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) ("Taken as a whole, the legislative history [of the Sherman Act] illuminates congressional concern with the protection of competition, not competitors . . . ."); *see* Kim, *supra* note 111, at 439–40.

114 *See* Am. Needle Inc. v. Nat'l Football League, 560 U.S. 183, 198 (2010) ("[I]llegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties.").

115 *See* Marinescu & Posner, *supra* note 112, at 1365.

116 Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."); *see* Kimble v.

Act and other antitrust laws to regulate labor markets.[117] Further, the application of Sherman § 1 to labor markets comports with *Copperweld*'s and *American Needle*'s proclamations that courts should focus on substance when assessing whether an entity is engaging in concerted or independent action.[118] The evolution of Sherman § 1 jurisprudence thus instructs that Sherman § 1 be interpreted flexibly, not rigidly.[119]

1. A Consumer Welfare Standard Supports Application of Antitrust Law to Labor Markets

Consumer welfare is widely accepted as the Sherman Act's primary purpose,[120] despite criticism by some scholars that the consumer welfare standard interferes with corporate efficiency.[121] Even accepting that the Sherman Act's primary concern is consumer welfare, antitrust enforcement against anticompetitive labor practices is consistent with such concerns.[122] Competition among employers benefits consumers

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Marvel Ent., LLC, 576 U.S. 446, 461 (2015) ("Congress . . . intended [Sherman § 1]'s reference to 'restraint of trade' to have 'changing content,' and authorized courts to oversee the term's 'dynamic potential.'" (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731–32 (1988))); United States v. Am. Tobacco Co., 221 U.S. 106, 181 (1911) (finding that the generic nature of Sherman § 1's prohibitions against combinations in restraint of interstate or foreign trade or commerce "embrace[s] every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed"); *see also* Smith, *supra* note 18, at 1227–33.

117 *See, e.g.*, Marinescu & Posner, *supra* note 112, at 1365–66.

118 *Am. Needle*, 560 U.S. at 195 ("[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))).

119 *See Kimble*, 576 U.S. at 461.

120 *See, e.g.*, Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966) ("To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction."); Hovenkamp, *supra* note 107, at 2.

121 *See* Caroline C. Corbitt, *Monopsony and Its Impact on Wages and Employment: Past and Future Merger Review*, COMPETITION, Fall 2019, at 34, 41 ("At a minimum, the consumer welfare standard weighs purported 'efficiencies' from a merger such as lower production costs against predicted impact on consumer welfare (*i.e.*, consumer pricing)."); Hovenkamp, *supra* note 107, at 2; Alan Devlin & Bruno Peixoto, *Reformulating Antitrust Rules to Safeguard Societal Wealth*, 13 STAN. J.L. BUS. & FIN. 225 (2008) (arguing for an "aggregate welfare standard" instead of a consumer-focused standard). Former Solicitor General Robert Bork himself acknowledges that Congress did not intend for the Sherman Act to interfere with business efficiency. *See* Bork, *supra* note 120, at 12.

122 *See* Hovenkamp, *supra* note 107, at 2–3 ("Under perfect competition on both sides of the market, each worker receives the marginal value of his or her production. In a very important sense, the fortunes of consumers and the fortunes of labour are linked together.").

because labor market competition may lead to higher output of goods and services, resulting in lower prices for consumers.[123]

Labor antitrust is simply an issue of monopsony—that is, a firm's power as a single buyer of labor, which enables it to suppress the wages of its workers.[124] A firm's monopsony power is limited where workers have employment alternatives.[125] Although the franchisees in *Arrington* are not pure monopsonists, monopsonistic competition is nonetheless implicated.[126] The no-hire agreements at issue in *Arrington* do not prevent employees from seeking jobs at all fast food restaurants, but the employees are still subject to considerable mobility restraints, as they may have good reasons to prefer working at another Burger King franchise instead of a different fast food chain.[127] For example, an employee at a Burger King restaurant may prefer the franchisor's operating model, but may disagree with a specific Burger King franchise's management, and thus may want to work at a different Burger King franchise. As emphasized in the complaint in *Arrington*, it is important for employees of a fast food chain to be able to transfer to another franchise within the same chain because that is where their skills will be most valuable.[128] Moreover, when an employee moves to a different fast food chain, they typically must start in an entry level role with entry level pay.[129]

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123 ANTITRUST DIV., DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 2 (2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/53VJ-CWFG]; Hovenkamp, *supra* note 107, at 2.

124 U.S. DEP'T OF THE TREASURY, *supra* note 89, at 3; *see* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS 41 (2010) ("Pure monopsony is the demand-side analog of monopoly. Just as a monopolist is a single seller, the monopsonist is a single buyer. In the same sense that a monopolist has market power in selling its output, the monopsonist has buying power in purchasing some of its input requirements. The economic objections to monopoly and monopsony are similar: The exercise of market power reduces social welfare.").

125 U.S. DEP'T OF THE TREASURY, *supra* note 89, at 3.

126 *See id.* at 5 ("An example of a monopsonistically competitive labor market might be a city with many restaurants. Though there might be many restaurants employing chefs, they are not identical. A chef has skills that can be used in a multitude of restaurants, but this does not mean the chef is indifferent to where they are employed. Some restaurants may provide a more suitable menu, have better or more predictable work schedules, or be more conveniently located. In this case, the chef may be willing to accept a discounted wage to work at a particular restaurant, giving that restaurant some degree of market power.").

127 *See* Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247, 1251–52 (11th Cir. 2022).

128 Class Action Complaint ¶ 43, Arrington v. Burger King Worldwide, Inc., 448 F. Supp. 3d 1322 (S.D. Fla. 2018) (No. 18-cv-24128), 2018 WL 4897041; *see* Hovenkamp, *supra* note 107, at 12; Marinescu & Posner, *supra* note 112, at 1385–88; *see also supra* notes 106–09 and accompanying text.

129 Class Action Complaint, *supra* note 128, ¶ 43; *see* Marinescu & Posner, *supra* note 112, at 1385–86.

Like monopoly power, the exercise of monopsony power has a detrimental effect on social and consumer welfare.[130] Because monopsony power can reduce output, when a firm has market power and a labor monopsony, the resulting suppressed wages may not translate to lower prices for consumers.[131] Further, as highlighted by the complaint, by limiting labor market competition for Burger King employees, the no-hire agreements disincentivize Burger King franchises from investing in training workers to improve the franchise's food, working conditions, customer experience, and service.[132] Like price, the quality of goods and services is linked to consumer welfare.[133] Thus, the consumer welfare rationale supports using antitrust law to deter anticompetitive labor practices.[134]

2. Recent Federal Government Activity Indicates Growing Support for Labor Antitrust

Recently, the Biden administration has taken aggressive steps toward antitrust enforcement, filing an unprecedented amount of antitrust suits to block deals that are allegedly harmful to consumers and workers.[135] In an executive order, President Biden encouraged the Chair of the FTC to exercise its rulemaking authority to stifle the use of

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130 *See* BLAIR & HARRISON, *supra* note 124, at 48 ("[M]onopsony power is to the demand side of a market what monopoly is to the selling side."); Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1510 (2013) ("The monopsonist can . . . reduce the quality of products it purchases and the amount of innovation that an otherwise competitive market would foster.").

131 *See* BLAIR & HARRISON, *supra* note 124, at 46–48. Blair and Harrison explain that the marginal cost curve of a monopsonist is higher than the marginal cost curve of a competitor in the labor market. *Id.* at 46. Since marginal cost drives output decisions, "the monopsonist will actually reduce its output below the level that a seller without monopsony power would select." *Id.* at 46–47. The authors further explain that, "[i]n fact, when the monopsonist has market power in its output market, the reduced input prices clearly translate into *higher* output prices." *Id.* at 48; *see also* Kim, *supra* note 111, at 447 ("[W]hile monopsony decreases wages, it increases the firm's effective marginal cost of labor, which will tend to increase consumer prices.").

132 Class Action Complaint, *supra* note 128, ¶ 63.

133 *See* Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995) (holding that anticompetitive behavior does not invoke the Sherman Act until it impacts consumer welfare, meaning that "it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality" (citing Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993))).

134 *See* Kim, *supra* note 111, at 446.

135 Leah Nylen, *DOJ Antitrust Losses in Court Are Seen as Setback for Biden's Merger Crackdown*, BLOOMBERG (Oct. 26, 2022, 8:00 AM), https://www.bloomberg.com/news/articles/2022-10-26/three-antitrust-losses-in-court-seen-as-setback-to-biden-clampdown-on-mergers [https://archive.is/8psLv].

noncompete clauses and other agreements that restrict worker mobility.[136] This is consistent with the Department of Justice's (DOJ) and the FTC's guidance to human resource professionals from 2016, instructing them to avoid entering into restrictive agreements relating to employment terms with competing firms.[137] In fact, the FTC has recently proposed a complete ban on noncompete agreements.[138] Further, Congress has enacted "industry-specific fair competition . . . laws" that, consistent with the aims of the Sherman Act, instruct executive agencies to protect competition in a number of ways.[139]

The federal government's focus on labor antitrust builds upon the existing antitrust principle that antitrust law exists to protect buyers and sellers.[140] Biden's executive order emphasized the connection between a competitive marketplace and worker welfare.[141] Furthermore, the DOJ and Department of Labor have agreed to protect workers from unfair collusion between employers that negatively impacts labor markets and worker mobility.[142] The DOJ, in a 2016 blog post, explicitly stated that

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136 Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021) [hereinafter Biden Executive Order].

137 ANTITRUST DIV., DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 123, at 3.

138 Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), http://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition [http://perma.cc/ZN96-EJ2R].

139 Biden Executive Order, *supra* note 136, § 2(d), at 36989 (charging agencies with protecting competition by: "(i) policing unfair, deceptive, and abusive business practices; (ii) resisting consolidation and promoting competition within industries through the independent oversight of mergers, acquisitions, and joint ventures; (iii) promulgating rules that promote competition, including the market entry of new competitors; and (iv) promoting market transparency through compelled disclosure of information").

140 *See* Press Release, U.S. Dep't of Just., Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster, (Nov. 2, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon [https://perma.cc/BD26-777E] ("Courts have long recognized that the antitrust laws are designed to protect both buyers and sellers of products and services, including, as relevant here, authors who rely on competition between the major publishers to ensure they are fairly compensated for their work. As the complaint makes clear, this merger will cause harm to American workers, in this case authors, through consolidation among buyers—a fact pattern referred to as 'monopsony.'").

141 *See* Biden Executive Order, *supra* note 136, § 1, at 36987 ("[A] competitive marketplace creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage.").

142 Press Release, U.S. Dep't of Just., Departments of Justice and Labor Strengthen Partnership to Protect Workers (Mar. 10, 2022), https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers [https://perma.cc/4TTJ-LPBE].

antitrust laws protect labor competition.[143] The DOJ's Antitrust Division and the FTC have asserted that restraints on labor are just as harmful to competition as price fixing or agreements to allocate customers.[144]

Significantly, the DOJ cited labor market concerns when blocking Penguin Random House's merger with Simon & Schuster; it placed an emphasis on author earnings instead of harm to consumers, thus marking a change in how the federal government approaches antitrust law.[145] In the government's view, because the proposed merger would result in fewer publishers contending for books at auctions, authors' compensation would drop, thus threatening competition in the market.[146]

3. Conduct That Is Pro-Competitive in Product Markets, but Anticompetitive in Labor Markets

An issue arises when labor constraints may have the effect of *increasing* competition among firms in the products market.[147] Such instances beg the question: When conduct is both procompetitive in the products market but anticompetitive in the labor market, which side does antitrust law favor?

This tension could be resolved by focusing on the party alleging injury in a particular case; in labor antitrust cases, this would be the laborers.[148] Because workers, who are sellers of labor, are injured by exercises of monopsony power in a similar way that buyers are injured by the exercise of monopoly power, and because deterring monopsony power is within the ambit of Sherman § 1, courts should strike down

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143 Renata B. Hesse, *Protecting Our Nation's Workforce Through Antitrust*, U.S. DEP'T OF JUST. (Oct. 20, 2016), http://www.justice.gov/archives/opa/blog/protecting-our-nations-workforce-through-antitrust [http://perma.cc/H7QW-9S47].

144 ANTITRUST DIV., DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 123, at 4.

145 Alexandra Alter & Elizabeth A. Harris, *Judge Blocks a Merger of Penguin Random House and Simon & Schuster*, N.Y. TIMES (Oct. 31, 2022), http://www.nytimes.com/2022/10/31/books/penguin-random-house-simon-schuster.html [https://web.archive.org/web/20231129112225/http://www.nytimes.com/2022/10/31/books/penguin-random-house-simon-schuster.html].

146 *Id.*

147 *See* Robert H. Jerry, II & Donald E. Knebel, *Antitrust and Employer Restraints in Labor Markets*, 6 INDUS. RELS. L.J. 173, 182 (1984). Robert Jerry & Donald Knebel present an example where firm *A* in city *X* and firm *B* in city *Y* compete in the same product market, but firm *A* and firm *B* draw from different labor markets in their respective cities. When the cost of labor rises in firm *A*'s market, but remains stable in firm *B*'s market, firm *A* may conspire with other firms in city *X* to fix the cost of labor, allowing firm *A* to maintain current product prices and remain competitive with firm *B*. *Id.*

148 *See* Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 77–81 (2019).

monopsonistic practices where such practices are alleged, regardless of downstream effects on eventual consumers.[149]

D. *Impact of the* Arrington *Decision*

Noncompete agreements are common and frequently apply to low-wage workers, suggesting that employers use noncompete agreements to exploit their labor power.[150] By nature, fast food employees have limited mobility, which could lead to suppressed wages.[151] Considering the drastic consequences of labor constraints in the context of low-wage workers, it is important for aggrieved employees to have an avenue to recover damages under antitrust law.[152] The consequences of antitrust violations can be severe, including criminal fines, civil liability, and even jail time,[153] and they serve as an effective deterrent for employers who may engage in anticompetitive conduct, like the no-hire agreements in *Arrington*. Antitrust enforcement against restrictive labor agreements is now more important than ever, considering that the COVID-19 pandemic saw a decrease in workplace oversight by the labor regulatory agencies.[154] Thus, it is important for the private enforcement of antitrust law to fill in the gaps left by the underenforcement of the labor laws.[155]

1. Private Enforcement of Intra-Franchise Noncompete Agreements

At a quick glance, the FTC's recent proposed blanket ban on noncompete agreements seems to render the *Arrington* decision

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149 *See id.* at 78–79; Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 703 (7th Cir. 2023) ("One problem with [treating no-hire agreements as ancillary restraints] is that it treats benefits to consumers (increased output) as justifying detriments to workers (monopsony pricing). That's not right; it is equivalent to saying that antitrust law is unconcerned with competition in the markets for inputs . . . ."); Hafiz, *supra* note 98, at 40 ("[By favoring consumer over worker welfare], courts have ignored the empirical literature on the employer power effects and labor market harms of non-competes."); *see also supra* note 113.

150 Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 544–46 (2018).

151 *See* Elmore, *supra* note 38, at 1238–39.

152 *See* Hiba Hafiz, *Labor Antitrust's Paradox*, 87 U. CHI. L. REV 381, 382–83 (2020) ("[U]nlike labor and employment law, labor antitrust is uniquely positioned to challenge industry-wide wage suppression; suing multiple employers is increasingly challenging in work law as a statutory, doctrinal, and procedural matter."). *But see* Elmore, *supra* note 38, at 1240 ("[I]t remains unclear whether antitrust law, employment law, or employment discrimination law can reach other employer practices that restrain mobility in ways that harm workers.").

153 Hesse, *supra* note 143.

154 *See* U.S. DEP'T OF THE TREASURY, *supra* note 89, at 36–37.

155 *See infra* Section II.D.1.

insignificant.[156] However, industry groups question the FTC's authority to implement such a sweeping ban on noncompete agreements.[157] Moreover, the Supreme Court has proven increasingly hostile toward broad exercises of agency power.[158] If the Supreme Court curtails the FTC's authority to regulate noncompete agreements, private enforcement would be crucial to remedy their anticompetitive harm.[159] Private enforcement can be an effective deterrent to anticompetitive conduct because successful plaintiffs in antitrust actions can recover treble damages and the cost of litigation, including attorneys' fees.[160]

The decision in *Arrington* is noteworthy because it solidified an avenue for aggrieved low-wage employees to challenge franchisor- and franchisee-imposed labor constraints under Sherman § 1.[161] In such labor market cases, an employee may allege that their employer injured them by entering into anticompetitive agreements with other employers that resulted in depressed wages.[162] First, restrictive employment agreements limit workers' abilities to seek higher-paying work, which reduces their bargaining and earning power.[163] Additionally, noncompete agreements, like those in *Arrington*, create a "'lock-in' effect," wherein workers experience limited job mobility and flat wages.[164]

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156 *See* Press Release, Fed. Trade Comm'n, *supra* note 138; *see also* Dan Papscun, *FTC Expected to Vote in 2024 on Rule to Ban Noncompete Clauses*, BLOOMBERG L. (May 10, 2023, 4:32 PM), http://news.bloomberglaw.com/antitrust/ftc-expected-to-vote-in-2024-on-rule-to-ban-noncompete-clauses [https://perma.cc/X78S-JGTZ].

157 Papscun, *supra* note 156.

158 Andrew Chung & John Kruzel, *Federal Agency Powers in the Crosshairs at the US Supreme Court*, REUTERS (July 5, 2023, 6:08 PM), http://www.reuters.com/legal/federal-agency-powers-crosshairs-us-supreme-court-2023-07-04 [https://perma.cc/G2PN-XHEN]; Dan Papscun & Robert Iafolla, *Worker Noncompete Ban Proposal Promises FTC Authority Fight*, BLOOMBERG L. (Jan. 5, 2023, 5:38 PM), http://news.bloomberglaw.com/antitrust/legal-challenges-loom-for-ftcs-proposed-worker-noncompete-ban [http://perma.cc/24YG-GA4M].

159 *See* Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 907 (2008) ("Indeed, private litigation actually does a better job than the government in advancing the primary goal of the government's enforcement program: deterring illegal corporate behavior.").

160 *See* 15 U.S.C. § 15(a).

161 Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247, 1254 (11th Cir. 2022) (discussing Sherman § 1's requirement of concerted action); *id.* at 1250 (holding that Burger King and its franchisees may be separate entities in the context of employment decisions); *see* Lande & Davis, *supra* note 159, at 907.

162 Jerry, II & Knebel, *supra* note 147, at 180 ("The employee might allege that an employer has engaged in concerted activity with other employers to stabilize wages and that this activity has caused the employee's wages to be depressed. This allegation would typically be directed at a group of employers that compete for a particular supply of labor.").

163 U.S. DEP'T OF THE TREASURY, *supra* note 89, at 13.

164 *Id.* at 16 (quoting Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan & Evan Starr, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers* 10 (Ctr. For Econ. Stud., U.S. Census Bureau, Working

To illustrate, consider the scenario where an independently owned Burger King franchise in one part of a city competes with another independently owned Burger King franchise in the same city for the labor of a particular, highly competent and experienced line chef. Without the labor constraint at issue in *Arrington*, the line chef would be free to leverage their experience and competency for higher wages or more favorable employment terms.[165] Instead, the employee is predestined by an agreement—to which they were not a party[166]—to suffer depressed wages and decreased mobility.[167] Thus, the employee has suffered an injury due to the no-hire agreement.[168]

Private enforcement would be toothless if franchisees and franchisors could avail themselves of the single-entity defense. As explained above, franchised businesses constitute a large portion of the U.S. economy and workforce.[169] Further, it is worth noting that weak labor markets for low-wage jobs primarily impact women and workers of color, who comprise a large share of low-wage workers.[170] Accordingly, it is important that the Sherman Act provides protections for low-wage workers against unreasonable labor restraints.[171]

The *Arrington* decision provides sound precedent, supported by solid Supreme Court reasoning, for the proposition that franchisees and franchisors are separate entities within labor markets for the purpose of Sherman § 1.[172] Considering that the other circuits are also bound by *American Needle*, it is plausible that they will follow the Eleventh Circuit in holding that franchises cannot cite the single-entity defense to justify intra-franchise noncompete agreements.[173]

Paper No. CES-17-09, 2017), https://www2.census.gov/ces/wp/2017/CES-WP-17-09.pdf [https://perma.cc/3MUR-EP3J]).

165 *See id.* at 15–16.

166 *See, e.g.*, Class Action Complaint, *supra* note 128, ¶ 15; *see also* Jason Hartley & Fatima Brizuela, *The Complexities of Litigating a No-Poach Class Claim in the Franchise Context*, COMPETITION, Fall 2019, at 1, 11.

167 *See* U.S. DEP'T OF THE TREASURY, *supra* note 89, at 16.

168 *See* Elmore, *supra* note 38, at 1238.

169 *See supra* Section I.B.

170 U.S. DEP'T OF THE TREASURY, *supra* note 89, at ii.

171 *See* Brutus St. Val, *supra* note 62, at 280 ("Economists have found these [no-poach] clauses have a detrimental effect on low-wage employees in the franchising industry.").

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

173 *See, e.g.*, Grow, *supra* note 44, at 494–95.

2. The No-Hire Agreements Should Not Be Upheld Under Any Standard of Review

There are three standards of review for Sherman § 1 claims: per se, rule of reason, and quick-look.[174] The per se standard, as the name suggests, is a bright-line rule deeming certain conduct to be automatically illegal.[175] Per se liability typically attaches to agreements between horizontal competitors, such as price-fixing and market allocation agreements, that "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit."[176]

The rule of reason, on the other hand, commands the court to consider the totality of the circumstances and weigh the procompetitive effects of an agreement against its restraints on competition.[177] The rule of reason standard is typically applied to vertical agreements—those restraining trade between different levels of distribution—such as loyalty discounts and exclusive dealing.[178] The more lenient treatment of vertical restraints is justified on the ground that vertical integration by contract is sometimes more efficient than vertical integration by ownership.[179] Further, vertical agreements are typically seen as less harmful to competition than horizontal agreements.[180]

Finally, the quick-look standard is a species of the rule of reason that requires the defendant to promulgate a justification for the conduct at

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174 Hartley & Brizuela, *supra* note 166, at 2.

175 *Id.*

176 State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (citing N. Pac. Ry. Co. v. United States, 356 U.S. 1 (1958)); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8 (1979) ("[A]greements among competitors to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the *per se* category."); Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49 (1990) (discussing how horizontal market allocations are per se illegal); *see* United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) (defining horizontal market allocation as "an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition"); *see also* Hartley & Brizuela, *supra* note 166, at 2; Zachary C. Flood, *Antitrust Enforcement in the Developing E-Book Market: Apple, Amazon, and the Future of the Publishing Industry*, 31 BERKELEY TECH. L.J. 879, 884 (2016).

177 Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978). The rule of reason evaluates competitive effect "by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *Id.* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007); *see* Flood, *supra* note 176, at 879–80 (defining the rule of reason as "a probing analysis of a given agreement's procompetitive and anticompetitive potential"); Hartley & Brizuela, *supra* note 166, at 2.

178 *Leegin Creative Leather Prods., Inc.*, 551 U.S. at 882 (holding that vertical price restraints are to be judged by a rule of reason analysis); *State Oil*, 522 U.S. at 7 (holding that vertical price fixing is no longer subject to per se liability); *see* Hartley & Brizuela, *supra* note 166, at 2; Flood, *supra* note 176, at 884.

179 Hafiz, *supra* note 98, at 33.

180 *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–58 (1977).

issue before the court fully assesses the competitive impact of the conduct.[181] Quick-look analysis applies "when the great likelihood of anticompetitive effects can easily be ascertained."[182]

The *Arrington* court declined to opine as to which level of scrutiny should apply to the no-hire agreements or how they should be adjudged under such scrutiny.[183] Regardless of the level of scrutiny applied, the agreements are so anticompetitive that they could not survive even the forgiving rule of reason.[184] Historically, since franchisors and franchisees enjoyed single-entity status, agreements between them were considered vertical, and, as such, were subject to the lenient rule of reason or quick-look analysis.[185] In fact, although the DOJ had previously announced an intent to prosecute all no-hire agreements as per se illegal,[186] in 2019 they backpedaled with regard to intra-franchise no-hire agreements.[187] Since the *Arrington* decision restricts franchisors' and franchisees' ability to rely on the single-entity defense in the context of labor decisions, labor restraints between franchisors and franchisees should be reconceived as horizontal restraints on trade, which would weigh in favor of per se illegality.[188]

But even under a rule of reason or quick-look analysis, the no-hire agreements should not be upheld. Generally, to be upheld, a noncompete

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181 Hartley & Brizuela, *supra* note 166, at 2–3.

182 Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999) (first citing Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1020 (10th Cir. 1998); then citing Chi. Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 674–76 (7th Cir. 1992); and then citing United States v. Brown Univ., 5 F.3d 658, 677–78 (3d Cir. 1993)).

183 Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247, 1257 (11th Cir. 2022).

184 *Cf.* Hesse, *supra* note 143 ("Going forward, the division intends to criminally investigate naked no-poaching or wage-fixing agreements unrelated or unnecessary to a larger legitimate collaboration between employers. These types of agreements eliminate competition in the same irredeemable way as agreements among competitors to fix the prices of goods or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct.").

185 John A. Capobianco, Note, *In Restraint of Wages: The Implications of "No-Poaching" Agreements*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419, 421 (2019); *see* Hafiz, *supra* note 98, at 37.

186 ANTITRUST DIV., DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 123, at 3 ("Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws.").

187 Hartley & Brizuela, *supra* note 166, at 4.

188 *See id.* at 5–11; Capobianco, *supra* note 185, at 421 (emphasizing the horizontal effects of franchise no-poaching agreements on employees); *see also* FED. TRADE COMM'N & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 3 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [https://perma.cc/C2RE-4RVS] ("Certain types of agreements are so likely to harm competition and to have no significant procompetitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects.").

agreement must relate to a significant lawful business purpose and be reasonably limited in scope.[189] Such agreements are acceptable to courts when the employee is in a position to obtain valuable personal contacts or trade secrets.[190] The reasonableness of noncompete agreements is further examined with respect to duration and territory.[191]

First, the no-hire agreements in *Arrington* made no reference to territory, and thus are likely too broad to survive a rule of reason analysis.[192] Second, the six-month duration of the no-hire agreement is arbitrary and likely does not serve a reasonable business purpose.[193] Considering that franchisees are typically bound to follow a uniform system of operations, there are likely no legitimate trade secrets between franchisees that justify labor restraints like those in *Arrington*.[194]

Furthermore, although the no-hire agreements at issue in *Arrington* allow employees to obtain employer consent to work at a competing franchise or wait six months before transferring,[195] they nonetheless unreasonably restrain employee mobility. First, franchisees have little incentive to consent to an employee transfer, because they would either lose a good employee or be forced to offer higher wages as an incentive to stay.[196] Second, fast food employees are low-wage workers and may experience significant financial hardship if they are unemployed for six months.[197]

Although rule of reason treatment of noncompete agreements is favorable to employers because defendants in such cases invoke the

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189 *See, e.g.*, Nationwide Mut. Ins. Co. v. Cornutt, 907 F.2d 1085, 1087 (11th Cir. 1990); Celtic Maint. Servs., Inc. v. Garrett Aviation Servs., LLC, No. CV 106-177, 2007 WL 4557775, at *4 (S.D. Ga. Dec. 21, 2007); Pactiv Corp. v. Menasha Corp., 261 F. Supp. 2d 1009, 1013 (N.D. Ill. 2003).

190 *See supra* note 189.

191 *See, e.g.*, Eichorn v. AT&T Corp., 248 F.3d 131, 145–46 (3d Cir. 2001); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 267 (7th Cir. 1981).

192 *See Pactiv Corp.*, 261 F. Supp. 2d at 1014 (holding that a blanket ban on hiring with no geographic limitation is unreasonable); Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 704 (7th Cir. 2023) ("Why did the [no-poach] clause have a national scope, preventing a restaurant in North Dakota from hiring a worker in North Carolina, when the market for restaurant jobs is local?").

193 *See* Club Props., Inc. v. Atlanta Offs.-Perimeter, Inc., 348 S.E.2d 919, 922 (Ga. Ct. App. 1986) (holding six-month no-hire period to be unreasonable); *Deslandes*, 81 F.4th at 704 ("Why did the [no-poach] restriction last as long as the employment (plus six months), rather than be linked to any estimate of the time a franchise would need to recover its investments in training?").

194 *See* Brutus St. Val, *supra* note 62, at 285; Hovencamp, *supra* note 107, at 12.

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

196 *See* Jerry, II & Knebel, *supra* note 147, at 180 ("In short, employers that compete in the labor market, regardless whether they compete in the product market, have incentives to stabilize wages.").

197 Class Action Complaint, *supra* note 128, ¶ 12.

consumer welfare rationale,[198] the consumer protection rationale may also be invoked to argue against such labor restraints, since monopsony power and market power often do not translate to lower prices for consumers.[199] Thus, regardless of the standard of review, no-hire agreements, like those in *Arrington*, are unlikely to be upheld.[200]

CONCLUSION

Arrington represents a shift in antitrust jurisprudence away from the single-entity defense for franchisors and franchisees. For the reasons explained above, the Eleventh Circuit correctly applied *American Needle* in the context of franchisors and franchisees.[201] Furthermore, the *Arrington* court properly considered labor market competition as within the scope of Sherman § 1.[202]

Arrington expanded the *American Needle* doctrine and gave aggrieved franchise employees—a large portion of the American workforce—an avenue to hold their employers accountable through private enforcement of antitrust law.[203] Considering the managerial flexibility provided by the franchising model, single-entity cases like *Arrington* will likely be decided on a case-by-case basis.[204] In general, the more control a franchisor has over a franchisee, the more likely it will be able to avail itself of a single-entity defense.[205] Therefore, it is possible that, after *Arrington*, franchisors will exhibit greater control over franchisees in order to remove themselves from the purview of Sherman § 1, since the franchisor would then be more likely to be viewed as the sole decision-maker.[206] However, since *American Needle* demands a focused inquiry into the activity at issue, rather than the structure and form of the business, it will be more difficult for franchisors and

198 Hafiz, *supra* note 152, at 393–94 ("While most courts find that workers can sufficiently allege antitrust injury for wage-fixing or no-poaching agreements, courts have not rejected employer defenses that alleged restraints benefit consumers under quick-look or rule-of-reason analyses." (footnote omitted)).

199 *See supra* Section II.C.1; *see also* BLAIR & HARRISON, *supra* note 124, at 46–48.

200 *See* Hartley & Brizuela, *supra* note 166, at 11.

201 *See supra* Section II.B.

202 *See supra* Section II.C.

203 Arrington v. Burger King Worldwide, Inc., 47 F.4th 1247 (11th Cir. 2022); *see supra* Sections I.B, II.D.

204 *See supra* Section II.A.

205 *See* Block & Ridings, *supra* note 37, at 221.

206 *See id.*

franchisees to escape antitrust liability in the context of labor market constraints similar to those in *Arrington*.[207]

Furthermore, franchisors and franchisees will face challenges in enforcing and justifying labor constraints, given that such constraints are already disfavored by the DOJ and other agencies.[208] Because of the Biden administration's aggressive approach toward litigating labor market-related antitrust violations, we may see more circuit court decisions on the issue of whether franchisors and franchisees are separate and distinct entities under Sherman § 1.[209]

Now, courts and agencies are beginning to view competition more holistically, treating competition in both labor markets and products markets as essential components of a healthy economy.[210] It may be that the days of large corporations hiding behind corporate form and purported consumer benefits to justify unfair labor practices are long gone.

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207 *See supra* Section I.C.2.

208 *See supra* Section II.C.2.

209 *See supra* Section II.C.2; Biden Executive Order, *supra* note 136.

210 *See, e.g.*, U.S. DEP'T OF THE TREASURY, *supra* note 89, at i.