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Office of Commissioner
Alvaro M. Bedoya

"Overawed": Worker Misclassification as a Potential Unfair Method of Competition

Remarks of Commissioner Alvaro M. Bedoya
United States Federal Trade Commission

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> "A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord."
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> *FTC v. Texaco*, 393 U.S. 223, 227 (1968) (quoting Judge John Minor Wisdom)[1]

Thank you Mike, for that introduction, thank you to the organizers of today's conference, and thank you all for being here this early on a Friday morning in Miami. I'd like to express a special note of gratitude to former FTC chair Edith Ramirez for inviting me to speak with you today, as well as to my own team of Max Miller, Catherine Sanchez, Sunila Steephen, and Dalia Wrocherinsky.

Before I begin I'll offer the standard but important disclaimer that I am here speaking for myself as a commissioner; I do not speak for the Commission, the chair or my fellow commissioners, or staff for that matter.

1. The tree planters

It's been a while since I traveled to Florida for work – 23 years, actually. Twenty-three years ago, I got my first legal job at a law office in the small sugarcane town of Belle Glade –

[1] FTC v. Texaco, 393 U.S. 223, 227 (1968) *citing* Shell Oil v. FTC, 360 F.2d 470, 487 (5th Cir. 1966) (Judge John Minor Wisdom). The thinking in this article was influenced in significant part by the research and writing of Sandeep Vaheesan, Brian Callaci, Professor Sanjukta Paul and Professor Hiba Hafiz; in addition to the journalistic exposés discussed in these remarks, I benefited greatly from listening to Krissy Clark's podcast series on misclassification in the janitorial services sector. *See generally* Brian Callaci & Sandeep Vaheesan, *Antitrust Remedies for Fissured Work*, 108 CORNELL L. REV. ONL. 27 (2023); Sanjukta Paul, *Fissuring and the Firm Exception*, 82 LAW & CONTEMPORARY PROB. 65 (2019); Hiba Hafiz, *Labor's Antitrust Paradox*, U. CHI. L. REV. 381 (2019); Krissy Clark, *Congratulations! You're an entrepreneur now,* MARKETPLACE (Feb. 3, 2020), https://www.marketplace.org/shows/the-uncertain-hour/congratulations-youre-an-entrepreneur-now/.

which is about an hour and a half north from here. I was 19, going into my junior year of college, and I'd gotten a summer job clerking for a farmworker lawyer named Greg Schell.

So I show up, and for my first assignment, Greg points to a big stack of paper on a table. He tells me we represent a group of tree planters who work for a major paper company. They work dawn to dusk, bending over, digging a hole, and planting a new tree every 15 seconds for ten to 11 hours a day. And for all that, he explains, the guys got about two dollars an hour – *before* expenses.[2]

The contractor who hired the men went broke. So, Greg says: "We sued the paper company.[3] But the paper company said: 'These guys aren't our employees. They don't work for us. They work for that *independent contractor*.'"

"So, that's their story," Greg says. "But *these* contracts" – and he taps the paper on the table – "they tell a different story. I want you to read them and tell me *that* story."

So I started reading the contracts. There were 64 of them. And Greg was right: The contracts *did* tell a different story. The contracts showed how the paper company controlled every aspect of the men's work – down to the inch, angle, and blade.

The paper company didn't just tell the men how deep to dig the holes or how far apart to dig them. The contract let the company decide the *angle* at which the seedling could be planted, the blade with which the hole could be dug, the clothes the men should wear, the size of each crew, the times at which the crew could plant. The company's supervisors could stop their work and start it, talk to the crew, correct the crew, and pull individual men off of it.

But there's more. Because the men couldn't dig a bunch of holes, take out all of the seedlings, and plant them all at once. *No* – the men could only hold a maximum of *two* seedlings in their hands at any time. And even then, the men had to start with the *oldest* seedlings first. But there's *more*. *When* the men planted a seedling and tamped down the dirt around it, the contract specified that their boot heels should go no deeper than *two inches* into the dirt – nor should they get *closer* than two inches to the seedling itself. Apparently that was a little too close, and the company later changed that to *four* inches.

All of this I wrote up in an affidavit. But we lost; the tree planters lost. The court decided that despite all of that, the paper company was *not* their joint employer, the men were working *solely* for an independent contractor[4] – and therefore, the court decided, the paper company was not responsible for providing them with a minimum wage and other benefits.

Last year, I started to look into the issue of *misclassification* – that's when an employer classifies someone as an independent contractor when they really should be a full employee. I

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[2] Brief of Appellants at 6-22, Gonzalez-Sanchez v. Int'l Paper Co., 346 F.3d 1017 (11th Cir. 2003) (No. 02-12201-JJ) (citing hours, pay, and average of 2,500 to 3,000 seedlings planted per person per day).
[3] Complaint – Class Action at 1-25, Martinez-Mendoza v. Champion Int'l Corp. (N.D. Fla. Jan. 26, 2000) No. 4:00-cv-00034-RV.
[4] Order at 31, *Martinez-Mendoza,* No. 4:00-cv-00034-RV.

see misclassification as a broader and overlapping problem that often encompasses the question of joint employer liability. Indeed, the tree planters only had to make a joint employer claim because the paper company misclassified the guy who hired them as an independent contractor – who himself apparently turned around and misclassified the tree planters as independent contractors.[5]

So I called up Greg, some twenty years later, and I asked him: *How did it get to this? What happened here?* And he said, "Well, the companies used to have their own crews. But about forty years ago, in the 1980s, they decided to bid all of that work out to contractors instead. The companies retained every bit of the control, but they could save a bunch of money by going with the lowest bidder. And it was just a race to the bottom from there. The contractors would bid low to get the work, break the backs of their guys to finish the job, stiff the men for their pay, and then skip town the next morning. And then when the guys went to the company, the company would just say those magic words – 'independent contractor' – and wash their hands of the problem."

If all of this is shocking to you, what is more shocking is the modern breadth of misclassification. Because misclassification isn't limited to tree planting or agriculture. It's in construction. It's in trucking. It's in in-home health care, in-home cleaning, and janitorial work. Anywhere people work in isolated settings or in jobs where you *bid* for work – you will find misclassification.[6] And it isn't limited to the tree farms of the southern U.S. It is *everywhere*.

The money at stake is staggering. Studies suggest that 10 to 30% of employers misclassify one or more of their employees.[7] And when workers are misclassified, they aren't just denied the minimum wage. Their employers also don't pay for overtime, Social Security, Medicare, workers compensation, unemployment insurance – and of course, they also don't pay for healthcare or retirement.[8] All told, depending on their profession, a worker may lose anywhere from $6,000 to $18,000 every year because of misclassification.[9] Multiply that dollar amount by, say, 300,000 workers in Illinois, or half a million workers in Pennsylvania, or 700,000 people in New York, and you get the picture:[10] Misclassification takes *billions* from working people and gives it to lawbreakers. It is a pervasive and national scandal.

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[5] While I will focus on the issue of misclassification, I believe that many of the issues I will discuss apply equally to joint employment and workplace fissuring more broadly.

[6] FRANÇOISE CARRÉ, ECON. POL'Y INST., (IN)DEPENDENT CONTRACTOR MISCLASSIFICATION 5-6 (2015), https://files.epi.org/pdf/87595.pdf.

[7] Nat'l Emp. L. Project, Independent Contractor Misclassification Imposes Huge Costs on Workers And Federal And State Treasuries 2, 6-11 (2020), https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf (summarizing national and state research findings).

[8] CARRÉ, *supra* note 4, at 3.

[9] JOHN SCHMITT ET AL., ECON. POL'Y INST., THE ECONOMIC COSTS OF WORKER MISCLASSIFICATION 4 (2023), https://files.epi.org/uploads/The-economic-costs-of-worker-misclassification-1.pdf.

[10] *See* MICHAEL P. KELSAY, ET AL., DEP'T OF ECON. UNIV. OF MO.-KAN. CITY, THE ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE STATE OF ILLINOIS 5 (2006), https://faircontracting.org/wp-content/uploads/2019/06/Illinois-Employee-Misclassification.pdf; LINDA DONAHUE, ET AL., CORNELL UNIV. ILR SCH., THE COST OF WORKER MISCLASSIFICATION 2 (2007), https://ecommons.cornell.edu/server/api/core/bitstreams/23a8b200-41c8-4a81-9e35-0be244cb1894/content; *Public Hearing in re: House Bill 2400 – Misclassification of*

Now, some of you may be thinking: Yes, this is horrible. But it's an employment law issue, a labor law issue – why are we discussing this here at an event hosted by the Global *Competition* Review?

Well, consider that in 1938, when Congress passed the Fair Labor Standards Act, the law that guarantees employees the minimum wage and overtime, they did so to make sure that honest employers would not have to compete with, "chiselers and sweatshop operators" who pay below subsistence wages.[11] And when they wrote the Fair Labor Standards Act, Congress said in *statute*, that those practices are, quote "an unfair method of *competition*."[12]

U.S. Treasury officials have recognized the competitive disadvantage that honest businesses face when they go against businesses that misclassify.[13] State officials in Ohio, Indiana, Tennessee, Georgia, and elsewhere have said misclassification is unfair to honest employers because it prevents them from being able to *compete*.[14]

Employees as Independent Contractors: Hearing Before the Lab. Rels. Comm., Regular Session 2007-2008, 18 (Pa. 2008) (statement of Patrick Beaty, Deputy Secretary of Unemployment Comp. Programs, Dep't of Lab. and Indus.), https://www.legis.state.pa.us/WU01/LI/TR/Transcripts/2008_0091T.pdf.

[11] 81 Cong. Rec. (Bound) 7651 (1937) (statement of Sen. Walsh).

[12] Roland Elec. Co. v. Walling, 326 U.S. 657, 668-670 (1946). Indeed, when the Supreme Court heard FLSA cases, it pointed to that language to ratify the idea that when an employer subjects employees to substandard labor conditions, the savings they reap would, quote "be reflected directly into competitive costs" and give those employers a "competitive advantage." *See* Fair Labor Standards Act, 29 U.S.C. § 202(a)(3). Professor Kati Griffith's research has revealed that, in early drafts of the law, Congress "explicitly recognized that a major enforcement challenge would be that some businesses would misclassify true employees as 'independent contractors[.]'" *See* Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old is New Again*, 104 CORNELL L. REV. 557, 568 n.44 (2019).

[13] Off. of Inspections and Evaluations, Treasury Inspector Gen. for Tax Admin., Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success 1 (2018), https://www.tigta.gov/sites/default/files/reports/2022-02/2018IER002fr.pdf (misclassification "plac[es] honest employers and businesses at a competitive disadvantage").

[14] *See, e.g.*, RICHARD CORDRAY, OHIO ATT'Y GEN., REPORT OF THE OHIO ATTORNEY GENERAL ON THE ECONOMIC IMPACT OF MISCLASSIFIED WORKERS FOR STATE AND LOCAL GOVERNMENTS IN OHIO 2 (2009), https://iiiffc.org/images/pdf/employee_classification/OH%20AG%20Rpt%20on%20Misclass.Workers.2009.pdf (explaining that misclassification "creates an uneven playing field within many industries, with all law-abiding businesses being left at a competitive disadvantage by their very compliance with the law"); S. SUBCOMM. ON EMPLOYEE MISCLASSIFICATION, THE FINAL REPORT OF THE SENATE SUBCOMMITTEE ON EMPLOYEE MISCLASSIFICATION, 2015-2016 Reg. Sess., at 1 (Ga. 2015), https://www.senate.ga.gov/sro/Documents/StudyCommRpts/EmployeeMisclassificationFinalReport.pdf ("companies that misclassify gain unfair advantages when businesses are involved in competitive bidding on projects"); MICHAEL P. KELSAY & JAMES I STURGEON, THE ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE STATE OF INDIANA, DEP'T OF ECON. UNIV. OF MO. KAN. CITY 2 (2010), https://stoptaxfraud net/wp-content/uploads/2019/11/Misclassificaiton-in-Indiana-Full-9-10.pdf ("Employers who misclassify their workers have a pricing edge over their counterparts which results in unfair competition in the marketplace. Firms that misclassify workers can bid for work without having to account for many normal payroll-related costs."); TENN. BUREAU OF WORKERS' COMP., ANNUAL REPORT ON EMPLOYER COVERAGE COMPLIANCE, at 6 (Tenn. 2019), https://www.tn.gov/content/dam/tn/workforce/documents/injuries/2019ComplianceAnnualReport.pdf ("Compliant employers are… disadvantaged, when their competition chooses to not follow the law. Law abiding employers are unable to competitively bid for work as the non-compliant uninsured employer can offer a lower price for a job because of their non-compliance."); Press Release, Off. of Minn. Att'y Gen. Keith Ellison, "Attorney General Ellison Forms Task Force on Worker Misclassification" (July 6, 2023), https://www.ag.state.mn.us/Office/Communications/2023/07/06_Taskforce.asp.

The Federal Trade Commission's original mandate, under our founding statute, is to stop, quote "unfair methods of competition." Most state attorneys general have the power, under statute, to stop unfair methods of competition.[15] And yet, to my knowledge, legal claims that misclassification is an unfair method of competition are almost unheard of.

The Department of Labor and the National Labor Relations Board have recently issued strong rules that will help combat misclassification.[16] Thanks to their work, we're in a far better place today to fight this problem, and I'm thrilled that under Chair Lina Khan, our agencies work more closely than they ever have before.[17]

I think the next step in confronting misclassification is making sure that we use every tool in our toolbox to fight it – *including* competition law. And so today I want to make the case for using the existing statutory prohibitions against unfair methods of competition to closely examine allegations of misclassification.

I want to make that case by discussing two industries where misclassification is allegedly endemic: the construction industry and port trucking.

2. What is an "unfair method of competition"?

Let's start at the beginning. The FTC Act was passed in 1914. That law created the FTC and charged us, under section 5, with prosecuting "unfair methods of competition."[18] So let's take a step back and ask: What *is* an "unfair method of competition"?

It's important to underscore that when it passed the FTC Act, Congress took a different approach than it did in other competition laws. It was worried about too-narrow readings of the Sherman Act that had sharply limited its effectiveness.[19] And so at first, Congress drew up a list of the specific practices it considered to be unfair methods of competition and drafted a bill to ban them.

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[15] Samuel Milner, *From Rancid to Reasonable: Unfair Methods of Competition under State Little FTC Acts*, 73 AM. U. L. REV. (forthcoming 2024), https://ssrn.com/abstract=4526066.

[16] Dept. of Lab. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 29 C.F.R. §§ 780, 788, 795 (2024); N.L.R.B. Standard for Determining Joint Employer Status, 29 C.F.R. § 103 (2024).

[17] In the last two years, Chair Khan signed new memoranda of understanding with both the National Labor Relations Board and the Department of Labor to encourage and facilitate inter-agency exchanges. *See* Fed. Trade Comm'n, & Nat'l Lab. Rels. Bd., *Memorandum of Understanding Between the Federal Trade Commission (FTC) and the National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest* (July 19, 2022), https://www ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf; Dep't of Lab. & Fed. Trade Comm'n, *Memorandum of Understanding Between The U.S. Department of Labor and the Federal Trade Commission* (Aug. 30, 2023), https://www ftc.gov/system/files/ftc_gov/pdf/23-mou-146_oasp_and_ftc_mou_final_signed.pdf.

[18] Federal Trade Commission Act, 15 U.S.C. §§ 41-58.

[19] Fed. Trade Comm'n, Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter On the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition under Section 5 of the FTC Act (Nov. 10, 2022) at 2-3.

This was similar to what it did in the Clayton Act, where Congress named specific conduct and prohibited it: price discrimination, interlocking directorates, and of course, certain mergers and acquisitions.[20]

But then Congress changed gears. It chose to *avoid* lists of specific prohibited practices. Instead it enacted a broad prohibition against "unfair methods of competition."[21] The Supreme Court would later wryly explain its reasoning: Congress was worried that a too-specific definition of "unfair methods of competition" today "would not fit *tomorrow*'s new inventions in the field." The Court emphasized that "there is no limit to inventiveness in the field."[22] The congressional record and debates also make clear that Congress wanted to stop practices that violated the spirit, not just the letter of antitrust laws, [23] and that it wanted to stop unfair practices "in the embryo," *before* they did their damage.[24]

And so, if you're asking yourself – "why would we need the work on the same problem as the Labor Department or the National Labor Relations Board?" – it's partly because our authority allows us to stop unfair practices in their *incipiency*, before harms to workers and other market actors are cemented. In this way, our agencies' authorities are complementary and not duplicative.

That said, while Congress deliberately drafted the term "unfair methods of competition" broadly, the Supreme Court and appellate courts considering unfair methods cases did offer two key criteria to figure out when a method of competition was unfair. Here is how the Commission recently summarized those criteria:

> First, the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature. It may also be otherwise restrictive or exclusionary, depending on the circumstances, as discussed below. Second, the conduct must tend to negatively affect competitive conditions. This may include, for example, conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers.[25]

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[20] Clayton Act, 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 51-53.

[21] For more on Congress's change of heart, see my statement on the issuance of the Section 5 policy statement in November 2022. *See* Fed. Trade Comm'n, Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter On the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition under Section 5 of the FTC Act (Nov. 10, 2022) at 1-3.

[22] Fed. Trade Comm'n v. Cement Inst., 333 U.S. 683, 708 (1948).

[23] E.I. du Pont de Nemours v. Fed. Trade Comm'n (Ethyl), 729 F.2d 128, 136-137 (2d Cir. 1984) (citing Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972)).

[24] 51 Cong. Rec. 12030 (1914) (remarks of Sen. Newlands) ("We want to check monopoly in the embryo. Monopoly commences in insidious ways, by practices that are against good morals and constitute violations of individual rights for which the individual can have an action at law or in equity but rights which the individual, because of his poverty or of his insignificance, is often unable to assert against these great organized powers.").

[25] Fed. Trade Comm'n., Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), at 9, https://www ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

And so, as I talk about the construction industry and port trucking, keep those words in mind: coercive, exploitative, collusive, abusive, deceptive, predatory, restrictive, exclusionary; and keep in mind that phrase about conduct that "foreclose[s] or impair[s] the opportunities of market participants, reduce[s] competition between rivals, or limit[s] choice."

3. Joshua Lawson, Sandie Domando, and misclassification in construction

Let's talk first about misclassification in the construction industry. I want to start by talking about two people: Joshua Lawson of Winston-Salem, North Carolina, and Sandie Domando of Palm Beach Gardens, right here in Florida, about an hour north of here. I learned about both Mr. Lawson and Ms. Domando from an extraordinary 2014 exposé led by Mandy Locke and Franco Ordoñez for McClatchy, working with reporters at outlets like the *Miami Herald*.[26]

Josh Lawson grew up in a rural county north of Greensboro.[27] Growing up, he always admired his great uncle, who built houses. That career had let his great uncle build his own house and buy a good truck, four-wheelers, a fishing boat. "I thought if I grew up to build houses, then I was going to have a good life," Mr. Lawson told reporters. So he found work with a local contractor who offered to pay him $10 an hour.

The contractor set his schedule, told him where to go, what jobs to do, and how to do them. It seemed okay, initially, but when it was time to file his taxes, Mr. Lawson realized that he was technically classified as an independent contractor – and therefore owed a full year's worth of payroll taxes.

Mr. Lawson often worked 14 hour days, and spent long stretches on the road away from his family. Yet after he deducted his expenses from his paycheck, he'd sometimes be left with around $200 for a week of work. According to the reporters, his family had to ask itself: Do we not pay the electric bill? Or do we cut down on meals for our two daughters? It got so bad that his wife had to sell their wedding bands.

Then a pack of two-by-fours fell on Mr. Lawson's shoulder. He couldn't lift his arm. His employer refused to cover the medical expenses; Mr. Lawson was told that he alone was responsible for it.

The company hadn't bought a workers' compensation policy for him. "I about lost everything," said Mr. Lawson.

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[26] *See* Contract to Cheat, MCCLATCHY DC, http://media mcclatchydc.com/static/features/Contract-to-cheat/ (last visited Jan. 30, 2024) for the full series.

[27] This discussion of Mr. Lawson draws from a news article and an accompanying video that were part of the investigation. *See* Mandy Locke & Franco Ordoñez, *Once Solid, Job Safety Net Frays For Construction Work*, MCCLATCHY WASHINGTON BUREAU (Sept. 4, 2014), https://media mcclatchydc.com/static/features/Contract-to-cheat/Job-safety-net-frays-for-construction-work html?brand=mcd; McClatchy Washington Bureau, "I thought if I grew up to build houses, I'd have a good life.", YOUTUBE (Sept. 3, 2014), https://www.youtube.com/watch?v=qbD YawGZmNE.

Experts estimate that after factoring in lost pay and lost benefits, people like Mr. Lawson can lose over $16,000 a year due to misclassification – easily a third of their earning power.[28] And it's not just money. Due to misclassification, one in three construction workers doesn't have health insurance – that's a rate three times as high as other workers, even though construction workers are often in dangerous working conditions.[29]

It's hard for anyone to hear Mr. Lawson's story. But since we are at a competition conference, and I'm posing the question of whether the misclassification of people like Mr. Lawson constitutes an unfair method of *competition*, I think we should take a second to consider whether misclassification in this context is a "method of competition" to begin with.

After all, our policy statement makes clear that "violations of generally applicable laws by themselves, such as environmental or tax laws, that merely give an actor a cost advantage would be unlikely to constitute a method of competition."[30]

For this question, I would love to talk about Ms. Sandie Domando.[31] When the *Miami Herald* interviewed her, Ms. Domando was an executive vice president at a construction company in Palm Beach Gardens. For years, the company had a strong book of business. They had around 250 workers on their payroll – every one a full employee with all benefits. For Ms. Domando, this was a matter of principle: "Our employees depend on us. There are families out there that depend on us," she told the *Herald*.

Then, during the recession, a lot of their referrals dried up, and Ms. Domando's company had to focus on bidding for government work paid for by stimulus funds. Usually, they won around 80% of these contract competitions.

This time around, they won around 35%, less than half their normal rate. Ms. Domando suspected it was due to her competitors misclassifying their employees as independent contractors. The *Herald* investigation seemed to support her; they found that one in five companies who won these government projects misclassified their employees.

Ms. Domando estimated that she had to lay off around 100 workers. She now has "little interest" in bidding for government work. "[W]e know we don't have a chance on most of those government jobs," she told the *Herald*. "We were getting underbid by companies that were cheating."

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[28] *See* SCHMITT, *supra* note 7, at 4.

[29] KEN JACOBS ET AL., UC BERKELEY CTR. FOR LAB. RSCH. AND EDUC., THE PUBLIC COST OF LOW-WAGE JOBS IN THE US CONSTRUCTION INDUSTRY 1 (2022), https://laborcenter.berkeley.edu/wp-content/uploads/2022/01/The-Public-Cost-of-Low-Wage-Jobs-in-the-US-Construction-Industry-FINAL.pdf.

[30] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), at 8, https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[31] The discussion of Ms. Domando draws on two articles, one by the *Miami Herald*, and one by McClatchy. *See* Mandy Locke & Franco Ordoñez, *Taxpayers and workers gouged by labor-law dodge*, MCCLATCHY WASHINGTON BUREAU (Sept. 4, 2014), https://www.mcclatchydc.com/news/nation-world/national/article24772648 html; Nicholas Nehamas, *For Florida companies that play by the rules, success is tough as nails*, MIAMI HERALD (Sept. 4, 2014), http://media.mcclatchydc.com/static/features/Contract-to-cheat/Florida-woman-learned-hard-lesson html.

Reading Ms. Domando's account,[32] and reading the range of studies on this issue,[33] it becomes clear that, in the context of competitive bidding, misclassification can be *more* than a cost savings strategy that hurts workers.

It can also be a *method* of competition that lets law-breaking employers win business from honest ones. And eventually, as appears to have happened with Ms. Domando, misclassification can worsen competitive conditions by taking honest employers off the playing field – and *out* of those bidding competitions – when they realize that they cannot compete with lawbreakers.[34]

As for the other section 5 criterion – having to do with conduct that is coercive, exploitative, abusive, etc. – I'll just offer a few quotes from workers interviewed as part of the investigation who *knew* they were being misclassified, but kept working anyways:

"I reckon I just have to go with it," said Adolph McNeill of Fayetteville, North Carolina.

I'm "just happy to be making anything," said a painter in Holt, Missouri.

"These days, you work for less or you don't work at all," said Armando Sanchez, of Jacksonville, North Carolina.

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[32] *See* Fort Worth Star-Telegram, '*Misclassification' of Workers Frustrates Employees*, YOUTUBE (Aug. 26, 2014), https://www.youtube.com/watch?v=M2X63Wg5_lA (featuring the account of Brian Anderson, the owner of a steel and rebar company in Mesquite, Texas); Mandy Locke, *In Dunn, NC, a family business follows the rules*, THE NEWS & OBSERVER (Sept. 4, 2014), https://www.newsobserver.com/news/nation-world/national/article10049798.html (featuring the account of Jimmy Tyndall, the owner of a concrete and paving company in Dunn, North Carolina).

[33] For more information on misclassification as a business model in contract construction, see Hearing on Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy Before the Subcomm. on Workforce Protections Subcomm. of the H. Comm. On Educ. and Lab., 116th Cong. (2019) (Testimony of Matt Townsend), https://www.congress.gov/116/meeting/house/110019/witnesses/HHRG-116-ED10-Wstate-TownsendM-20190926.pdf; LAURA VALLE-GUTIERREZ ET. AL., UP TO 2.1 MILLION U.S. CONSTRUCTION WORKERS ARE ILLEGALLY MISCLASSIFIED OR PAID OFF THE BOOKS (Century Found., 2023), https://tcf.org/content/report/up-to-2-1-million-u-s-construction-workers-are-illegally-misclassified-or-paid-off-the-books/; Mark Erlich, Misclassification in Construction: The Original Gig Economy, 74 ILR REV. 4 (2020), https://lwp.law.harvard.edu/files/lwp/files/erlich_ilrr_final_article_11.28.20.pdf; FRANÇOISE CARRÉ & RANDALL WILSON, CENTER FOR SOCIAL POLICY, THE SOCIAL AND ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN CONSTRUCTION (2004), https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1042&context=csp_pubs.

[34] Of course, given the wage losses of misclassified construction workers, there is also an argument that labor market conditions were also negatively affected. Another indication of the worsening of the competitive field can be drawn from accounts of what happens when misclassifying *businesses* are identified by the authorities or face organizing drives from labor. On many of these occasions, the contractors are revealed to be little more than shell companies. The Tennessee Bureau of Workers' Compensation reported in 2019, for example, that non-compliant businesses frequently "shut down" and then "reopen as a newly formed business entity that is a continuation of the closed business." See TENN. BUREAU OF WORKERS' COMP, *supra* note 14, at 12. In one instance in 2007, a carpentry firm told the National Labor Relations Board that they "never employed any employees" – and pointed to a group of 14 subcontractors. When the NLRB mailed subpoenas to those 14 subcontractors, they were all sent back as "undeliverable." Erlich, *supra* note 33, at 15.

4. Samuel Talavera and the port truckers of Los Angeles

That is one context in which I think the competitive dynamics of misclassification can be quite clear – competitive bidding for construction contracts. Another example I'd like to highlight draws on a *USA Today* exposé on port truckers in Los Angeles from 2017; this one was written by a reporter named Brett Murphy.[35]

The lead story for the exposé features a gentleman named Samuel Talavera, Jr. Mr. Talavera came to this country 30 years ago from Nicaragua. After coming here, he began working as a short-haul trucker for a company at the L.A. harbor. It was a decent job. He owned his own truck and earned enough to buy a house for his family and take his kids to Disneyland.

Then, in 2010, the company informed him that he needed to trade in his truck as a downpayment towards a new truck, which the company had purchased in order to comply with new environmental rules. The company would hold the title to the truck, and he would pay it down through a lease-purchase agreement. The same thing happened to other truckers working for other companies at the port.

Suddenly, Mr. Talavera's job was completely different. He was working up to 16 hours at a time, and up to 20 hours a day. Mr. Talavera and the other truckers interviewed as part of the exposé did not set their own hours or pick their own routes; their companies decided who got the good routes and who got the bad ones, and their companies could decide when – or if – the truckers could go home at night.

In fact, Mr. Talavera *stopped* coming home at night to save time on his commute. He started sleeping in the back of his cab.

Yet even though he was working longer hours, *the money got worse* – a lot worse. Because even though the company controlled nearly every aspect of his job, they treated him like an independent contractor, and deducted the costs of doing his work from *his* paycheck. The deductions that the truckers saw weren't just for gas or tires. Some truckers were charged a fee to park their trucks on the company's lot. One company even charged truckers two dollars a week for toilet paper and office supplies. Some weeks, Mr. Talavera would make as little as $112 or $33; one week he made $0.67.[36] *USA Today* identified seven companies where truckers ended a week *owing* their company money.

Mr. Talavera drew down his savings. His wife took three separate jobs to help with the bills. Eventually, they filed for bankruptcy just to keep their house.

Then, in October 2013, Mr. Talavera's truck broke down and he couldn't afford the repairs. So his company fired him and took back his truck, which he had paid $78,000 towards owning. This didn't just happen to Mr. Talavera. A trucker named Eddy Gonzalez took a week

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[35] *See* Brett Murphy, *Rigged: Forced Into Debt. Worked Past Exhaustion. Left With Nothing*, USA TODAY (June 16, 2017), https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/.

[36] *Id*.

off of work to care for his mother, and then arrange her funeral when she passed away. The company he was working for fired him and took his truck. A trucker named Ho Lee paid $1,600 a month for two years towards his lease-to-own truck. Then he got sick, missed a week of work, got fired, and had his truck taken, too.

Is what happened to the port truckers a method of competition? And is it unfair under section 5? These are fact and law-specific questions, but speaking *generally*, I think there are compelling reasons to think that the answer to both of these questions might be "yes."

To answer the first question, vertical restraints are a paradigmatic method of competition. What might those vertical restraint be, in this context? Well, it's when a company takes the independence away from an independent buyer or seller. It's when a company says: "You have no choice but to do what I say as part of this transaction."

And so, it's telling that "independent" tree planter how deep they can stamp a seedling. It's telling the "independent" trucker the hours they have to work, the routes they have to drive, and the exact truck they have to drive it with.

Not all vertical restraints are illegal, but the Supreme Court has upheld the FTC's ability to curb problematic vertical restraints through our unfair methods authority. [37] Misclassification helps hide vertical restraints under a veneer of independence. [38]

Turning to the criteria of unfairness, what happened to the port truckers seems to have clearly worsened competitive conditions in the market. Before 2010, Mr. Talavera and most of his colleagues owned their trucks outright; they appear to have had the capacity to take their equipment, *which they owned*, to another port, or another job, should working conditions decline.

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[37] There are canonical Section 5 cases in which the Supreme Court upheld the FTC's ability to curb vertical restraints through our unfair methods authority. *See, e.g.* Atlantic Refining Co. v. Fed. Trade Comm'n, 381 U.S. 357, 371 (1965); Fed. Trade Comm'n v. Texaco, Inc., 393 U.S. 223, 228-31 (1968).

[38] I am personally struck by the fact that the history of antitrust is full of instances in which companies hide their anticompetitive conduct behind a fiction of independence. When Congress first started enumerating the specific kinds of conduct that would constitute "unfair methods of competition" – a strategy that it later dropped – the authors of the FTC Act expressly identified the use of "'bogus' independent concerns" as one such method. *See* 51 Cong. Rec 11108 (1914) (statement of Sen. Newlands) (providing specific examples of unfair competition, such as local price cutting and organizing "bogus independent concerns . . . for the purpose of entering the field of the adversary and cutting prices with a view to his destruction[,]"; *id*. at 11230 (statement of Sen. Robinson) (providing examples of unfair competition, including bogus independent concerns). The Robinson-Patman Act was inspired, in part, by large buyers' use of ostensibly independent "dummy brokerages" that they forced their suppliers to retain and pay as "their" brokers – but that, in reality, the buyers wholly owned. *See* 80 Cong. Rec. 8110 (1936) (remarks of Rep. Arthur Greenwood of Indiana). And none other than John Rockefeller cut secret deals with the railroads to secure lower prices for Standard Oil against those of its competitors. See GREGORY WERDEN, THE FOUNDATIONS OF ANTITRUST 5-7 (2020) ("Rockefeller saw nothing improper in Standard Oil's deals with railroads, but neither did he want them publicized."). The Standard Oil trust was *itself* a secret; that secret trust agreement allowed its 37 member companies to hold themselves out to member companies as ostensible competitors. *See* Horace Lafayette Wilgus, *The Standard Oil Decision: The Rule of Reason*, 9 MICH. L. REV. 643, 648 (1911) ("In 1879, a secret trust agreement was entered into by the 37 stockholders of the Standard Oil Company of Ohio…"); *see also* WERDEN at 8 ("Rockefeller and his close associates saw a need for tighter control, which was complicated by the desire to continue to keep the secrecy of Standard's ownership of some of its companies.").

What happened in 2010 and onwards seems to have taken from those drivers any independence they had; instead, they became misclassified and unlawfully underpaid employees.[39]

Note the two distinct harms to competitive conditions. First, arguably independent market actors were effectively taken off of the playing field and turned into unclassified employees. Second, thanks to that misclassification, labor market conditions were deeply almost certainly negatively affected. Experts estimate that misclassification *alone* can cost truckers between $9,000 and $18,000 a year in lost pay and benefits.[40]

While the nature of the port truckers' treatment may make their exploitation more than evident, their experiences brought to mind for me a passage from a canonical section 5 case, the *Texaco* case, which the Supreme Court decided in 1968.

That case involved an oil company that cut a deal with a tire manufacturer which forced the oil company's ostensibly independent dealers to exclusively sell goods from that tire manufacturer. In deciding that case, Justice Black dwelt on the *power* that the oil companies held over their dealers, and that let the company force the arrangement upon them. Justice Black said, quote:

> These dealers typically hold a one-year lease on their stations, and these leases are subject to termination at the end of any year on 10 days' notice. At any time during the year, a man's lease on his service station may be immediately terminated by Texaco without advance notice if, in *Texaco*'s judgment, any of the "housekeeping" provisions of the lease, relating to the use and appearance of the station, are not fulfilled. […] The average dealer is a man of limited means who has what is, for him, a sizable investment in his station. […] "A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord."[41]

It is hard for me to read those words and *not* think about Mr. Talavera, Mr. Gonzalez, and Mr. Lee – and how their trucks, and the tens of thousands of dollars they'd paid into them, were taken away at a moment's notice.

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[39] This result reminds me of a stark warning raised by the Supreme Court in an 1897 case analyzing the purpose of the Sherman Act. Justice Rufus Peckham, writing for the majority, warned that "[I]t is not for the real prosperity of any country that such changes should occur which result in transferring an independent businessman, the head of his establishment, small though it might be, into a mere servant or agent of a corporation… having no voice in shaping the business policy of the company, and bound to obey orders issued by others." United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 324 (1897).

[40] JOHN SCHMITT ET AL., ECON. POL'Y INST., THE ECONOMIC COSTS OF WORKER MISCLASSIFICATION 4 (2023), https://files.epi.org/uploads/The-economic-costs-of-worker-misclassification-1.pdf (reflecting estimates of costs to "light truck delivery drivers" and "truck drivers," respectively); A 2014 estimate specific to the L.A. port truckers estimated that they lost around $4,000 to $5,000 *per month* due to their misclassification. *See* NAT'L EMP. L. PROJECT, THE BIG RIG OVERHAUL 31 (2014), https://www.nelp.org/wp-content/uploads/2015/03/Big-Rig-Overhaul-Misclassification-Port-Truck-Drivers-Labor-Law-Enforcement.pdf.

[41] FTC v. Texaco, 393 U.S. 223, 227 (1968) *citing* Shell Oil v. FTC, 360 F.2d 470, 487 (5th Cir. 1966) (Judge John Minor Wisdom). Tellingly, Justice Black and the majority also foreclosed the tire company's competitors from selling their wares at the stores of the oil company's dealers. *Id.* at 229-230.

5. Conclusion

A few years after I spent that summer here in Belle Glade, I spent a year working as a researcher for the International Labor Organization's Special Action Program to Combat Forced Labor. I was based in Lima and traveled around South America.

I co-authored reports on debt bondage and other kinds of forced labor in the cattle ranches of Paraguay, the illegal logging industry in the Peruvian jungle, and the annual Brazil nut harvest in northern Bolivia.[42] I saw and heard about things that shocked me – and shock me to this day. I was particularly struck by my conversations with families in the town of Riberalta, Bolivia. They would move to the jungle to harvest Brazil nuts for two or three months, slowly see their meager earnings whittled away by charges at the company store for basics like rice, salt, sugar, or medicine – and then leave the camp *owing* their employers money.[43] I never thought I would hear about things like that in the United States.

People need to know that there are places here in America where people work 60, 70, 80 hours a week – and still have to pawn their wedding bands to get by. Places where people work so long that they sleep in back of their truck – even though their homes are only a drive away – only to make $0.67 a week, or worse, end up *owing* their employer money.

Misclassification helps this abuse happen. The Department of Labor and the National Labor Relations Board are doing everything they can to stop it. It's time for competition authorities to step up to the plate.

Thank you for your time.

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[42] *See generally* Eduardo Bedoya Garland & Alvaro Bedoya, *Enganche y Servidumbre por Deudas en Bolivia* (Int'l Lab. Off., Working Paper No. 41, 2004), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_082055.pdf; Eduardo Bedoya Garland & Alvaro Bedoya, *El Trabajo Forzoso en la Extracción de la Madera en la Amazonìa Peruana* (Int'l Lab. Off., Working Paper No. 40, 2004), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/--declaration/documents/publication/wcms_082056.pdf; Alvaro Bedoya & Eduardo Bedoya Garland, *Servidumbre por Deudas y Marginación en el Chaco de Paraguay* (Int'l Lab. Off., Working Paper No. 45, 2005), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081941.pdf.

[43] Alvaro Bedoya & Eduardo Bedoya Garland, *Servidumbre por Deudas y Marginación en el Chaco de Paraguay* 27-33 (Int'l Lab. Off., Working Paper No. 45, 2005), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081941.pdf.