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RE: Comment on Draft Merger Guidelines | Docket ID: FTC-2023-0043

Chair Khan and Assistant Attorney General Kanter:

Farm Action submits this comment letter[1] in strong support of the draft update of the Merger Guidelines (the "**Proposed Guidelines**") published by the Department of Justice ("**DOJ**") and the Federal Trade Commission ("**FTC**"; together with DOJ, the "**Antitrust Agencies**" or "**Agencies**") on July 19, 2023. Farm Action is a farmer-led advocacy organization dedicated to building a food and farming system that works for all Americans instead of a handful of powerful corporations. Headquartered in Missouri, Farm Action conducts research, develops policy, and undertakes advocacy efforts informed by the experience and priorities of its Local Leaders network, which includes farmers, ranchers, food system workers, consumers, and rural community leaders across the country.

Many of Farm Action's constituents — including one of Farm Action's founders, Joe Maxwell — have been pioneers in the fight against monopolistic control of American agriculture since the 1980s. Over their lives, they have seen administration after administration — Democratic and Republican alike — ignore the letter of the nation's antitrust laws in favor of "letting corporations accumulate more and more power" through mergers and acquisitions.[2] No more. Today, with the adoption of the Proposed Guidelines, the Biden administration finally turns the page on this decades-long, bipartisan dereliction of duty in the enforcement of our antitrust laws — and

[1] Farm Action thanks Basel Musharbash of Basel PLLC for his assistance in preparing this comment.
[2] *See* Joseph R. Biden, Remarks by President Biden at Signing of Executive Order Promoting Competition in the American Economy, WHITE HOUSE (July 9, 2021).

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revitalizes a critical protection for the liberty and welfare of America's farmers and workers, consumers and small businesses. We applaud the Antitrust Agencies for taking this historic step.

This comment proceeds in two parts. In Part I, we demonstrate that the Proposed Guidelines are faithful to the law as it was written and intended by Congress, and recommend improvements to further effectuate the governing statute. Our analysis of the text, structure, and legislative history of the Clayton shows that its prohibition encompasses each of the classes of mergers identified in the Proposed Guidelines and then reaches beyond — to prohibit all mergers that eliminate competitive activity or concentrate economic power to any material extent, dispermit efficiency and induced entry defenses, and preclude any requirement of "market definition" the identification of a line of business in some distinguishable segment of the country's geography or population. Based on this analysis, we finally make certain recommendations to bring the Proposed Guidelines into further alignment with the will of Congress.

In Part II we urge the Antitrust Agencies to vigorously enforce the Proposed Guidelines throughout America's food system. We provide an in-depth survey of the structure and prevailing anticompetitive dynamics in five primary sectors of the agricultural economy — livestock, dairy, fertilizer, seed and agrochemical, and crop-insurance — to demonstrate the urgency of the moment. As our analysis shows, what the FTC once called the "dead hand of corporate control" is fast replacing the "unseen hand of competition" in essentially all of the industries on which farmers depend to grow, harvest, and market their crops, and on which, by extension, we all rely for the food we eat.[3] Against this backdrop, we leave the Agencies with a map of the most significant merger enforcement concerns in each sector of the agricultural economy — and urge the Agencies to stand firmly as a bulwark against the further concentration of power and the deterioration of competition in our food system.

I. The Text, Structure, and Legislative History of Section 7 Show That It Prohibits Each Of the Classes of Mergers Identified in the Proposed Guideline — And Reaches Far Beyond

According to its text, structure, and legislative history, Section 7 prohibits mergers and acquisitions that could possibly, in one or more realistic ways, either diminish competitive activity, or conduce to a course of action or behavior that can bring a monopoly about, in any line of business carried on within any distinct segment of the nation's geography or population. For a merger to have a realistic possibility of anticompetitive or monopolistic effects, its concrete features must give it the potential to cause such effects, and that potential must not be foreclosed by prohibitive conditions in the merger's concrete environment. Where the requisite possibility exists, the fact that alternative possibilities also exist — such as a potential for a merger to somehow "strengthen" competition — cannot stay the application of the statute. Nor can any defense rest on

[3] *See* FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT (1948), in LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3456 (Earl W. Kintner, ed. 1978).

future circumstances — such as induced entry — which do not yet have substance in reality. The statute, as the Supreme Court said in its first decision interpreting the Clayton Act, does not "give license to the imagination."[4]

The Proposed Guidelines identify eight classes of mergers that are well-within the scope of this statutory prohibition. By virtue of their concrete features, each of the types of mergers identified in the Proposed Guidelines — from those which eliminate an actual or potential rival, to those which restrict rivals' access to necessary inputs or other products they could use in competition, to those which exacerbate concentration, the risk of coordination, or the existing dominance of a single firm — have substantial potential to lessen competition or tend to the creation of a monopoly. Accordingly, where the concrete environment surrounding a merger with any of these features does not foreclose its anticompetitive or monopolistic potential from manifesting, that merger is necessarily unlawful under Section 7.

We applaud the Antitrust Agencies for proposing merger guidelines with such fidelity to the governing statute. We also, however, urge the Agencies to make certain revisions in order to more fully vindicate the Clayton Act's protections against anticompetitive and monopolistic mergers. The guidelines should reject defenses — like "efficiencies" and "induced entry" — that disregard the plain text of the statute; discard the hypothetical monopolist test and embrace a qualitative, instrumental approach to market definition; and include explicit definitions of key terms within Section 7 to ground the Proposed Guidelines in the statutory text as opposed to transient policy or administrative discretion.

1. The Congressional Purpose of Section 7

Congress enacted the core antitrust laws applicable to merger enforcement with "a strong prophylactic orientation against the concentration of private economic power."[5] "Distrust of power," as the legal scholar Eleanor Fox has written, "is the one central and common ground that over time has unified [congressional] support for antitrust statutes."[6] Enacted to stand *against* concentration, the central purpose of the antitrust laws is to perpetuate and preserve an organization of markets characterized by fair competition and fair dealing among numerous, independent participants, both for its own sake and as a way to achieve a variety of policy objectives.[7] The most salient of these objectives include: (1) protecting the liberty of citizens to govern their lives and communities; (2) preventing large corporations from extorting wealth from consumers, farmers, workers, small producers, and local merchants; and (3) preserving open and fair markets for entrepreneurs and small businesses.[8]

[4] *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922).
[5] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 966 (2018).
[6] *See* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1153 (1981).
[7] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 966 (2018).
[8] *See* Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960, 966 (2018). The legislative history of the antitrust laws taken as a whole is carefully mapped in, John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259 (1988); Eleanor M. Fox, *The Modernization of Antitrust: A New*

The first antitrust law, the Sherman Act of 1890, was enacted in response to a pervasive national fear of the rapid assimilation of power by groups of financiers and "captains of industry" who had succeeded in consolidating many basic industries into holding companies or trusts.[9] Bare-minimum enforcement and unworkable judicial interpretation quickly emasculated the Sherman Act, however, and another consolidation wave ensued.[10] The so-called "Great Merger Movement," which took place between 1897 and 1907, saw "[m]ore than 1,800 firms disappea[r] into horizontal combinations, at least a third of which controlled more than 70% of the markets in which they operated."[11] The last straw fell in 1911, when the Supreme Court held that the Sherman Act's prohibitions on restraints of trade and monopolization only apply when a judge determines that a defendant's actions have "operated to prejudice the public interests."[12] The reaction in Congress was swift.

Fearing that the Court's interpretation of the Sherman Act had substituted "the court[s] in the place of Congress" and permitted judges to "test each restraint of trade by the economic standard which [they] happen to approve [of],"[13] in 1914 Congress enacted the Clayton Act to establish a "legislative rule" for the proscription of business methods that it had determined were "common and favorite method[s] of promoting monopoly" — corporate mergers, exclusive dealing, and commercial discrimination.[14] Learning its lesson from the Sherman Act's lackluster implementation, Congress also created an independent agency — the FTC — to administer the Clayton Act in

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Equilibrium, 66 CORNELL L. REV. 1140, (1981); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65 (1982); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012); Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 766, 774-75 (2019); Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 265 (2017).

[9] *See* Harlan Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 575 (1973). *See also* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MARYLAND L. REV. 7616, 771-779 (2019); Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 940 (1987); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L. J. 257, 283-84 (1989).

[10] For documentation of the roots of the Clayton Act in congressional concern over the Sherman Act's failure to stop industry consolidation, *see* James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 507-514 (1968); DAVID D. MARTIN, MERGERS AND THE CLAYTON ACT 4-8, 13-19 (1959). *See also* U.S. FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3437-39 (Earl W. Kintner, ed. 1978). That proponents of the Clayton Act in Congress blamed this failure on the Department of Justice's disinterest in enforcing the Sherman Act, on the one hand, and the Supreme Court's interpretation of the Sherman Act, on the other, has also been documented. *See, e.g.*, James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 507-514 (1968); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 231 (1980). This legislative background to the Clayton Act has also been recognized in the Supreme Court's merger jurisprudence. *See, e.g.*, *United States v. Von's Grocery Co.*, 384 U.S. 270, 274 (1966).

[11] NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904 1 (1985).

[12] United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911).

[13] *See* SENATE COMM. ON INTERSTATE COMMERCE: CONTROL OF CORPORATIONS, PERSONS, AND FIRMS ENGAGED IN INTERSTATE COMMERCE *in* S. REP. NO. 1326, 62d Cong., 3d Sess. (1913).

[14] The congressional desire to fashion a "legislative rule" for the proscription of monopolistic methods in the Clayton Act is exemplified by the report of the Senate Interstate Commerce Committee on its investigation, authorized by Senate resolution in response to the *Standard Oil* decision, into "the control of corporations, persons, and firms engaged in interstate commerce." *See* SENATE COMM. ON INTERSTATE COMMERCE: CONTROL OF CORPORATIONS, PERSONS, AND FIRMS ENGAGED IN INTERSTATE COMMERCE *in* S. REP. NO. 1326, 62d Cong., 3d Sess. (1913). The House Judiciary Committee's report on the Clayton Act bill, H.R. REP. NO. 627, 63d Cong., 2d Sess. (1914), refers to corporate mergers forming holding companies as a "common and favorite method of promoting monopoly" and describes holding companies as "an abomination and in our judgement [] a mere incorporated form of the old-fashioned trust."

accordance with congressional intent and to proscribe new and unanticipated methods of unfair competition as they arise.[15]

As originally enacted, Section 7 of the Clayton Act prohibited corporate acquisitions "where [their] effect . . . may be [1] to substantially lessen competition between the corporation [acquired] and the corporation making the acquisition, or [2] to restrain commerce in any section or community, or [3] to tend to create a monopoly in any line of commerce." Almost immediately after it was enacted, however, the courts began ignoring Section 7's language and diluting its restrictions on corporate mergers. The first decisive blow came in 1926, when the Supreme Court held that Section 7 applied only to stock — not asset — mergers.[16] The provision was immediately considered a dead letter.[17] A wave of asset-based mergers took off the very next year.[18] Within five years, over 4,800 mergers were consummated — a record pace at the time.[19] In 1930, the Court added insult to injury by holding that Section 7 only prohibited mergers which "injuriously affect the public" — practically nullifying the distinction between the Clayton Act and the Sherman Act.[20] Although the Great Depression soon brought merger activity to a temporary halt, another consolidation wave began in 1940 and accelerated after the end of World War II.[21] Fearing the key role of corporate mergers in the processes of monopoly and concentration, in 1950 Congress enacted the Celler-Kefauver Act to establish a "new statutory formula for the legality of mergers"[22] — one that, according to the Act's proponents, would finally "call a halt to the merger movement . . . in this country."[23]

The legislative process leading up to the Celler-Kefauver Amendment reveals a clear embrace of an antimonopoly vision of markets by lawmakers and their "reliance upon a structural theory of competition which stresses the advantages of a large number of small-sized firms."[24] The Amendment stemmed directly from the Temporary National Economic Committee's (TNEC) landmark 3-year investigation into the causes and effects of concentration in our economy.[25] Following the conclusion of its investigation in 1941, TNEC called for a legislative program of "economic restructuring" that would "stop the processes of concentration" and secure a

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[15] *See* James C. Thomas, *Conglomerate Merger Syndrome — A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 511-512 (1968). We note it was unambiguously indicated in the floor debates on the Clayton Act that the Federal Trade Commission would translate the broad prohibitions of Sections 2, 3, and 7 into administrable rules. *See, e.g.*, 51 Cong. Rec. 16317-18 (1914) (statement by Rep. Floyd, a House conferee and a framer of the original Clayton bill, indicating that Sections 2, 3, and 7, were restored in the conference committee on the Clayton Act at the insistence of the House conferees primarily in order to ensure that the Federal Trade Commission had the constitutional authority to enforce rules against contractual restraints of trade).

[16] *See FTC v. Western Meat Co.*, 272 U.S. 554 (1926).

[17] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 229-30 (1960).

[18] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 229-30 (1960).

[19] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 229-30 (1960).

[20] *See International Shoe Co. v. FTC*, 280 U.S. 291 (1930)

[21] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 230-31 (1960).

[22] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 230-31, 306 (1960).

[23] *See* 95 CONG. REC. 11484, 11485 (81st Cong., 1st Sess., August 15, 1949) (statement of Rep. Celler).

[24] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 247 (1960); James C. Thomas, *Conglomerate Merger Syndrome — A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 537-551 (1968). The legislative history of the Celler-Kefauver Act is carefully mapped in, Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766, 766–67 (1952).

[25] *See* James C. Thomas, *Conglomerate Merger Syndrome — A Comparison: Congressional Policy with Enforcement Policy*, 36 Fordham L. Rev. 461, 536-40 (1968); Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766, 766–67 (1952).

"permanent decentralization" of economic power in American society.[26] Finding that mergers had "hastened the growth of the concentration of economic power and had contributed in major part toward the elimination of competition," TNEC recommended the passage of a law that would "halt the merger process in its inception."[27]

Senator Joseph O'Mahoney, who had served as TNEC's chair, immediately introduced the anti-merger legislation recommended by the committee.[28] Each subsequent Congress considered similar bills from Senator O'Mahoney and others in the House and Senate until 1950.[29] Meanwhile, Congress acted vigorously — through legislation, select committees, and investigations — to deconsolidate industries and strengthen small businesses.[30] In 1941, the House of Representatives approved a resolution by Rep. Wright Patman creating the Select Committee on Small Business to "study and investigate[] the National Defense Program in its relationship to small business in the United States."[31] Before this time, the term "small business" had no meaning in federal law and policy.[32] The Small Business Committee's investigations stirred Congress to change that — in 1942, it passed the Small Business Mobilization Act.[33]

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[26] TEMPORARY NATIONAL ECONOMIC COMMITTEE, INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, S. DOC. NO. 35, 77th Cong., 1st Sess. 691, at 4 (1941).

[27] TEMPORARY NATIONAL ECONOMIC COMMITTEE, INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, S. DOC. NO. 35, 77th Cong., 1st Sess. 691, at 38 (1941).

[28] James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 537 (1968).

[29] The following bills, accompanying documents and debates—relating to H.R. 2734, 81st Cong., 1st Sess. (1949), the only bill to reach the floor of either house—comprise the full legislative history of the Celler-Kefauver Act:

- *78th Congress:* S. 577, 78th Cong., 1st Sess. (1943)(O'Mahoney)—no action; H.R. 1517, 78th Cong., 1st Sess. (1943) (Sumners)—no action.
- *79th Congress*: S. 615, 79th Cong., 1st Sess. (1945)(O'Mahoney)—no action; H.R. 2357, 79th Cong., 1st Sess. (1945) (Kefauver); *Hearings before a Subcommittee of the Committee on the Judiciary on H.R. 2357*, 79th Cong., 1st Sess. (1945); reintroduced with Acts as H R. 4519, 79th Cong., 1st Sess. (1945) (Kefauver); reintroduced with Acts as H.R. 4810, 79th Cong., 1st Sess. (1946) (Kefauver); H.R. REP. NO. 1480, 79th Cong., 2d. Sess. (1946); reintroduced with Acts as H.R. 5535, 79th Cong., 2d Sess. (1946) (Kefauver); H.R. REP. NO. 1820, 79th Cong., 2d Sess. (1946).
- *80th Congress*: S. 104, 80th Cong., 1st Sess. (1947) (O'Mahoney) [Unpublished hearings, reprinted in part in *Hearings before a Subcommittee of the Committee on the Judiciary of the House of Representatives on H.R. 2734*, 81st Cong., 1st Sess. 60-94 (1949)]; H.R. 515, 80th Cong., 1st Sess. (1947) (Kefauver); *Hearings before a Subcommittee of the Committee on the Judiciary on H.R. 515*, 80th Cong., 1st Sess. (1947); reintroduced with Acts as H.R. 3736, 80th Cong., 1st Sess. (1947) (Kefauver); H.R. REP. NO. 596, 80th Cong., 1st Sess. (1947); H.R. 7024, 80th Cong., 2d Sess. (1948) (Kersten)—no action.
- *81st Congress*: S. 56, 81st Cong., 1st Sess. (1949) (O'Mahoney and Kefauver); H.R. 988, 81st Cong., 1st Sess. (1949) (Jackson); H.R. 1240, 81st Cong., 1st Sess. (1949) (Mansfield); H.R. 2006, 81st Cong., 1st Sess. (1949) (Hobbs); H.R. 2734, 81st Cong., 1st Sess. (1949) (Celler); *Hearings before a Subcommittee of the Committee on the Judiciary of the House of Representatives on H.R. 2734*, 81st Cong., 1st Sess. (1949) [hereinafter referred to as *Hearings on H.R. 2734*]; H.R. REP. NO. 1191, 81st Cong., 1st Sess. (1949); debated in the House of Representatives under a suspension of rules, 95 CONG. REC. 11484-11507 (1949); passed House of Representatives, August 15, 1949, Yeas—223, Nays—92, Not voting—117, 95 CONG. REC. 11507 (1949); *Hearings before a Subcommittee of the Committee on the Judiciary of the United States Senate on H.R. 2734*, 81st Cong., 1st and 2d.Sess. (1949-50); SEN. REP. NO. 1775, 81st Cong., 2d.Sess. (1950); debated in the Senate, 96 CONG. REC. 16404-05, 16433-57, 16460-61, 16498-16508 (1950); passed Senate with Acts, Dec. 13, 1950, Yeas—55, Nays—22, Not voting—19, 96 CONG. REC. 16508 (1950); House agrees to Senate Acts, 96 CONG. REC. 16573 (1950); approved by the President, Dec. 29, 1950, 96 CONG. REC. 17138 (1950).

[30] For a fuller history of the congressional effort to restructure the economy and rebuild a yeomanry of small, local, independent business during the 1940s and 1950s, *see* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 173–79 (1961). For a discussion of how the Small Business Mobilization Act of 1942 and the Surplus Property Act of 1944 interlace with the antitrust statutes, *see* Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 UNIV. PENN. L. REV. 1076, 1077 (1979).

[31] *See* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 169 (1961).

[32] *See* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 169 (1961).

[33] *See* 50a U.S.C. §§ 1101-1112 (1942); Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 169 (1961).

Consistent with the antimonopoly vision animating the antitrust laws, the Small Business Mobilization Act authorized small businesses to cooperate in war production without fear of violating the antitrust laws and established the Smaller War Plants Corporation to finance that cooperation.[34] Relying on this Act, millions of small, independent businesses (each with fewer than 500 employees) freely coordinated their resources to create productive capacities that rivaled the efficiency of the largest manufacturers.[35] Congress did not forget these achievements. As the war's end came near, it made reversing the processes of concentration and securing a permanent decentralization of economic power its explicit policy in the Surplus Property Act of 1944.[36] Federal agencies were instructed to distribute the government's enormous wartime industrial capacity with unequivocal objectives to "discourage monopolistic practices," to "strengthen and preserve the competitive position of small business concerns," to "foster the development of new independent enterprises," and, critically, to "develop the *maximum of independent operators* in trade, industry, and agriculture."[37]

In this context, legislators viewed the accelerating merger wave of the post-war era as a profound threat to their vision "of a peace-time economy of free independent private enterprise."[38] In 1947 and 1948, the FTC delivered comprehensive § 6(f) reports to Congress on the role of corporate mergers in promoting "the growth of giant corporations," "the disappearance of small business," and "a general increase in concentration and monopoly."[39] Centrally, these reports highlighted for Congress that: (a) the Great Merger Movement of 1897-1907 was the original cause of "American industry['s] characteristic twentieth-century concentration of control"; and that (b) corporate mergers had ever since served as the primary vehicle for "the growth of giant corporations, by accretion, at the expense of small, independent firms" in the remaining "small business industries."[40] The two FTC reports — and the TNEC report — provided the core factual

[34] *See* 50a U.S.C. §§ 1101-1112 (1942); Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 169 (1961).

[35] Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 169 (1961). Jonathan J. Bean, *World War II and the "Crisis" of Small Business: The Smaller War Plants Corporation, 1942–1946*, 6(3) J. POL'Y HIST. 215 (1994).

[36] *See* 50a U.S.C. §§ 1101-1112 (1942); Louis Cain & George Neumann, *Planning for Peace: The Surplus Property Act*, 41(1) J. ECON. HIST. 129, 129–31 (1981). Two other statutes were passed the same year to supplement the Surplus Property Act — the War Mobilization and Reconversion Act and the Contract Settlement Act — pursued the same antimonopoly policies. *See* Wendell Barnes, *What Government Efforts Are Being Made To Assist Small Business*, 24 LAW & CONTEMP. PROBS. 3, 4 (1959).

[37] *See* 58 Stat. 765 § 2(b), 2(d), 2(p) (1944).

[38] *See* 58 Stat. 765 § 2(b); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1149-50 (1981).

[39] The quoted language is from the FTC's 1947 report. *See* FEDERAL TRADE COMMISSION, FTC REPORT TO THE CONGRESS: THE PRESENT TREND OF CORPORATION MERGERS AND ACQUISITIONS 5 (1947), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3418, 3421 (Earl W. Kintner, ed. 1978) ("In short, after studying the problem, the Federal Trade Commission, the Temporary National Economic Committee, and the House Judiciary Committee (all of which were bipartisan in membership) have agreed, in effect, that the present loophole [for asset mergers under the original Section 7 of the Clayton Act] creates a contradiction in law, promotes the growth of giant corporations, leads to the disappearance of small business, and results in a general increase in concentration and monopoly."). The FTC's 1948 report conveyed similar sentiments. *See* FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT 66 (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3456 (Earl W. Kintner, ed. 1978).

[40] *See* FEDERAL TRADE COMMISSION, FTC REPORT TO THE CONGRESS: THE PRESENT TREND OF CORPORATION MERGERS AND ACQUISITIONS 3-4 (1947), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3418, 3421 (Earl W. Kintner, ed. 1978) ("As a result of this anomaly [the loophole in Section 7 for asset mergers], a powerful impetus was given to the growth of giant corporations, by accretion, at the expense of small, independent firms."); FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT 24 (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3452 (Earl W. Kintner, ed. 1978) ("It is often forgotten that many of the Nation's largest corporations were originally

and intellectual premises on which legislators relied in passing the Celler-Kefauver Amendment and were thoroughly interwoven into its legislative history.[41]

This decade-long legislative process culminated in extensive Senate and House hearings on the nature and effect of corporate mergers that spanned the 79th, 80th, and 81st Congresses, the results of which were ultimately distilled into the committee reports, sponsor statements, and floor debates leading to the Amendment's passage.[42] Throughout this process, the central theme of the Amendment's proponents was the historic, continuing, and primary role of corporate mergers in the centralization of economic power within large corporations.[43] All who spoke in favor of the bill — and the committee reports — emphasized that the concentration of asset-ownership and market-control within large corporations (both in the economy as a whole and in specific industries) was both exceedingly high and still increasing.[44] The role of corporate mergers as a vehicle of economic concentration was highlighted invariably through examples of: (ab) large corporations combining with each other; (ba) new large corporations being created out of multiple smaller ones; or (c) small businesses being absorbed into large corporations.[45]

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created as giant consolidations of numerous existing small firms. . . . [I]t was the consolidation movement at the turn of the century that 'gave to American industry its characteristic twentieth century concentration of control.'").

[41] *See, e.g.,* 96 CONG. REC. 16433 (Dec. 12, 1950) (statement of Sen. O'Conor) (citing findings and conclusions of FTC reports as primary reasons to pass Act.); 96 CONG. REC. 16433, 16444 (Dec. 12, 1950) (statement of Sen. O'Mahoney) ("My attention was called to the need of such a measure during the hearings of the so-called Temporary National Economic Committee, which in 1938 undertook a searching and painstaking study of our economy and on March 31, 1941, filed its report. In that report was contained a unanimous recommendation for the enactment of a bill like this. The record which was made by the Federal trade Commission, and by others who had studied this question when they appeared before the Temporary National Economic Committee, left no doubt of the fundamental fact that an innocent defect in the drafting of section 7 of the Clayton Act back in 1914 had resulted in creating a great opportunity for escape by flagrant violators of the law."). Even Senators in opposition to the Celler-Kefauver Act relied on the FTC and TNEC reports in their opposition. *E.g.,* 96 CONG. REC. 16433 (Dec. 12, 1950) (statements of Sens. Donnell and O'Mahoney) (the two Senators volleyed back and forth at length debating validity of the FTC conclusions as to the impact of mergers in industry concentration). Beyond floor debates, the FTC reports are heavily quoted in the Senate Judiciary Reports in both support and opposition of the Act. *See* S. REP. NO. 1775, at 6, 13, 14 (1950) (Majority describes type of problem Act was intended to resolve in words of FTC Report. Opposition uses FTC Report findings as premise for opposition). *See also* 95 CONG. REC. 11484 at 11486-87 (Aug. 15, 1949) (statement of Rep. Celler) (citing findings of TNEC as evidence in support of congressional action to preserve competition.)

[42] *See, e.g.*, 96 CONG. REC. 16436 (1950) (statement of Sen. O'Conor) ("As would be expected from this lengthy legislative history, the record on this bill is voluminous, consisting of three printed volumes of hearings before subcommittees of the House Judiciary Committee in the Seventy-Ninth, Eightieth and Eighty-first Congresses; approximately 700 typewritten pages of transcript of hearings before the subcommittee of the Senate Judiciary Committee of the Eightieth Congress; a printed volume of hearings before the subcommittee of the Senate Judiciary Committee of the Eighty-first Congress . . ."). *See also* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 306 (1960) ("It [the Celler-Kefauver Act] was enacted after very extensive hearings on the nature and effects of mergers, and was treated in the reports and debates as creating for the first time an effective antimerger policy.").

[43] *See generally* 96 CONG. REC. 16433 (Dec. 12, 1950). *See also* 95 CONG. REC. 11484 (Aug. 15, 1949).

[44] *See, e.g.,* 96 CONG. REC. 16433 (Dec. 12, 1950) (statement of Sen. O'Conor) ("The immediate need for the passage of H.R. 2734 stems from the widespread merger activity which has been taking place since World War II."). *See also* 96 CONG. REC. 16433 at 16446-47 (Dec. 12, 1950) (statement of Sen. O'Mahoney) (quoting President Theodore Roosevelt and Taft in 1908 and 1910, respectively, on the increase in and evils of monopoly). *See also* 95 CONG. REC. 11484 at 11494 (Aug. 15, 1949) (statement of Rep. Carroll) ("Everyone who has studied this problem knows that competition has been weakened during the past several decades. Actually, we have lost rather than gained ground since the days of the great trust-busting operations . . . This movement has been especially serious since the end of the war, in industry after industry, three, four, five, or six huge corporations dominate prices, production, and employment.").

[45] 96 CONG. REC. 16433 (Dec. 12, 1950) (statement of Sen. O'Conor) ("Moreover, in certain small-business industries, notably steel drums, tight cooperage, and wines, virtually all or a substantial part of the industry has been taken over by large corporations."). *See also* 96 CONG. REC. 16433 (Dec. 12, 1950) (statement of Sen. O'Mahoney) ("Of course the history of concentration in the steel industry, not at all confined to the earlier years, has been the history of acquisition by the United States Steel Corp. when it started,

Significantly, proponents unanimously argued that the 1940s merger wave had to be checked through passage of the Amendment precisely because it was pervaded by large corporations buying out small, independent businesses in traditionally fragmented industries.[46] Drawing on the FTC reports, legislators repeatedly hammered home their alarm that 93% of the firms acquired between 1940 and 1947 had less than $1 million in assets;[47] that more of these acquisitions occurred in "small business" industries such as textiles and food than in any other industries;[48] that these acquisitions had taken 2,500 independent firms out of business; and that they were gradually transforming "open and free" industries into oligopolies.[49] Almost none of these mergers had, on its own, significantly consolidated markets or harmed market performance. That was the point.

In tandem with this unambiguous condemnation of the concentrative mergers and acquisitions that had pervaded contemporary and previous merger waves, "none of the justifications for mergers by big companies were accorded any significance by Congress."[50] Instead, "[e]fficiency, expansion, and the like were ignored or simply brushed aside in the deliberations."[51] This was not an accident. It reflected the considered economic policy of Congress after a decade of congressional investigations into the nature and effect of corporate mergers in our economy.[52]

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and by the Republic Steel Corp. and other later corporations, of competing concerns, so that today in the steel industry there has been built up what amounts to a monopolistic situation by which the entire production and distribution of steel in the United States are directed by common consent."); 96 CONG. REC. 16433 at 16451 (Dec. 12, 1950) (statement of Sen. Kefauver) ("Nevertheless, since the time Abraham Lincoln made the statement which I quoted, the control of industry of our Nation has become more and more concentrated in the hands of fewer and fewer persons and corporations . . . Today, control of industries which manufacture a great many of our basic products-steel, copper, lead, and many other products upon which our very economy depends – is held by a handful of corporations."). Similar conversations occurred in the House of Representatives. *E.g.*, 95 CONG. REC. 11484 at 11487 (Aug. 15, 1949) (statement of Rep. Celler) (using steel industry as an example of extreme concentration).

46 96 CONG. REC. 16433 (Dec. 12, 1950) (statement of Sen. O'Conor) ("The evidence thus points to the conclusion that, insofar as its impact on concentration is concerned, the outstanding characteristic of the current merger movement has been the absorption of smaller independent enterprises by larger concerns."). 96 CONG. REC. 16433 at 16443 (referring to charts showing increase in acquisitions in grocery and food products, distilleries, wineries, farm-machinery, chemical, and steel companies). 96 CONG. REC. 16433 at 16450 (Dec. 12, 1950) (statement of Sen. O'Mahoney) ("The widespread entry of corporations into unrelated lines of manufacture is … because we have not taken the steps necessary to prevent this constant concentration which closes the door to enterprise by the citizen of the States which are represented by every Senator upon this floor."). *See also* 96 CONG. REC. 11484 at 11489 (Aug. 15, 1949) (statement of Rep. Keating) ("Unless the bill is enacted, there is every reason to believe that, like the steel and copper industries, these traditionally small business fields of which I am speaking will also come under the control of a few large corporations. That this is indeed a very real and positive danger is revealed by the fact that most of the acquisitions during the recent merger movement have actually taken place in what have commonly been regarded as traditionally small business industries."); 95 CONG. REC. 11484 at 11494-95 (Aug. 15, 1949) (statement of Rep. Bryson) (discussing impact of merger movement on southern communities and loss of control of textile industry); 96 CONG. REC. 11484 at 11494-95 (Aug. 15, 1949) (statement of Rep. Boggs) (naming predominantly small-business fields such as food, textiles, apparel, and non-electrical machinery as those most impacted by merger movement).

47 96 CONG. REC. 16404, 16434 (1950) (statement of Sen. O'Conor); 95 CONG. REC. 11484 at 11506(Aug. 15, 1949) (statement of Rep. Byrne).

48 96 CONG. REC. 16404, 16434 (1950) (statement of Sen. O'Conor); 95 CONG. REC. 11484 at 11497-98 (Aug. 15, 1949) (statement of Rep. Boggs).

49 96 CONG. REC. 16404, 16434 (1950) (statement of Sen. O'Conor); 95 CONG. REC. 11484 at 11506(Aug. 15, 1949) (statement of Rep. Byrne).

50 *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 307 n.252 (1960).

51 *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226, 307 n.252 (1960).

52 *See* EARL W. KINTNER, *Introduction: The Celler-Kefauver Act of 1950*, *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (1978); James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 506-49 (1968).

The basic economic conclusions that legislators derived from this decade of congressional study were that, in general, corporate mergers: (a) did not generate productive efficiencies; (b) produced little, if any, economic value for the public; and (c) functioned mainly as a vehicle for large corporations to consolidate economic power at the expense of small, independent business.[53] Since consolidation slackened competitive pressures and diverted investment from the creation of new productive capacities and enterprises, such mergers were also found to have their own negative effects on efficiency.[54] Meanwhile, other methods for achieving economies of scale — such as internal expansion or cooperation between small businesses — were found to deliver all of the alleged benefits of corporate mergers without the concentrative baggage.[55] Based on this policy judgment about the relative social and economic value of corporate mergers compared to other business methods, legislators found such mergers were "methods of monopoly" whose operation was "the antithesis of meritorious competitive development" — to be discouraged among all but small, independent businesses.[56]

Throughout the legislative history of the Celler-Kefauver Amendment, only three categories of mergers and acquisitions were identified as innocuous or, at least, not inconsistent with the antimonopoly policy of the bill: (1) acquisitions of failing companies, (2) mergers between small businesses, and (3) transactions involving individuals or partnerships.[57] By 1950, these categories were not amorphous in the kinds of firms they encompassed. On the one hand, an acquisition of a "failing company" that is competitively innocuous had been defined by the Supreme Court as early as 1930, when it held in *International Shoe* that "a corporation with resources so depleted and the prospect of rehabilitation so remote that it face[s] the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants [are] operated" may be acquired by a competitor without violating the antitrust laws, if "no other prospective purchaser" exists and the buyer has no anticompetitive or monopolistic purpose. Both the House and Senate reports reviewed the Supreme Court's opinion in *International Shoe* and adopted this definition of a "failing company" transaction. The term "small business" was likewise a definite one in federal regulatory and legislative practice by 1950, being primarily identified with firms that had fewer than

[53] *See, e.g.*, 95 CONG. REC. 11484 at 11489 (Aug. 15, 1949) (statement of Rep. Keating) (discussing consolidation in steel, copper industries and resulting economic concentration of power as well as increase in merger activity in traditionally small business fields).

[54] *See, e.g.*, 95 CONG. REC. 11484 at 11494 (Aug. 15, 1949) (statement of Rep. Yates) ("When three or four producers take the places of 20 or 30, the chances are great that price competition will be crippled, that declining markets will be dealt with by restriction of output instead of by price reduction, that the big concerns will adopt a live-and-let-live policy toward each other at the sacrifice of their efficiency and their progress, and that the remaining small competitors will be either bought out or reduced to vassals who meekly follow the large enterprises."); 95 CONG. REC. 11484 at 11495 (Aug. 15, 1949) (statement of Rep. Bryson) ("Not only is this growing trend toward outside control of local enterprise damaging to civic welfare, but also it is harmful to the general welfare, as the heads of large concentrated organizations tend to follow the suicidal policy of maintaining prices and cutting production, rather than lowering prices and maintaining production."); 95 CONG. REC. 11484 at 11501 (Aug. 15, 1949) (statement of Rep. Evins) (discussing common practice among large corporations – particularly in steel industry – to channel supplies into own integrated corporations, denying smaller businesses essential inputs).

[55] 96 CONG. REC. 16433 at 16449 (Dec. 12, 1950) (statement of Sen. Kefauver) (discussing positive impact of small business cooperation on defense production during World War II).

[56] *See, e.g.*, 96 Cong. Rec. 16404, 16453 (statement of Sen. O'Mahoney).

[57] *See* James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 547-551 (1968)

500 employees, confined their facilities to a single state, and were owned and operated independently of the dominant firms in their field.[58] Indeed, shortly after enacting the Celler-Kefauver Amendment, Congress eliminated any confusion about this category by enacting a statutory definition of "small business" that mirrored these terms in the Small Business Act of 1953 — an act many viewed *in pari materia* with the antitrust laws at the time[59] The common thread that ties these categories of mergers together is that each would have produced "only a minimal effect on any further concentration of economic power" and "no perceptible change in the intensity of competition."[60]

In summary, the legislative history of the Celler-Kefauver Amendment reveals an unambiguous congressional purpose to establish a far-reaching prohibition on mergers that serve to concentrate economic power in large corporations without impinging upon the freedom of small and intrastate business.[61] Toward that end, the framers of the Amendment indicated that its text was carefully drafted "to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."[62] Read in light of the prevailing Sherman Act jurisprudence at the time, this statement clarifies exactly how far-reaching a prohibition legislators were seeking to impose on concentrative mergers and acquisitions.

By the time the Amendment was enacted in 1950, the Supreme Court had (as discussed in Part 2 below) re-interpreted the Sherman Act to cabin the discretion of judges and "giv[e] the law new and far-reaching scope."[63] Among other things, the Court's decisions over the 1940s imposed definite restrictions on the use of corporate mergers by dominant firms. Specifically, they made clear that a merger would justify a Sherman Act proceeding where it: (1) served to create a realized monopoly, in the sense of consolidating into one person or group exclusive control over all or substantially all trade in a line of business, or a preponderant share of such trade coupled with power to exclude the remaining competition from the relevant line of business when desired;[64] (2) entrenches or extends

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[58] *See* Everette MacIntyre, *Small Business and the Antitrust Laws*, 39 U. DET. L. J. 169, 169–71 (1961); Jonathan J. Bean, *World War II and the "Crisis" of Small Business: The Smaller War Plants Corporation, 1942–1946*, 6(3) J. POL'Y HIST. 215 (1994); Louis Cain & George Neumann, *Planning for Peace: The Surplus Property Act*, 41(1) J. ECON. HIST. 129, 132–35 (1981); Wendell Barnes, *What Government Efforts Are Being Made To Assist Small Business*, 24 LAW & CONTEMP. PROBS. 3, 4 (1959) .

[59] *See* Pub. L. 83–163, ch. 282, 67 Stat. 232 It was codified at 15 U.S.C. ch. 14A ("For the purposes of this title, a small-business concern shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation."); Federal Aids to Small Business 11 Business Lawyer (ABA) 1955-1956 (heinonline.org)

[60] *See* James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 558-59 (1968)

[61] S. REP. NO. 1775, 81st Cong., 2d Sess., (June 2, 1950) (Report of the Senate Judiciary Committee on H.R. 2734); Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 272 (2017); James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 552-53 (1968).

[62] *See* S. REP. NO. 1775, 81st Cong., 2d Sess., (June 2, 1950), at 5 (Report of the Senate Judiciary Committee on H.R. 2734) ("The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.").

[63] Eugene V. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 580 (1947).

[64] United States v. Aluminum Co. of Am., 148 F.2d 416, 424–26 (2d Cir. 1945); United States v. Paramount Pictures, 334 U.S. 131, 149–57 (1948); United States v. Griffith, 334 U.S. 100, 106–10 (1948); United States v. Columbia Steel Co., 334 U.S. 495, 519–34 (1948).

an existing monopoly;[65] (3) "unreasonably lessens competition" in a line of business by eliminating head-to-head rivalry that is "substantial" in light of "the strength of the remaining competition, . . . the probable development of the industry, consumer demands, and other characteristics of the market";[66] (4) "unreasonably restricts the opportunities of competitors to market their products" in light of "the nature of the market to be served" and the "leverage" which it "creates or makes possible" in the hands of the merged firm;[67] or (5) otherwise "tend[s] to create a monopoly and to deprive the public of the advantages that flow from free competition."[68] Furthermore, in evaluating the "reasonableness" or "unreasonableness" of a lessening of competition or restriction of market opportunities caused by a merger, the Court held that judges had to be guided by the "recognized policy of the Sherman [Act] itself."[69] That policy, the Court made clear, was the "preservation of business competition" as a bulwark against the various "evils" that flow from "the concentrated commercial power of trusts and combinations."[70] And Congress did not authorize judges to "creat[e] special exceptions" to this policy based on their own choices "between competing business and economic theories," or their own assessment that "some good result[]" might come from "restraints on free competition in business."[71]

Against this already restrictive Sherman Act background, the legislative history makes clear that the Amendment's test of illegality — prohibiting mergers where their "effect . . . in any line of commerce in any section of the country, may be substantially to lessen competition, or to tend to create a monopoly" — was intended to "reach far beyond the Sherman Act" and its pre-existing restrictions on mergers.[72] Thus, the committee reports and sponsor statements explain that, under the Amendment, enforcers need not "speculate as to what is in the 'back of the mind' of those who promote a merger," prove that the merging parties had engaged in, or will engage in, "unethical or predatory" behavior, or show that the merged firm will "posses[s] the power to destroy or exclude competitors or fix prices."[73] Moreover, whereas the Court's *Columbia Steel* decision (1948) had established that a merger's legality under the Sherman Act must be tested in the context of the "market in which the [merging parties] compete," the committee reports and sponsor statements on the Amendment indicate that its "section-of-the-country" language was used to allow a proscribed

[65] United States v. Columbia Steel Co., 334 U.S. 495, 519–34 (1948) ; United States v. Paramount Pictures, 334 U.S. 131, 167–75 (1948); United States v. Griffith, 334 U.S. 100, 105–10 (1948)

[66] United States v. Columbia Steel Co., 334 U.S. 495, 508 (1948).

[67] United States v. Columbia Steel Co., 334 U.S. 495, 524 (1948).

[68] Associated Press v. United States, 326 U.S. 1, 17 n.1 (1945); United States v. Aluminum Co. of Am., 148 F.2d 416, 428–29 (2d Cir. 1945); *see also* S. REP. NO. 1775, 81st Cong., 2d Sess., (June 2, 1950), at 10 (Report of the Senate Judiciary Committee on H.R. 2734) (discussing the holding in *United States v. Aluminum Co. of America* (2d. Cir. 1945) providing that 90-percent control of an industry by one company was, *per se*, in violation of the Sherman Act but noting, in dicta, it was "doubtful" that 64-percent would be sufficient and that 33-percent was "certainly" not sufficient).

[69] United States v. Paramount Pictures, 334 U.S. 131, 159 (1948)

[70] Apex Hosiery Co. v. Leader, 310 U.S. 469, 498 (1940).

[71] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222, 258 (1940); Fashion Originators' Guild of Am. v. Fed. Trade Comm'n, 312 U.S. 457 (1941); United States v. Crescent Amusement Co., 323 U.S. 173, 187 (1944); Apex Hosiery Co. v. Leader, 310 U.S. 469, 490 n.11 (1940); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912).

[72] *See* S. REP. NO. 1775, 81st Cong., 2d Sess., (June 2, 1950), at 5 (Report of the Senate Judiciary Committee on H.R. 2734) ("The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.")

[73] *See, e.g.*, H.R. REP. NO. 1191, 81st Cong., 1st Sess., August 4, 1949, at 8 (REPORT OF THE HOUSE JUDICIARY COMMITTEE ON H.R. 2734).

effect to be demonstrated in any "appreciable segment" of an "area of effective competition" within a line of commerce, and that the merging parties need not be head-to-head competitors or even do business in the segment where the proscribed effect is shown.[74] Finally, although the Senate Report suggested that the phrase "may be" in the Amendment refers to a "reasonable probability" of anticompetitive or monopolistic effects, the House Report was silent, and opponents of the Amendment repeatedly pointed out during the consideration of the bill that the Amendment may easily be read to require only a "reasonable possibility" of such effects.[75]

To fortify this expansive standard embodied in the Amendment against "the tendency of the courts in cases under [the original Section 7] to revert to the Sherman Act test," legislators made further modifications to the original section to remove the main justifications that courts had used to ignore Section 7's original text in the past — its potential to prohibit mergers between small, local businesses.[76] As noted above, the original Section 7 prohibited mergers that, among other things, (1) lessened competition between the acquiring and acquired firm, or (2) restrained commerce in "any section or community."[77] Lawmakers believed the reason this text was abandoned by the courts was that, construed literally, it might have prohibited "any local enterprise in a small town from buying up another local enterprise in the [same] small town."[78] The Amendment sought to correct this defect by removing the "acquiring-acquired" and "community" phrasing from Section 7 and by prohibiting mergers based on their effect on competition, or tendency to create a monopoly, "in any line of commerce in any *section* of the country."[79] As committee reports and sponsor statements reveal, the central purpose of these changes was to avoid prohibiting mergers between small businesses that were "inconsequential" or "economically insignificant," or "would [make] no perceptible change" in competition.[80] By dropping these provisions that had previously led courts to abandon the text of Section 7, lawmakers sought to "assure a broader construction of its more fundamental provisions . . . than had been given in the past."[81]

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[74] To be "appreciable," a segment "may not only be a segment which covers an appreciable segment of the trade, but it may also be a segment which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country." *See* S. REP. NO. 1775, 81st Cong., 2d Sess., (June 2, 1950), at 10 (REPORT OF THE SENATE JUDICIARY COMMITTEE ON H.R. 2734); H.R. REP. NO. 1191, 81st Cong., 1st Sess., August 4, 1949, at 11 (REPORT OF THE HOUSE JUDICIARY COMMITTEE ON H.R. 2734). *See also* Thomas K. McElroy, *Section 7 of the Clayton Act and the Oil Industry*, 5 BAYLOR L. REV. 121, 129-132, 140-141 (1953).

[75] 96 CONG. REC. 16433 at 16454 (Dec. 12, 1950) (statement of Sen. O'Mahoney).

[76] *See, e.g.*, S. REP. NO. 1775, 81st Cong., 2d Sess., at 4-6 (June 2, 1950) (REPORT OF THE SENATE JUDICIARY COMMITTEE ON H.R. 2734).

[77] *See, e.g.*, S. REP. NO. 1775, 81st Cong., 2d Sess., at 4-6 (June 2, 1950) (REPORT OF THE SENATE JUDICIARY COMMITTEE ON H.R. 2734).

[78] 96 CONG. REC. 16433 at 16446 (Dec. 12, 1950) (statement of Sen. O'Mahoney).

[79] *See, e.g.*, S. REP. NO. 1775, 81st Cong., 2d Sess., at 4-6 (June 2, 1950) (REPORT OF THE SENATE JUDICIARY COMMITTEE ON H.R. 2734).

[80] *See, e.g.*, H. R. REP. NO. 1191, 81st Cong., 1st Sess., at 8 (August 4, 1949) (REPORT OF THE HOUSE JUDICIARY COMMITTEE ON H.R. 2734); S. REP. NO. 1775, 81st Cong., 2d Sess., at 4-6 (June 2, 1950) (REPORT OF THE SENATE JUDICIARY COMMITTEE ON H.R. 2734).

[81] *See, e.g.*, S. REP. NO. 1775, 81st Cong., 2d Sess., at 4-5 (June 2, 1950) (REPORT OF THE SENATE JUDICIARY COMMITTEE ON H.R. 2734).

In this way, Congress sought to enact an anti-merger law that would have "broad application to acquisitions that are economically significant"[82] but limited impact on small, intrastate, and personal businesses. Legislators viewed corporate mergers as just another "road to monopoly" — some even called them a "highway to monopoly" — that Congress thought it had outlawed back in 1914.[83] The "paradox" for legislators was that, because of the "loophole" in Section 7, the antitrust laws were prohibiting the "weaker, less effective, cooperative methods of eliminating competition"[84] — while permitting the "permanent and more effective method of consolidation under a single management."[85] By reshaping Section 7 to prohibit all mergers which "may" conduce to the creation of monopolies or diminish the competitive process in any line of commerce in any section of the country, lawmakers fashioned a single, broad standard that reached all corporate emergers regardless of whether they were horizontal, vertical, or conglomerate — but left small, locally-oriented businesses free to coordinate and cooperate.[86] In this sense, the Celler-Kefauver Amendment truly was designed, in the words of the Senate Report, to "limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy."[87]

2. The Text and Structure of Section 7

The text and structure of Section 7, as amended by the Celler-Kefauver Act, aligns closely with the purpose of Congress to "clamp down with vigor on mergers,"[88] and safeguard the nation's commerce from the corrosive effects of this method of business they regarded as inherently monopolistic. Section 7 prohibits mergers and acquisitions "where, in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[89] This language has often been dismissed as hopelessly vague or susceptible to endlessly malleable interpretation. That, as we show below, is false. Broad as the standard of illegality established by Section 7 may be, it is not an "empty

[82] S. REP. NO. 1775, 81st Cong., 2d Sess., at 6 (June 2, 1950) (REPORT OF THE SENATE JUDICIARY COMMITTEE ON H.R. 2734).

[83] *E.g.*, 96 CONG. REC. 16404 at 16436 (Dec. 11, 1950); FEDERAL TRADE COMMISSION, THE MERGER MOVEMENT: A SUMMARY REPORT 15 (1948), *in* LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3436, 3456 (Earl W. Kintner, ed. 1978); YALE BROZEN, MERGERS IN PROSPECTIVE 13 (1982).

[84] *See, e.g.*, 96 CONG. REC. 16404 at 16436 (Dec. 11, 1950 (statement of Sen. O'Conor).

[85] *See, e.g.*, 96 CONG. REC. 16404 at 16436 (Dec. 11, 1950 (statement of Sen. O'Conor).

[86] S. REP. NO. 1775, 81st Cong., 2d Sess., (June 2, 1950) (REPORT OF THE SENATE JUDICIARY COMMITTEE ON H.R. 2734); Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 272 (2017); James C. Thomas, *Conglomerate Merger Syndrome—A Comparison: Congressional Policy with Enforcement Policy*, 36 FORDHAM L. REV. 461, 552-53 (1968).

[87] S. REP. NO. 1775, 81st Cong., 2d Sess., at 3 (June 2, 1950) (REPORT OF THE SENATE JUDICIARY COMMITTEE ON H.R. 2734).

[88] *See* United States v. Von's Grocery Co., 384 U.S. 270, 276 (1966)

[89] *See* 15 U.S.C. § 18:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

vessel" into which judges — or enforcers — are "free to pour a vintage [they] think better suits present-day tastes."[90] Although the scope of Section 7's provisions shades outward into a "margin of uncertainty," its provisions also have "core meanings" that delineate unambiguous guideposts for "circumstances . . . plainly covered by the[ir] terms."[91]

To properly identify and analyze the key terms defining the scope of Section 7's prohibition, we must start our inquiry by examining the grammatical structure of the relevant text. The critical language in Section 7 is introduced by the conjunction "where," which is used to indicate the case or situation in which Section 7's prohibition applies.[92] That case or situation is then defined by a main clause ("the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly") and a relative clause that modifies the main clause ("in any line of commerce or in any activity affecting commerce in any section of the country").

The main clause begins with the noun-phrase "the effect of such acquisition." That noun-phrase is the subject of the clause. It is followed by the predicate, "may be," which consists of the main verb "be" aided by the modal auxiliary verb "may." Used as a copula, this compound verb then re-identifies the subject of the clause — "the effect of such acquisition" — with two infinitive phrases functioning as nominative complements: "to lessen competition" and "to tend to create a monopoly." Finally, the adverb "substantially" is placed in-between the copula and its complements. This placement, as we explain more fully below, precludes the adverb from grammatically modifying the complements that follow it, and instead requires the word to function as a sentence adverb, which modifies the clause's predication as a whole. Because of this, in the following subsection (b), we examine the meaning of the term "substantially" independently.

Additionally, Section 7's syntax makes clear that its two proscribed effects are independent of each other and must be given different meanings. Each of the two effect-defining phrases in Section 7 — "to lessen competition" and "to tend to create a monopoly" — is given its own introductory preposition *to* and separated from the other by a comma and the conjunction *or*. This parallel construction makes the two phrases into independent complements of the verb-phrase "may be," and is unique among the provisions of the Clayton Act. The effect-defining language in Section 3 — which prohibits exclusive dealing where its "effect . . . may be to substantially lessen competition or

[90] *See* United States v. Sisson*,* 399 U.S. 267, 297 (1970) (rejecting appellant's argument that "radical reinterpretations of the phrase 'decision arresting a judgment' [in the Criminal Appeals Act] are . . . necessary in order to effectuate a broad policy . . . underlying the [Act]" on the ground that "the statutory phrase 'decision arresting a judgment' is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes.").

[91] *See* Reed Dickerson, Statutory Interpretation: Core Meaning and Marginal Uncertainty, 29 MO. L. REV. 1, 2 (1964) ("[Professor H. L. A.] Hart's thesis is that communication is possible only because the general words through which it is conducted have a core meaning or 'standard instance in which no doubts are felt about its application.' Around each vague word there is a margin of uncertainty called the 'penumbra.' The distinction between core and penumbra is important to Hart's larger thesis that the core is the stronghold of the 'isness' of the law, whereas the penumbra is the arena to which issues of the nature and role of 'oughtness' in resolving uncertainties resulting from imprecision of legislative meaning are confined."); *Cf.* United States v. Sisson*,* 399 U.S. 267, 297 (1970) ("The axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that guides us when circumstances *not* plainly covered by the terms of a statute are *subsumed* by the underlying policies to which Congress was committed.") (emphasis added).

[92] *See, e.g.*, *Where*, OXFORD ENGLISH DICTIONARY (1st ed. 1933) (defining "where" as a compound relative to mean "10. . . . b. . . . "in a or the case in which (often nearly = WHEN); in the circumstances position, or condition in which; in that respect or particular in which.").

tend to create a monopoly" — employs no separation at all. The same goes for the corresponding language of Section 2, which prohibits commercial discrimination where its "effect . . . may be substantially to lessen competition or tend to create a monopoly." Notably, however, legislators *did* place a comma and a separate introductory *to* before the distinct proscribed effect added to Section 2 by the Robinson-Patman Act of 1936. As a result, Section 2 prohibits discriminations whose "effect may be to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination[.]"

Altogether, this suggests that Congress "acted intentionally and purposely" in hardening the distinction between the two effects-defining phrases in Section 7.[93] In this context, to read these two phrases as referring to the same thing while using different words would be "to disregard what 'or' customarily means."[94] As the Supreme Court has often said, the "ordinary use of ['or'] is almost always disjunctive," requiring "the words it connects to be given separate meanings."[95] Since no countervailing indicia of meaning exist and, as demonstrated below, the two phrases — "to lessen competition" and "to tend to create a monopoly" — reach substantially different kinds of circumstances, each must be given independent effect.[96]

Based on the foregoing, we proceed by examining the text, structure, and legislative history of Section 7 to determine the plain meaning of the following key statutory phrases: (a) "may be"; (b) "substantially"; (b) "to lessen competition"; (c) "to tend to create a monopoly"; and (d) "in any line of commerce . . . in any section of the country."

a. "May be"

As the Proposed Guidelines recognize, "Section 7 itself creates a relatively expansive definition of antitrust liability."[97] It prohibits any merger whose "effect . . . *may be* substantially to lessen competition, or to tend to create a monopoly."[98] These two words express the core predication of the relevant statutory text — extending Section 7's prohibition to all mergers that create a *possibility* of anticompetitive or monopolistic effects.

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[93] *See* Gozlon–Peretz v. United States, 498 U.S. 395, 404 (1991) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[94] *See* Loughrin v. United States, 573 U.S. 351, 357 (2014) (quoting United States v. Woods, 571 U.S. 31, 45–47 (2013) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979))).

[95] *See id.*

[96] *See id.* at 2390 (quoting Williams v. Taylor, 529 U.S. 362, 404 (2000) (explaining that a "cardinal principal" of statutory interpretation is "[t]hat courts must give effect, if possible, to every clause and word of a statute.").

[97] *See* Proposed Guidelines (quoting California v. Am. Stores Co., 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18 with emphasis) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962)).

[98] *See* 15 U.S.C. § 18.

The ordinary meaning of the auxiliary verb "may" around the time of the Celler-Kefauver Act's passage in 1950 was to indicate that whatever action or state is expressed by the main verb is "possible."[99] The ordinary meaning of the verb "to be" when used as a copula is likewise determinate, indicating that a subject "exists as" or "coincides in identity with" the object (or objects) specified.[100] Thus, when the copula "be" is aided by the auxiliary "may" to form the compound verb "may be," the compound's function is necessarily to indicate what a subject possibly is or could be.[101] To our knowledge, every federal court decision interpreting the phrase "may be" in a statute other than the Clayton Act published since 1890 has agreed with this possibilistic understanding of the term.[102]

A "possible" state or action is one that is "potentially realizable" and "not negated by necessity."[103] Thus, the Oxford English Dictionary of 1933 defined the auxiliary "may" to imply that what is qualified is either (1) not foreclosed by "prohibitive conditions" in an objective sense, or (2) "admissible as a supposition" in light of a given agent's subjective knowledge about the world.[104] Similarly, in a corpus linguistics analysis of modal expressions in the 1950s and 1960s, linguistics scholar Madeline E. Herman found that the "basic meaning" of the auxiliary "may" in common midcentury writing was "something like 'nothing in the environment prevents the predication, and there is no insurance that it will not occur.'"[105]

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[99] Every major English dictionary published between 1930 and 1961 defined the auxiliary verb "may" to indicate a possibility. *See, e.g.*, *May*, OXFORD ENGLISH DICTIONARY (1st ed. 1933) (defining "may," at sense 14.b., "With reference to the present or future (*may* with infinitive [such as 'be']) = 'would possibly be' or 'do'" or, at sense 7.a., "In relation to the future and in general predictions (I *may be* or *do* = 'it is possible that I will be' or 'do')"); *May*, WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY (1936) (defining "may" as "liberty; opportunity; permission; possibility; as, he *may* go; you *may* be right."); *May*, FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (1943) (defining "may" as "to be contingently possible; as, it *may* be; you *may* get off."); *May*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) (defining the phrase "may be" to mean "possibly but not surely; not certainly; PERHAPS"; and the word "may" as "2. . . . b. : in some degree likely <you ~ be right> <they ~ get here in time after all> <~easily be the best play of the season> . . . ; compare MIGHT"). So did leading grammar and usage treatises from the era. *See, e.g.*, F. TH. VISSER, AN HISTORICAL SYNTAX OF THE ENGLISH LANGUAGE: VOLUME III 1754-1780 (1969); MICHAEL R. PERKINS, MODAL EXPRESSIONS IN ENGLISH 37-41 (1983). Indeed, the denotation of the auxiliary "may" was so tied up with the idea of possibility that the Oxford English Dictionary of 1933 defined the adjective "possible" to mean that something "may be" or that it "may or can exist, be done, or happen." *Possible*, OXFORD ENGLISH DICTIONARY (1st ed. 1933).

[100] *See Be*, OXFORD ENGLISH DICTIONARY (1st ed. 1933). *See also* F. TH. VISSER, AN HISTORICAL SYNTAX OF THE ENGLISH LANGUAGE: VOLUME I 189-190 (1963); F. TH. VISSER, AN HISTORICAL SYNTAX OF THE ENGLISH LANGUAGE: VOLUME II 971 (1972) ("as a rule, the copula to be expresses the semantic identity of the parts of the sentence joined by it").

[101] *See Possible*, OXFORD ENGLISH DICTIONARY (1st ed. 1933).

[102] *See* United States v. Lexington Mill Co., 232 U.S. 399, 411 (1914); Colautti v. Franklin, 439 U.S. 379, 393 (1979); United States v. Halloran, 821 F.3d 321, 332 (2d Cir. 2016); Monaco v. WV Parkways Auth., 57 F.4th 185, 188-89 (4th Cir. 2023); U.S. v. Griego, CRIMINAL No. 10-2311 LH, at *11-12 (D.N.M. Mar. 25, 2011); Orgulf Transport Co. v. U.S., 711 F. Supp. 344, 347 (W.D. Ky. 1989); Gov't Benefits Analysts, Inc. v. Gradient Ins. Brokerage, Inc., Civil Action No. 10-2558-KHV-DJW, at *5 (D. Kan. Aug. 13, 2012).

[103] *See Possible*, OXFORD ENGLISH DICTIONARY (1st ed. 1933); Ruud van der Helm, *Towards a clarification of probability, possibility and plausibility*, 8(3) foresight 17 (2006); Ruud van der Helm, *Defining the Future: Concepts and Definitions as Linguistic Fundamentals of Foresight*, *in* RECENT DEVELOPMENTS IN FORESIGHT METHODOLOGIES (Maria Giaoutzi & Bartolomeo Sapio eds., 2013); Elena Herburger, *Gradable Possibility and Epistemic Comparison*, 36(1) J. Semantics 165 (2019); Daniel Lassiter, Measurement and Modality: The Scalar Basis of Modal Semantics, Dissertation, NYU (2011).

[104] *May*, OXFORD ENGLISH DICTIONARY (1st ed. 1933).

[105] Madeline E. Ehrman, *The Meaning of the Modals in Present-Day American English*, 4(28) Linguistics 46, 50 (1966). *See also* Michael R. Perkins, Modal Expressions in English (1983).

Because the auxiliary verb "may" is so intimately tied up with the notion of possibility, the text of Section 7 does not permit an interpretation that requires any specific *probability* of anticompetitive or monopolistic effects. These two concepts — possibility and probability — "belong to different categories and cannot be used interchangeably."[106] "Probability" refers to estimative claims about the chance or likelihood that a state of affairs has been or will be realized.[107] Thus, probability is an inherently comparative and gradable qualifier: Identifying an outcome as "probable" necessarily entails identifying certain alternative outcomes as "improbable" and placing them ordinally on some scale or gradient of likelihood.[108] "Possibility," in contrast, refers to ontological claims about whether a state of affairs *could* be realized in the first place.[109] Thus, whether an outcome is "possible" hinges, not on a comparison to alternative outcomes, but on whether it satisfies a single, fixed condition — that of being "not negated by necessity" under a given set of rules and circumstances.[110]

This interpretation of "may be" in Section 7 is consistent with the judicial interpretations of the phrase in the Clayton Act that were authoritative when the Celler-Kefauver Act was passed in 1950. Within the preceding five years, two Supreme Court cases — *Corn Products* (1945) and *Morton Salt* (1948) — had interpreted the use of "may be" in Section 2 of the Clayton Act to prohibit all commercial discriminations that create a "reasonable possibility" of proscribed effects.[111] A year after *Morton Salt*, the Court's decision in *Standard Oil of California* (1949) noted that the framers of the Clayton Act in 1914 understood the phrase "where the effect may be" to mean "where it is possible for the effect to be."[112] To avoid "stultify[ing] the force of Congress' declaration that [exclusive deals are] prohibited wherever their effect 'may be' to substantially lessen competition," the Court went on to hold that Section 3's prohibition applies if: (a) a plaintiff introduces sufficient evidence to support a "bare inference" that "competition has been or probably will be lessened" in a relevant market as a result of an exclusive dealing contract; and (b) the defendant fails to "conclusively" disprove the contract's "potential" to "impede [or to have impeded] a substantial amount of competitive activity" in the relevant market.[113] This, as we demonstrate more fully in Part 2.b. below, is functionally identical to the plain meaning of "may be" as modified by "substantially" — which operates as a sentence adverb in Section 7 and modifies the predication of the where-clause to prohibit mergers if: (a) their concrete features give them the potential to cause proscribed effects

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[106] Ruud van der Helm, *Towards a clarification of probability, possibility and plausibility*, 8(3) foresight 17 (2006). *Compare Possibility*, OXFORD ENGLISH DICTIONARY (1st ed. 1933), *with Probability*, OXFORD ENGLISH DICTIONARY (1st ed. 1933), *with Possible*, OXFORD ENGLISH DICTIONARY (1st ed. 1933) *with Probable*, OXFORD ENGLISH DICTIONARY (1st ed. 1933).

[107] *Probability*, OXFORD ENGLISH DICTIONARY (1st ed. 1933); Ruud van der Helm, *Towards a clarification of probability, possibility and plausibility*, 8(3) foresight 17 (2006); Ruud van der Helm, *Defining the Future: Concepts and Definitions as Linguistic Fundamentals of Foresight*, *in* RECENT DEVELOPMENTS IN FORESIGHT METHODOLOGIES (Maria Giaoutzi & Bartolomeo Sapio eds., 2013).

[108] *Probability*, OXFORD ENGLISH DICTIONARY (1st ed. 1933); Ruud van der Helm, *Towards a clarification of probability, possibility and plausibility*, 8(3) foresight 17 (2006); Ruud van der Helm, *Defining the Future: Concepts and Definitions as Linguistic Fundamentals of Foresight*, *in* RECENT DEVELOPMENTS IN FORESIGHT METHODOLOGIES (Maria Giaoutzi & Bartolomeo Sapio eds., 2013).

[109] *See Possibility*, OXFORD ENGLISH DICTIONARY (1st ed. 1933); Ruud van der Helm, *Towards a clarification of probability, possibility and plausibility*, 8(3) foresight 17 (2006); Ruud van der Helm, *Defining the Future: Concepts and Definitions as Linguistic Fundamentals of Foresight*, *in* RECENT DEVELOPMENTS IN FORESIGHT METHODOLOGIES (Maria Giaoutzi & Bartolomeo Sapio eds., 2013).

[110] *Possibile*, OXFORD ENGLISH DICTIONARY (1st ed. 1933); Ruud van der Helm, *Towards a clarification of probability, possibility and plausibility*, 8(3) foresight 17 (2006); Ruud van der Helm, *Defining the Future: Concepts and Definitions as Linguistic Fundamentals of Foresight*, *in* RECENT DEVELOPMENTS IN FORESIGHT METHODOLOGIES (Maria Giaoutzi & Bartolomeo Sapio eds., 2013).

[111] *See* Corn Products Co. v. Comm'n, 324 U.S. 726 (1945); *Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37 (1948).

[112] *See Standard Oil Co. of California v. United States (Standard Stations), 337 U.S. 293 (1949)*

[113] Standard Oil Co. of California v. United States (*Standard Stations*), 337 U.S. 293 (1949)

and (b) the manifestation of that potential is not foreclosed by prohibitive conditions in the merger's real and actual environment.

b. "Substantially"

The adverb "substantially" is a "chameleon-hued word."[114] Its meaning "depends on the context in and purpose for which it is used."[115] During the midcentury period when the Celler-Kefauver Act was passed, it was frequently used in at least three senses relevant for our purposes. First, it was used to describe a state or action as being that which is specified "[i]n all essential characters or features; in regard to everything material; in essentials; to all intents and purposes; in the main."[116] Second, it was used to indicate that the action or state expressed by a verb has a "substantial nature or existence," that is, a nature or existence that "has substance in reality; [is] not imaginary, unreal, or only apparent; [is] true, actual, [or] real."[117] Finally, it was used to describe an action or state as having an "ample or considerable" degree or extent.[118] To determine in which sense "substantially" was used in Section 7, we have to examine its role in the statutory text.

In drafting the Celler-Kefauver Amendment, legislators placed the word "substantially" in a grammatically restricted position — right after the compound verb in the where-clause ("may be") and right before the subject-defining complements introduced by that verb ("to lessen competition" and "to tend to create a monopoly"). That position is a common, and grammatically correct, placement for sentence adverbs — adverbs that modify the entire predication of their clause or sentence — and for adverbs that modify "be" as a main verb.[119] It is not, however, a position from

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[114] *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 318 (2006) ("To summarize, 'located,' as its appearances in the banking laws reveal is a chameleon word; its meaning depends on the context in and purpose for which it is used."); Fed. Aviation Admin. v. Cooper, 132 S. Ct. 1441, 1450 (2012) ("Because the term 'actual damages' has this chameleon-like quality, we cannot rely on any all-purpose definition but must consider the particular context in which the term appears").

[115] *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 318 (2006) ("To summarize, 'located,' as its appearances in the banking laws reveal is a chameleon word; its meaning depends on the context in and purpose for which it is used."); Fed. Aviation Admin. v. Cooper, 132 S. Ct. 1441, 1450 (2012) ("Because the term 'actual damages' has this chameleon-like quality, we cannot rely on any all-purpose definition but must consider the particular context in which the term appears").

[116] *See, e.g.*, *Substantially*, OXFORD ENGLISH DICTIONARY (1st ed. 1933).

[117] *See, e.g.*, *Substantially*, OXFORD ENGLISH DICTIONARY (1st ed. 1933).

[118] *See, e.g.*, *Substantially*, OXFORD ENGLISH DICTIONARY (1st ed. 1933).

[119] As the leading grammar treatise of the era, George Curme's A Grammar of the English Language, explained in 1935, a sentence adverb is "usually place[d] after or before the copula." *See* George O. Curme, A Grammar of the English Language (Volume II: Syntax) 131 (1935). Where an infinitive phrase is used as a predicate noun or adjective, however, "the sentence adverb always precedes the *to*." *See id.* at 466-467 ("There is one case where the sentence adverb *always* precedes the *to*, namely, when the infinitive clause follows the copula with the force of a predicate adjective or noun[.] . . . As the infinitive clause in each of these sentences has the function of a predicate and thus is felt as a unit, the sentence adverb, which belongs to the sentence as a whole, cannot enter it."). *See also* Eric Partridge, Usage and Abusage 220 (1942)) (quoting George O. Curme, A Grammar of the English Language (Volume II: Syntax) (1935)) ("[I]t is also pointed out that sometimes the adverb (or adverbial phrase) modifies, not the verb alone but the sentence as a whole. In this case, the adverbial element usually precedes the verb, verbal phrase, or predicate noun or adjective (*i.e.*, the object or the complement)[.]"). More broadly, Curme's treatise instructs that an "[a]n adverb that modifies a verb precedes the verb if it itself has a weaker stress but follows the verb if it itself has the stronger stress." *See* George O. Curme, A Grammar of the English Language (Volume I: Parts of Speech and Accidence) 71-72, 74 (1935). *See also* George O. Curme, Principle and Practice of English Grammar 147 (1947) ("An adverbial element is often more heavily stressed than a verb and then usually follows it: He *acted promptly*."). Since "copulas and auxiliaries are usually unstressed," it continues, "an adverb [that modifies a copula or an auxiliary] should follow them." *See* id. 71-72, 74 (1935); *See also* George O. Curme, Principle and Practice of English Grammar 147 (1947) ("An adverbial element is often more heavily stressed than a verb and then usually follows it: He *acted promptly*."). In the same vein, prominent English usage dictionaries of the era state that the "normal" or "natural" placement for an adverb that modifies the verb "to be" as a copula is between "be" and its subject complement. Fowler's 449 (1926); Margaret Nicholson, A Dictionary of American-English Usage 11,

which "substantially" can grammatically modify the infinitive stems "lessen" and "tend" in the subsequent effect-defining phrases.

The syntax of Section 7 precludes "substantially" from modifying those terms because of basic grammar: The infinitive phrases function as nouns in the relevant text, and a noun cannot be modified by a preceding adverb.[120] The noun-behavior of the infinitive phrases derives from the nature of the main verb in the relevant clause — "be." In its context,"be" functions as a copula: it has "little meaning" of itself and operates primarily to link the subject and the complements.[121] Aided by the auxiliary "may," it indicates that the subject of the clause ("the [proscribed] effect of such acquisition") could possibly be identified with one or both of the infinitive phrases "to lessen competition" and "to tend to create a monopoly." As a result, these phrases function as alternative possible nominatives for "the [proscribed] effect."[122] When, as here, an infinitive phrase is used in the nominative case after a copula, it is "parsed as a single element" and given "the effect of [a] noun."[123] The initial *to* loses its prepositional sense and operates only to introduce the infinitive stem, which in turn functions purely as a verbal noun re-identifying the subject of the clause.[124] This noun — like all nouns — may be modified by an adverb within its grammatical phrase (as in, "she is a profoundly good person") or, if we adopt a more descriptive approach to the English language, it arguably may be modified by a subsequent adverb (as in, "she is a famous person globally"). But there is no grammatical way for a preceding adverb — particularly one of degree or manner with an *-ly* suffix like "substantially" — to modify a subsequent noun.[125]

Given this context, the placement of "substantially" in Section 7 precludes it from modifying the verbal nouns "lessen" and "tend" in the subsequent effect-defining phrases. It can, however, function as a predicate adverb, modifying the compound verb it follows ("may be"), or as a sentence adverb, modifying the predication of the where-clause as a whole. Since "may be" is the only verbal element in the clause and its predication is only copular in nature, either reading would lead to the same result: "Substantially" necessarily modifies the manner in which a possible-identity relationship should exist between the subject ("the effect of such acquisition") and one or both of its complements ("to lessen competition" and "to tend to create a monopoly") in order for Section 7's prohibition to apply.

436; Adverbs and adverb phrases: position - Cambridge Grammar; (1956); Fowler's 465 (1965); Cornelia Evans & Bergen Evans, A Dictionary of Contemporary American Usage 277-279 (1957).

120 *See Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 140 (2012)) ("Because words are to be given the meaning that proper grammar and usage would assign them, the rules of grammar govern statutory interpretation unless they contradict legislative intent or purpose.") (internal citations and quotation marks omitted).

121 *See, e.g.*, George O. Curme, A Grammar of the English Language (Volume I: Parts of Speech and Accidence) (1935) ("The copula . . . performs . . . the function of announcing the predicate"). George Quirk, Grammar of Contemporary English (1972) ("The verb in sentences with subject complement is a 'copula' (or linking verb), which of itself has little meaning but functions as a link between the complement and subject.").

122 Robert Williams (1946) "Usage, Logic, and Predicate Noun." *English Journal*. Pp. 155-157.

123 JAMES CHAPLIN FERNALD, ENGLISH GRAMMAR SIMPLIFIED 83 (1916); JAMES CHAPLIN FERNALD, ENGLISH GRAMMAR SIMPLIFIED 85-87, 138 (Cedric Gale, rev. ed. 1963); *see also* George O. Curme, A Grammar of the English Language (Volume II: Syntax) 466-477 (1935) (where infinitive clause "follows the copula with the force of a predicate adjective or noun . . . [it] is felt as a unit").

124 *See* GEORGE O. CURME, PRINCIPLE AND PRACTICE OF ENGLISH GRAMMAR 268-276 (1947).

125 John Payne et al., The Distribution and Category Status of Adjectives and Adverbs, 3 WORD STRUCTURE 31 (2010);

Having figured out what "substantially" does, we can finally turn to determining what "substantially" means. At a minimum, "substantially" must mean something that is reasonably compatible with the predication it modifies. Since that predication expresses the possibility required to trigger Section 7's prohibition, "substantially" must be read in a way that reasonably modifies that possibility. This need for congruity with the possibilistic modality expressed by "may be" in the where-clause forecloses two of three senses in which "substantially" was commonly used around 1950 — leaving only the sense that the predication has "substance in reality" as a viable option.

As explained above, possibility is an inherently binary qualifier. An outcome is either "not negated by necessity" and therefore possible, or "negated by necessity" and therefore impossible, but there is no intelligible scale in-between. Since the possibility of an outcome indicates only that it satisfies this threshold value — being "potentially realizable" under a set of circumstances — it has no scalar content that can be measured or graded. An outcome cannot be "more" or "less" possible, "very" possible or only "somewhat" possible, or the like. As a result, it has long been established — in both prescriptive grammar and empirical studies of ordinary usage — that the auxiliary *may* is a "non-gradable" verb, which is not susceptible to modification by adverbs of degree or extent.[126]

This precludes "substantially" from operating either to raise or reduce the "degree" to which the effect of an acquisition "may [possibly] be" — or, to use the definition of what is "possible" from the 1933 Oxford English Dictionary again, "may or can exist" as — "to lessen competition" or "to tend to create a monopoly." Thus, "substantially" cannot be read to say that a merger is prohibited where the possibility that it will cause a proscribed effect is "ample" or "considerable" in degree. Nor, by the same token, can "substantially" be read to imply that a merger is prohibited where a proscribed effect is possible merely "in the main" or "in essential features." Indeed, since the quality of possibility that "may" imparts is a yes-or-no attribute pegged to a single threshold feature — that of being "permitted," or "not negated," within a given environment — a possibility has no non-essential features it could shed while still remaining a possibility "in the main."

Luckily, there is no need to "[do] violence to the English language" by adopting either of these senses of "substantially" in the context of Section 7.[127] The last remaining sense of the word could felicitously serve as a specifier of the nature of the possibility required to prohibit a merger under the Clayton Act. Although the modal predicate *may be* is not susceptible to modification in its "degree" or "force," it is susceptible to modification in the "flavor" of the possibility it expresses.[128] The modal flavor of "may" refers to the set of conditions and circumstances — what linguists call the "conversational background" — within which the asserted possibility is anchored.[129] Commonly, the

[126] Elena Herburger, *Gradable Possibility and Epistemic Comparison*, 36(1) J. Semantics 165 (2019); Angelika Kratzer, Modals and Conditionals (2012); Peter Klecha, Bridging the Divide: Scalarity and Modality, Dissertation, U. Chi. (2014); Daniel Lassiter, Measurement and Modality: The Scalar Basis of Modal Semantics, Dissertation, NYU (2011). *Cf.* F. R. Palmer, Modality and the English Modals 68 (1st ed. 1979, 2d. ed. 1990) ("In general, epistemic modals [like *may*] cannot be modified by adverbs").

[127] *Matter of Patterson*, 825 F. 2d 1140, 1147 (7th Cir. 1987); Reno v. Bossier Parish School Bd., 528 U.S. 320, 332 n.1 (2000).

[128] *See* Angelika Kratzer, Modals and Conditionals (2012); Peter Klecha, Bridging the Divide: Scalarity and Modality, Dissertation, U. Chi. (2014); Daniel Lassiter, Measurement and Modality: The Scalar Basis of Modal Semantics, Dissertation, NYU (2011).

[129] *See* Angelika Kratzer, Modals and Conditionals (2012); Peter Klecha, Bridging the Divide: Scalarity and Modality, Dissertation, U. Chi. (2014); Daniel Lassiter, Measurement and Modality: The Scalar Basis of Modal Semantics, Dissertation, NYU (2011).

use of *may* as an auxiliary only indicates an *epistemic* possibility.[130] An epistemic possibility is a subjective possibility. It is anchored in what a particular agent, in the light of their own knowledge and beliefs, can and cannot rule out as a supposition about the truth of a proposition or the occurrence an event.[131] Sometimes, however, the auxiliary "may" is used to express an objective possibility.[132] In that case, it indicates that a proposition or event is not only "admissible as a [mental] supposition" because an agent lacks knowledge of its negation, but also has the potential to be true or to occur within the constraints of "some real aspect of the world."[133] Just what that "real aspect" is can vary, but it is often indicated by an adverb — like "substantially."

Against this background, we can naturally read "substantially" to indicate that an acquisition is prohibited under Section 7 where the possibility that "the effect of [said] acquisition may be . . . to lessen competition, or to tend to create a monopoly," has "substance in reality" and is "not imaginary, unreal, [or] only apparent."[134] In this vein, a "real" possibility has been defined as a "genuine alternative" for how "actuality [could] unfold" from "the concrete momentary circumstances at hand."[135] As such, a real possibility cannot be grounded in "the mere absence of knowledge,"[136] like an epistemic possibility, but must be a potentiality that "can, in fact, be actualized" by an object within the concrete circumstances of "some local standpoint in time."[137]

Reading "substantially" in this way gives the word independent effect in a manner that is grammatically and semantically congruent with its surroundings. Had legislators used "may be" alone in the Celler-Kefauver Act, the plain meaning of the text would have been that a merger is prohibited where there is even an epistemic possibility of anticompetitive or monopolistic effects. Since an epistemic possibility exists whenever the knowledge available to a given agent is insufficient to rule out its realization, the use of a bare "may be" in Section 7 would have obliged courts — the agents in the context of a law enforced through the judicial system — to find a merger unlawful whenever the evidence fails to affirmatively negate the possibility of proscribed effects in every relevant line of commerce. By predicating Section 7's prohibition on what the effect of a merger "*may be substantially*," however, legislators made clear that a sufficient possibility exists only where a merger does, in fact, have the potential to cause a proscribed effect, and that potential is, in fact, not foreclosed by prohibitive conditions in the merger's concrete environment.

Thus, the use of the adverb "substantially" in Section 7 anchored the statutory inquiry in concrete reality. For a merger to be prohibited, lessening competition or tending to the creation of a monopoly must be genuine alternatives for how the merger's effect could unfold in the context of the merger's concrete momentary circumstances. This creates a "fundamental asymmetry between

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130 *See* Leo Hoye, Adverbs and Modality in English (1997); Michael R. Perkins, Modal Expressions in English 37-41 (1983).

131 Michael R. Perkins, Modal Expressions in English 37-41 (1983).

132 *See* Leo Hoye, Adverbs and Modality in English (1997);Michael R. Perkins, Modal Expressions in English 37-41 (1983).

133 *See* Antje Rumberg, Dissertation: Transitions toward a semantics for real possibility, Utrecht University, 2016; Michael R. Perkins, Modal Expressions in English 37-41 (1983).

134 *See Substantially*, OXFORD ENGLISH DICTIONARY (1st ed. 1933); *Substantial*, OXFORD ENGLISH DICTIONARY (1st ed. 1933).

135 *See* Antje Rumberg, Dissertation: Transitions toward a semantics for real possibility, Utrecht University, 2016.

136 *See* Yilwa Wirling & Tille Grune, Epistemic and Objective Possibility in Science, 74(3) BJPS __ (2023) (forthcoming).

137 *See* Antje Rumberg, Dissertation: Transitions toward a semantics for real possibility, Utrecht University, 2016.

the past and the future" for the purposes of determining a merger's legality under Section 7.[138] The past leading up to the present necessarily exists. The future that will unfold from the present, however, necessarily does not. We can certainly imagine — sometimes, even try to predict — what circumstances might exist in the future. But imagining or predicting non-existent circumstances does not make them real. And the statute, as indicated by the use of "substantially," is not concerned with what is "imaginary, unreal, or only apparent."[139] Since Section 7 only requires a possibility of anticompetitive or monopolistic effects that "has substance in reality," it does not require enforcers to demonstrate such a possibility in every conceivable future that might exist. And its application when the requisite real-world possibility exists cannot be cannot be precluded merely by confident claims about the future.

Where a particular reading is "mandated by the grammatical structure of [a] statute," that structure may not be ignored unless "overcome by other textual indications of meaning."[140] As the Supreme Court had occasion to note recently, "the rules of grammar govern statutory interpretation unless they contradict legislative intent or purpose."[141] Here, neither textual indicia nor legislative intentions contradict the grammatical sense of Section 7's text. Indeed, they affirm it.

To begin with, the placement of "substantially" in the Celler-Kefauver Act of 1950 was different from its placement in the original version of Section 7. When Congress enacted the Clayton Act in 1915, "substantially" was placed within the *to*-infinitive phrase following "may be" — so that Section 7 prohibited corporate acquisitions "where [their] effect . . . may be [1] *to substantially lessen competition* between the corporation [acquired] and the corporation making the acquisition, or [2] to restrain commerce in any section or community, or [3] to tend to create a monopoly in any line of commerce." In 1950, Congress moved "substantially" out of that original position, where it plainly modified the subject complement and could not grammatically modify "may be" or the sentence as a whole, and into its current position, where it plainly modifies "may be" or the sentence as a whole and cannot grammatically modify the subject complement. Such a "significant change in language" is ordinarily "presumed to entail a change in meaning."[142] That presumption applies even when the significant textual change is made through a subtle revision, and regardless of whether the legislative

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[138] *See* Antje Rumberg, Dissertation: Transitions toward a semantics for real possibility, Utrecht University, 2016. *See also* Antje Rumberg, *An Introduction to Real Possibilities, Indeterminism, and Free Will*, 196 Synthese 1 (2019).

[139] *See Substantially*, OXFORD ENGLISH DICTIONARY (1st ed. 1933); *Substantial*, OXFORD ENGLISH DICTIONARY (1st ed. 1933);

[140] *See* Nielsen v. Preap, 139 S. Ct. 954, 965 (2019) ("Because words are to be given the meaning that proper grammar and usage would assign them, the rules of grammar govern statutory interpretation unless they contradict legislative intent or purpose.") (internal citations and quotation marks omitted); ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 140-141 (2012) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989)). While a court need not review "congressional enactments as a panel of grammarians," it may not ignore "ordinary principles of English prose" in the "construction of those enactments." *See also Flora v. United States*, 362 U.S. 145, 150 (1960). Legislators "are presumed to be grammatical in their compositions," and to understand things like "subject–verb agreement, noun–pronoun concord, the difference between the nominative and accusative cases, and the principles of correct English word–choice." They "are *not* presumed to be unlettered." ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 140 (2012).

[141] *See Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 140 (2012)) ("Because words are to be given the meaning that proper grammar and usage would assign them, the rules of grammar govern statutory interpretation unless they contradict legislative intent or purpose.") (internal citations and quotation marks omitted) [add more].

[142] *See* ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256-60 (2012); *United States v. Wells,* 519 U.S. 482 (1997); *Crawford v. Burke*, 195 U.S. 176, 190 (1904).

history of the amending enactment expresses an intent to make no change.[143] "The new text is the law, and where it clearly makes a change, that governs."[144]

It is "particularly inappropriate" to ignore an amendatory change in the statutory text like the 1950 movement of *substantially* in Section 7 where, as here, Congress has shown that "it knows how to adopt the omitted language or provision" in related statutory provisions.[145] As enacted in 1914, the original texts of Sections 2 and 3 of the Clayton Act placed "substantially" after the word "to" and within the subject complement. As such, they prohibited commercial discrimination and exclusive dealing, respectively, "where the effect of such [discrimination or exclusive dealing] may be *to substantially lessen* competition or *tend* to create a monopoly in any line of commerce." This uniform placement made clear that "substantially" belonged to the subject complement in the effect-defining clauses of Sections 2 and 3, and could not grammatically modify anything else in those clauses. Moreover, coupled with the lack of a a comma and a separate introductory "to" before the second phrase in the complement ("tend to create a monopoly") the placement of "substantially" in the original syntax of Sections 2 and 3 made it unambiguous that "substantially" modified both complementary phrases. If Congress had desired to restrict its prohibition in the Celler-Kefauver Act only to mergers whose effect may be "to substantially lessen competition or tend to create a monopoly," it could have simply copied that phrasing from the original provisions of the Clayton Act. Congress, however, chose to abandon that locution — both when it enacted the Robinson-Patman Act amending Section 2 in 1936 and when it subsequently enacted the Celler-Kefauver Act amending Section 7 in 1950.

143 *See United States v. Wells*, 519 U.S. 482, 496–97 (1997) (declining to rely on the "Reviser's Note" accompanying change in statutory text made through codification enactment, which stated that the codifying amendments to the statute "[were] without change of substance," because the "indication" that those "who prepared the legislation either overlooked or chose to say nothing" about removing a term from 3 of 13 consolidated statutes "does nothing to muddy the ostensibly unambiguous provision of the statute as enacted by Congress," and because, "[i]n any event, the revisers' assumption that the consolidation made no substantive change was simply wrong") (citations omitted); *Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC*), 899 F.3d 1178, 1192 (11th Cir. 2018) ("Nonetheless, in light of the unambiguous statutory language, we would reach the same conclusion even if it could be shown that Congress did not intend a substantive change in the meaning of the statute when it replaced § 60(c)'s 'remaining unpaid' language with § 547(c)(4)(B)'s requirement that the debtor 'not make an otherwise unavoidable transfer to or for the benefit of' the creditor who gave new value.") (citations omitted).

144 *See Benjamin v. United States (In re Benjamin)*, 932 F.3d 293, 298 (5th Cir. 2019) (quoting Scalia & Garner 256-260)) ("'The new text [of an amended statute] is the law, and where it clearly makes a change, that governs. This is so even when the legislative history . . . expresses the intent to make no change.' This principle applies even if the statute has a general accompanying instruction eschewing any substantive changes: 'When the general assertion of no change is contradicted by an unquestionable change in a specific provision, the specific will control over the general.")

145 *See Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) ("Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision. Congress has enacted statutes that expressly include the language Rotkiske asks us to read in, setting limitations periods to run from the date on which the violation occurs or the date of discovery of such violation. In fact, at the time Congress enacted the FDCPA, many statutes included provisions that, in certain circumstances, would begin the running of a limitations period upon the *discovery* of a violation, injury, or some other event. It is not our role to second-guess Congress' decision to include a "violation occurs" provision, rather than a discovery provision.") (internal citations omitted); *Nichols v. United States*, 578 U.S. 104, 109-10 (2016) ("If the drafters of SORNA [the Sex Offender Registration and Notification Act] had thought about the problem of sex offenders who leave the country and had sought to require them to (de)register in the departure jurisdiction, they could easily have said so; indeed, that is exactly what the amended Wetterling Act had required. It is also what Kansas *state* law requires[.] Congress could have chosen to retain the language in the amended Wetterling Act, or to adopt locution similar to that of the Kansas statute (and echoed in the statutes of many other States[.] It did neither. SORNA's plain text — in particular, § 16913(a)'s consistent use of the present tense — therefore did not require Nichols to update his registration in Kansas once he no longer resided there.").

In the Robinson-Patman Act, Congress moved "substantially" out of the subject complement, behind "to," and next to "may be," so that the amended Section 2 prohibited commercial discrimination "where the effect of such discrimination *may be substantially* to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." This new phrasing of Section 2 was authoritatively interpreted by the Supreme Court in *Corn Products* and *Morton Salt*.[146] The Court found that, as amended, Section 2 prohibited sellers from discriminating among purchasers of the same product in ways that had a "reasonable possibility" of causing disfavored purchasers to be "handicapped in competing with the more favored . . . purchasers" on resales of the at-issue product.[147] Thus, where the evidence showed that a discriminatory discount had, in fact, "result[ed] in price differentials between competing purchasers sufficient in amount to influence their resale prices" of the at-issue product, the Court held that the discount was forbidden regardless of whether the at-issue product was "a major or minor portion of [purchasers'] stock," the discount was large or small "in proportion to [the product's] price," or the purchasers disfavored by the discrimination accounted for a high or low percentage of the market.[148] What mattered, the Court made clear, was "that the competitive opportunities of certain merchants were [in fact] injured" by the challenged discrimination — not the degree or extent of that injury.[149]

A year after interpreting the Robinson-Patman Act's prohibition on discriminations whose effect "may be *substantially to* lessen competition or tend to create a monopoly" in *Morton Salt*, the Court handed down its *Standard Stations* (1949) decision interpreting Section 3's unamended prohibition on exclusive deals whose effect "may be *to substantially* lessen competition or tend to create a monopoly."[150] In this case, the Court took a rather different approach with respect to substantiality. It held that the degree or extent to which competition "may" have been lessened by Standard Oil of California's requirement contracts with independent gas stations *did* matter.[151] Specifically, the Court held that Section 3 prohibits exclusive deals that have the "potential" to "impede a *substantial amount* of competitive activity."[152] The burden of demonstrating such potential may be "satisfied," the Court continued, by proof that an exclusive deal "foreclosed" rivals from competing for a "volume of business" that is "not insignificant or insubstantial" as a "share of the line of commerce affected."[153]

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[146] *Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37 (1948); *Corn Products Co. v. Comm'n*, 324 U.S. 726 (1945).
[147] *Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37 (1948); *Corn Products Co. v. Comm'n*, 324 U.S. 726 (1945).
[148] *Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37 (1948); *Corn Products Co. v. Comm'n*, 324 U.S. 726 (1945).
[149] *Id.*
[150] *Standard Oil Co. v. United States*, 337 U.S. 293 (1949).
[151] *Id.*
[152] *Id.*
[153] *Id.*

Thus, when legislators drafted the Celler-Kefauver Act in 1950, they had a real choice with respect to the placement of "substantially" in the new Section 7. On the one hand, they could have adopted the placement of "substantially" in Section 3 and embraced the degree-based interpretation given to the term in *Standard Stations*. On the other hand, they could have adopted the placement of "substantially" in the Robinson-Patman Act and embraced the realism-based interpretation given to the term in *Morton Salt*. They decided on the latter — aligning the syntax of Section 7 with that of the Robinson-Patman Act while leaving Section 3 in its original 1914 form.[154] When Congress opts for different language in different parts of the same statute in this manner, "we normally presume that Congress did so to convey different meaning."[155]

c. "Lessen competition"

The phrase "lessen competition" and its variations did not exist in federal legislation when Congress enacted the Clayton Act in 1914, but they were widely used in state antitrust provisions. At least twenty-seven states placed prohibitions on restraints of "competition" as distinguished from restraints of "trade."[156] Some of these states prohibited arrangements and combinations that "prevented," "hindered," or "destroyed" competition.[157] Others — including Georgia, Indiana, Kansas, Missouri, South Carolina, Tennessee, and Texas — had statutes that specifically barred arrangements or combinations that "lessened" competition.[158] These statutes were exemplified by that of Tennessee, which prohibited all combinations "made with a view to lessen, or which tend to lessen, full and free competition in" the importation, manufacturer, or sale of any "article of commerce."[159] When construing this statute in a leading antitrust case of the time, *Standard Oil Co. v. Tennessee*,[160] the Tennessee Supreme Court explained that the relevant text meant the following:

> The statute was not only intended to prohibit contracts and combination between those engaged in the same business, made for the purpose, or which had a tendency, to destroy all competition, and which are injurious to the whole public, but those made and formed by any and all persons with a view, or which in their nature tend, to lessen competition to any material extent, to the injury of any part of the people of the State.[161]

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154 *See* The Clayton Act of 1914, Pub. L. 63–212, 38 Stat. 730; The Robinson-Patman Act of 1936, Pub. L. No. 74-692, 49 Stat. 1526; The Celler-Kefauver Act of 1950, P.L. 81-899, 64 Stat. 1125;

155 *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 398 (2016).

156 *See* Joseph E. Davis, Commissioner of Corporations, Department of Commerce, Trust Laws and Unfair Competition 159-64 (1916) (though published in 1916, the actual date of this report was March 15, 1915). *See also* Nathan B. Williams, LAWS ON TRUSTS AND MONOPOLIES: DOMESTIC AND FOREIGN (1913) (report compiled under the direction of J. J. Speight, Clerk of the Committee on the Judiciary of the House of Representatives and printed for the use of the committee).

157 *Id.*

158 *Id.*

159 *Id.*

160 117 Tenn. 618, 659-60 (Tenn. 1906)

161 *Id.*

As this passage suggests, the courts of the time interpreted statutes prohibiting combinations which "tend to . . . lessen competition" mostly in their ordinary sense. By reading the Tennessee statute to ban all combinations that tended "to lessen competition to *any* material extent," the court made clear that only the minimal degree of materiality — that is, concreteness or actuality — was required to trigger the statute's prohibition. However, it was common for the courts to read an additional requirement of public injury into state antitrust statutes; in the case of the Tennessee Supreme Court, it was a requirement of injury not to "the whole public," but only to "any part of the people of the State."

When Congress adapted the phrase "lessen competition" for use in the Clayton Act, however, it placed the words in a different context than was common in state laws. The original Section 7 prohibited mergers wherever their effect "may be to *substantially* lessen competition *between the corporation [acquired] and the corporation making the acquisition*[.]"[162] Since this phrasing did not entail a lessening of competition in an entire field of business, as the state locution did, or in a "line of commerce," as the locution in other provisions of the Clayton Act did, its literal implication was to restrict the test of illegality to whether a merger "may . . . substantially lessen" whatever competition subsisted between the acquiring and acquired companies prior to their merger. That, however, was not how the Supreme Court initially interpreted the original language of Section 7.

The first, and last, Supreme Court case to interpret Section 7's effect-defining clause before 1950 was *International Shoe* (1930).[163] In that decision, the Court held that, by prohibiting mergers only where they threatened to "substantially" lessen competition between the acquired and acquiring firm, Congress intended the Clayton Act to deal "only with such acquisitions as probably will result in lessening competition to a substantial degree[.]"[164] And, since the "great purpose" of the Clayton Act "was to advance the public interest by securing fair opportunity for the play of contending forces" in industry, the "substantial degree" of lessening in competition required was "such degree as will injuriously affect the public."[165]

Whatever may have been the textual merit of *International Shoe*'s analysis as a general matter, the critical factor for the purposes of interpreting the phrase "to lessen competition" in the Celler-Kefauver Amendment is that *International Shoe*'s analysis was focused on the meaning of a different term — "substantially."[166] Unlike the high court of Tennessee, the majority in *International Shoe* did not simply read a requirement of public injury into the words "lessen competition," but grounded that requirement in its interpretation of the role Congress intended for the word "substantially" in the statutory text.[167] Since, as discussed above in Part 2.b., the Celler-Kefauver Act changed the placement and role of "substantially" in Section 7, and adopted a phrasing of the requisite effect on competition comparable to that used in Sections 2 and 3 as opposed to that used in the original

162 *See* The Clayton Act of 1914, Pub. L. 63–212, 38 Stat. 730;
163 *See International Shoe Co. v. FTC*, 280 U.S. 291 (1930)
164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.*

Section 7, it cannot be said that Congress intended to incorporate *International Shoe*'s interpretation into the Celler-Kefauver Act.

No other pre-1950 decision by the Court gave a definite, independent construction of the phrase "to lessen competition" in the Clayton Act. Accordingly, the phrase as a whole was not a "term of art" with a "specialized legal meaning" in antitrust jurisprudence when the Celler-Kefauver Act was passed.[168] The word "competition," however, arguably was such a term. In some cases, the Supreme Court defined "competition" as the process of competing — of "striving for something which another is actively seeking and wishes to gain" — in which market participants are engaged as "honorable opponents."[169] In other cases, "competition" was defined more abstractly as a market ideal in which a "fair opportunity" exists "for the play of contending forces ordinarily engendered by an honest desire for gain."[170]

The conception of "competition" as a real-life process in which market rivals are engaged was typically used by the Court in the course of analyzing the effect of assailed conduct on the marketplace to determine its legality. For example, in *Standard Oil of California* (1949), the Court explained that the test of illegality under Section 3 of the Clayton Act was whether the effect of an exclusive dealing arrangement "may be" to "impede a substantial amount of competitive activity," or otherwise substantially "diminish competitive activity," in any line of commerce.[171] Similarly, in *Morton Salt* (1948), the Court upheld the FTC's finding that "competition" may have been "lessened," or "injured," within the meaning of Section 2 of the Clayton Act where the defendant's discriminatory wholesale prices for table salt had "handicapped" small grocers "in competing with the more favored [large] purchasers" for resales of table salt to consumers.[172] Similarly, in *Columbia Steel* (1948), the Court explained that a corporate acquisition "unreasonably lessens competition" in violation of the Sherman Act where (1) it eliminates rivalrous activity between the merging parties for inputs or customers, or an opportunity for rivals to compete for the same; and (2) the eliminated rivalry, or opportunity for rivalry, is "substantial" when considered in light of "the percentage of the business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market."[173]

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[168] *Cf. Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.*s, 532 U.S. 598, 615 (2001) (Scalia, J., concurring) ("Words that have acquired a specialized meaning in the legal context must be accorded their legal meaning.").*See Moskal v. United States*, 498 U.S. 103, 114 (1990) ("Where a . . . statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning.").

[169] *See, e.g.*, *United States v. Union Pacific R.R. Co.*, 226 U.S. 61, 62 (1912)

[170] *See, e.g.*, *U.S. v. American Oil Co.*, 262 U.S. 371, 388 (1923)

[171] *Standard Oil Co. v. United States*, 337 U.S. 293 (1949)

[172] *Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37 (1948)

[173] *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

In contrast, the Court primarily employed the concept of "competition" as an ideal market condition when speaking about the "great purpose" of the antitrust laws. For example, in *International Shoe,* the Court said that the "great purpose of [the Clayton and FTC Acts] was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain."[174] Similarly, in *Paramount Famous*, the Court explained that "[t]he Sherman Act was intended to secure equality of opportunity and protect the public against evils commonly incident to monopolies and . . . contracts and combinations which tend directly to suppress the conflict for advantage called competition — the play of the contending forces ordinarily engendered by an honest desire for gain."[175]

Since the common legal usage of the word "competition" in the context of determining whether "competition" has been "lessened" for the purposes of the Sherman and Clayton Acts referred exclusively to the real-life activity of competition, that definition should control.[176] In any event, that definition is the more consistent one with the ordinary sense of the word. Every prime English dictionary from the era of the Celler-Kefauver Act defines the main sense of "competition" using some variant of the following from Webster Second International Dictionary (1934): "the act of competing, esp. of seeking, or endeavoring to gain, what another is endeavoring to gain at the same time; common strife for the same object; strife for superiority, emulous contest; rivalry, as for approvation, or for a prize."[177] Its usage in commercial and economic contexts merely applies this general sense to trade, and is consistently defined to refer to some variant on "[t]he effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms[.]"[178]

Understanding "competition" in this way — as the activity or process in which market rivals are practically engaged in order to gain the business of third parties — would also be compatible with the meaning of "lessen" and the broader statutory context. When, as here, "lessen" is used as a transitive verb with an object, it means to "make [that object] less in size, quantity, amount, scope, etc.; to diminish."[179] Whether the competitive process taking place in any given line of business has been diminished, or could be diminished, by a merger is a coherent question susceptible to definite

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[174] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[175] *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930).

[176] *Cf. Fed. Trade Comm. v. Raladam Co., 283 U.S. 643, 649 (1931)* (interpreting FTC Act: "It is obvious that the word "competition" imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors — that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured."

[177] *See Competition*, Webster's Second International Dictionary (1934); *See also, e.g.*, *Competition*, Webster's Third New International Dictionary (1961) ("1: the act or action of seeking to gain what another is seeking to gain at the same time and us. under or as if under fair or equitable rules and circumstances: a common struggle for the same object esp. among individuals of relatively equal standing: RIVALRY <to prevent the realization that cooperation, not ~, is the road to happiness—Bertrand Russell> 2: a contest between rivals: a match or trial between contestants <a ~ in essay writing> <a high-diving ~> 3: RIVAL, COMPETITTOR 4 a: the effort of two or more parties to secure the custom of a third party by the offer of the most favorable terms **b:** a market condition in which a large number of independent buyers and sellers compete for identical commodities, deal freely with each other, and retain the right of entry and exit from the market 5: more or less active demand by two or more organisms or kinds of organism or kinds of organisms at the same time for some environmental resource in excess of the supply available . . .").

[178] *See Lessen*, Webster's Second International Dictionary (1934)*See also* [add all other dictionaries]

[179] *See, e.g.*, *Competition*, Webster's Second International Dictionary (1934); *Competition*, OXFORD ENGLISH DICTIONARY (1st ed. 1933).

answer. That would not be the case if "competition" in Section 7 were read to refer to an abstract condition.

To begin with, defining "competition" by reference to the play of contending forces that would *ordinarily* arise from an honest desire for gain in a given market would imply that Section 7 only prohibits mergers that "lessen" the play of such forces in a way that is *not* ordinary — that is "abnormal," to use the Court's term in *Paramount Famous*, or somehow contrary to the customary or expected course of events.[180] That would necessarily invite a court in a merger proceeding under Section 7 to examine the characteristics of the market, make a policy determination about the "ordinary" or "fair" scope of "play" for competitive forces in that market, and ultimately decide whether the merger lessens that scope in a way or to a degree that is improper. This would, in effect, be a duplication of the Sherman Act test for the illegality of mergers announced in *Columbia Steel* (1948), which required courts to determine whether a merger will "*unreasonably* lessen competition" in light of the nature of the market in which the parties compete.[181] Congress, however, predicated the prohibition of the Celler-Kefauver Act exclusively upon whether a merger's effect "may be" simply "to *lessen* competition" — excluding any requirement of "unreasonableness" from the statutory text. Where Congress has believed that standard was too stringent for a specific industry, it has provided an exception through express legislation.[182] Since Congress "has shown that it knows how to adopt" an exception to Section 7 where it wants one, supplying such an exception by judicial or administrative fiat would be "particularly inappropriate."[183]

Against this backdrop, it is plain that a merger runs afoul of the "lessen-competition" prong of Section 7 if its effect may be to diminish the competitive activity — the "striving" of business rivals in "emulous contest" for the custom of others[184] — taking place in any line of commerce in any section of the country.

d. "Tend to create a monopoly"

The phrase "tend to create a monopoly" has its roots in the early jurisprudence of the Sherman Act. Until its decision in *Standard Oil* (1911), the Supreme Court held that the Sherman Act prohibits not only those contracts, combinations, and conspiracies which "result or will result in a total suppression of trade or in a complete monopoly" of a "part of interstate commerce," but also those

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[180] *See Ordinary,* OXFORD ENGLISH DICTIONARY (1st ed. 1933).

[181] *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948)

[182] *See* H. R. REP. NO. 1191, 81st Cong., 1st Sess., at 6 (August 4, 1949) (REPORT OF THE HOUSE JUDICIARY COMMITTEE ON H.R. 2734) (The last paragraph of section 7 is new. It simply provides that provisions of the bill should not apply to corporations coming under the jurisdiction of ICC, CAA, FCC, FPC, SEC, and the Secretary of Agriculture. These agencies already have jurisdiction over these corporations, and there is no disposition to change the present arrangement regarding them.").

[183] *See Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) ("Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision."); Iselin v. United States, 270 U.S. 245, 251 (1926) (Brandeis, J.) ("To supply omissions transcends the judicial function."); *Ebert v. Poston*, 266 U.S. 548, 554 (1924) (Brandeis, J.) ("a cassus omissus does not justify judicial legislation."). *See also Petteys v. Butler*, 367 F.2d 528, 538 (8th Cir. 1967) (Blackmun, J. dissenting) ("My [view] is that either the statute means what it literally says or . . . it does not; that if the Congress intended to provide additional exceptions, it would have done so in clear language; and that the recognized purpose and aim of the statute are more consistently and protectively to be served if the statute is construed literally and objectively rather than non-literally and subjectively on a case-by-case application. The latter inevitably is a weakening process.").

[184] *See Competition*, OXFORD ENGLISH DICTIONARY (1st ed. 1933).

which "*tend to create a monopoly* in such trade or commerce and to deprive the public of the advantages that flow from free competition."[185] An examination of the Court's pre-1950 caselaw interpreting the Sherman Act and the Clayton Act yields no expressed definition of the phrase, however. As such, the phrase as a whole was not a "term of art" with a "specialized legal meaning" when the Celler-Kefauver Act was passed.[186] Neither — with the possible exception of "monopoly," as explained below — were any of its words. Accordingly, they can be interpreted according to "their ordinary, contemporary, common meaning."[187]

We start with "tend to." All of the prime contemporary dictionaries give "tend" substantially the same definition when "tend" is used as an intransitive verb followed by "to" or "toward."[188] Namely, they describe its meaning as "to conduce," "to serve, contribute, or conduct, in some degree or way," or "to exert an influence in a certain direction or toward a certain end."[189] This common understanding of the verb "tend" as implying a contributory relationship between its subject and some action or state of affairs is consistent with the term's contemporary usage in jurisprudence. For example, in applying Section 3 of the Clayton Act in *International Salt* (1947), the Supreme Court

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[185] *See* Northern Securities Co. v. United States, 193 U.S. 197, 332 (1904) ("[T]o vitiate a combination [under the Sherman Act], it need not be shown that the combination, in fact, results or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international trade or commerce, or *tends to create a monopoly* in such trade or commerce and to deprive the public of the advantages that flow from free competition[.]"). *See also* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 237 (1899) (quoting United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895)) ("Again, all authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really *tends to that end* and to deprive the public of the advantages which flow from free competition."); Waters-Pierce Oil Co. v. State of Texas, 212 U.S. 86, 110 (1909) (quoting approvingly the preceding passages from United States v. E.C. Knight Co., 156 U.S. 1 (1895), Addyston Pipe & Steel Co. v. United States, 175 U.S. 237 (1899), and Northern Securities Co. v. United States, 193 U.S. 197, 332 (1904)).

[186] *Cf.* Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.s, 532 U.S. 598, 615 (2001) (Scalia, J., concurring) ("Words that have acquired a specialized meaning in the legal context must be accorded their legal meaning.").

[187] See, e.g*., Sandifer v. U.S. Steel Corp*., 571 U.S. 220, 227 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)) ("It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

[188] *See* The Oxford English Dictionary, Vol. XI 177 (1st. ed. 1933) (defining the verb "tend" when used as an intransitive verb with "to" as "to lead or conduct to some state or condition," and when used as intransitive verb with "to" and a "noun of action" as "to lead or conduce to some action."); Webster's International Dictionary 2600 (2nd ed., Unabridged 1934) (defining the verb "tend" when used as an intransitive verb with *to* or *toward* to mean: "1. To move or direct one's course in a certain direction; . . . 2. To be directed or have a tendency, conscious or unconscious, to any end, object, or purpose; to exert activity or influence in a particular direction; to serve as a means; conduce"); Funk & Wagnalls New Standard Dictionary of the English Language 2481 (1943) (defining "tend, v." when followed by "to" and a noun or an infinitive to mean: "1. To exert an influence in a certain direction or toward a certain end; have a bent, aptitude, or tendency; aim; conduce; followed by *to* and a noun or by an infinitive; as, education *tends* to refinement; luxury *tends* to produce effeminacy. 2. To move in a certain direction; hold a course; as, he tended toward the mountain; his path *tended* upward."); Century Dictionary and Cyclopedia 6228 (1911) (defining "tend" when used as an intransitive verb to mean: "1. To move or be directed, literally or figuratively; hold a course. . . . 2. To have a tendency to operate in some particular direction or way; have a bent or inclination to effective action in some particular direction; aim or serve more or less effectively and directly; commonly followed by an infinitive: as, exercise *tends* to strengthen the muscles. . . . 3. To serve, contribute, or conduce in some degree or way; be influential in some direction, or in promoting some purpose or interest; have a more or less direct bearing or effect (upon something).").

[189] *See* Black's Law Dictionary (4th Ed. 1968) (defining "tend" to mean: "to have a leaning; *to serve, contribute, or conduct in some degree or way*, or have a more or less direct bearing or effect; to be directed at any end, object or purpose; to have a tendency, conscious or unconscious, to any end, object, or purpose."). Funk & Wagnalls New Standard Dictionary of the English Language 2481 (1943) (defining "tend, v." when followed by "to" and a noun or an infinitive to mean: "1. To exert an influence in a certain direction or toward a certain end; have a bent, aptitude, or tendency; aim; conduce; followed by *to* and a noun or by an infinitive; as, education *tends* to refinement; luxury *tends* to produce effeminacy. 2. To move in a certain direction; hold a course; as, he tended toward the mountain; his path *tended* upward."); Webster's International Dictionary 2600 (2nd ed., Unabridged 1934) (defining the verb "tend" when used as an intransitive verb with *to* or *toward* to mean: "1. To move or direct one's course in a certain direction; . . . 2. To be directed or have a tendency, conscious or unconscious, to any end, object, or purpose; to exert activity or influence in a particular direction; to serve as a means; conduce")

stated that "the tendency of [an exclusive dealing] arrangement" to create a monopoly arises from "the direction of the movement" it effectuates, and "it is immaterial that the [movement] is a creeping one rather than one that proceeds at full gallop."[190] In prohibiting arrangements that demonstrate a "tendency to accomplishment of monopoly," the Court continued, Section 3 did not "await arrival at the goal before condemning" steps along the way.[191]

This contributory interpretation of the "tendency" proscribed by the provisions of the Clayton Act is also consistent with the meaning of the immediate object of "tend" in Section 7 — the verbal noun phrase "create a monopoly." In its common usage, the word "create" means "to bring [an object] about by a course of action or behavior."[192] It implies the process, not the instant, of creation. Thus, the plain implication of the phrase "tend to create a monopoly" in Section 7 is, not just to proscribe mergers which "may" conduce to the direct establishment of a monopoly, but also those which "may" conduce to a course of action or behavior that brings a monopoly about "in any line of commerce in any section of the country."

But what exactly is "a monopoly"? By the time Congress passed the Celler-Kefauver Act in 1950, the Supreme Court had developed a clearly articulated definition of "monopoly" in its antitrust jurisprudence. Through a series of cases over the 1940s — specifically *Alcoa* (1945),[193] *American Tobacco* (1946),[194] *Paramount* (1948),[195] *Griffith* (1948),[196] and *Schine Theaters* (1948),[197] among others — the Court advanced a consistent definition of "monopoly" as having "the power . . . to exclude competition" from an "appreciable part of interstate commerce" to a "substantial extent." In the course of applying this conception of monopoly in its decisions over the decade prior to the enactment of the Celler-Kefauver Act, the Court crystallized three core aspects of the idea of "monopoly" under the antitrust laws.

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[190] Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947). *See also* Int'l Bus. Machines Corp. v. United States, 298 U.S. 131, 136 (1936) (finding that a tying arrangement "tend[ed] to create a monopoly" within the meaning of the Clayton Act where it functioned as "an important and effective step in the creation of monopoly"); Magranes Houstoun 1922 (defining phrase as requiring only that exclusive dealing arrangement have "an actual tendency to monopoly").

[191] Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947).

[192] Webster's Third New International Dictionary (1961). *See also, e.g.*, Oxford English Dictionary (1st ed. 1933) (defining "create, v." as: "1. Of a divine being or natural agency. A. *transitive*. To bring into being, cause to exist; *esp.* to produce where nothing was before. . . . 2. Of a human agent. . . . b. *transitive*. To make, form, set up, or bring into existence . . . 3. *transitive*. To cause, occasion, produce, or give rise naturally to (a condition or set of circumstances."); Webster's International Dictionary 621 (2nd ed., Unabridged 1934) (defining "create, v." as : "1. To bring into being; to cause to exist; — said esp. of the formation of the world from chaos. 2. Hence, to cause to be, or to produce, by fiat or by mental, moral or legal action as: a. to invest with a new form, office, or character; to constitute by an act of law or of sovereignty; . . . b. to produce, form, or bring to pass, by influence over or stimulation of others; as, to *create* a favorable public opinion.").

[193] *United States v. Aluminum Co. of Am.* (*Aloca*), 148 F. 2d 416 (1945).

[194] *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946).

[195] *United States v. Paramount Pictures*, 334 U.S. 131 (1948).

[196] *United States v. Griffith*, 334 U.S. 100 (1948).

[197] *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948).

First, the Court established that a monopoly meant the possession of substantial — not complete — power over competition. To possess a monopoly, a person or group had to have the power to "control," "dominate," or "regiment" actual competition in an "appreciable part" of interstate commerce.[198] It was not required to control all of the competition that restrained its ability to raise prices.[199] *Second*, the Court made clear that a monopoly consisted in possessing the required power, not in exercising it. The "material consideration in determining whether a monopoly exists," the Court emphasized, was whether the requisite power "exists," not whether "prices are raised" or "competition actually is excluded."[200] *Third*, the Court held that monopoly was a functional condition. If a combination had gained "effective market control" in an appreciable part of interstate commerce,[201] then the "form of the combination," the specific intent behind it, and the "particular means [it] used" to acquire or retain its monopoly were immaterial.[202] Thus, where a single firm possessed exclusive control of a market without direct competitors, that firm was held to possess a monopoly regardless of how or why it acquired that control.[203] Correspondingly, where a group of firms wielded the power to exclude competition in their field "collectively" by engaging in parallel, mutually beneficial conduct, a monopoly was held to exist just as well as if the group were a single firm.[204]

This comprehensive "restatement of the conception of monopoly" under the antitrust laws broke sharply with the understanding of the term that had prevailed in the Supreme Court's antitrust jurisprudence since *Standard Oil* (1911) — and harkened back to earlier Sherman Act jurisprudence.[205] Before *Standard Oil*, the understanding of monopoly that had prevailed among "modern legislators and judges" was the one summed up by the government's argument in *Northern Securities* (1904): "[T]he combining or bringing together, in the hands of one person or set of persons, of the control, or the power of control, over a particular business or employment, so that competition therein may be suppressed."[206] In *Standard Oil*, however, the Court shifted the paradigm. Regardless of whether a combination has a "monopoly in the concrete," the Court held that a combination could only constitute a monopoly at law if: (1) it is created "with an intent to wrong the public or limit the right of individuals," rather than "the legitimate purpose of reasonably forwarding personal interest and developing trade"; and (2) it is likely to result in one of three "evils" that

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198 *See United States v. Aluminum Co. of Am. (Alcoa), 148 F. 2d 416 (1945); Am. Tobacco Co. v. United States, 328 U.S. 797 (1946).*

199 *See United States v. Aluminum Co. of Am. (Alcoa), 148 F. 2d 416 (1945); Am. Tobacco Co. v. United States, 328 U.S. 797 (1946); Associated Press v. United States*, 326 U.S. 1, 18 n.17 (1945) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 371 (1943) (Hand, J.).

200 *See Am. Tobacco Co. v. United States*, 328 U.S. 781, 809, 811 (1946); *United States v. Paramount Pictures*, 334 U.S. 131, 174 (1948); *United States v. Griffith*, 334 U.S. 100, 107 n.10 (1948); *United States v. Aluminum Co. of Am.* (*Alcoa*), 148 F. 2d 416, 427 (1945); *U.S. v. Crescent Amusement Co.*, 323 U.S. 173 (1944); *Schine Theatres v. United States*, 334 U.S. 110 (1948); *Mandeville Farms v. Sugar Co.*, 334 U.S. 219 (1948)

201 *See United States v. Griffith*, 334 U.S. 100, 107 (1948) (citing *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428-29 (2d. Cir. 1945)); *United States v. Columbia Steel Co.*, 334 U.S. 495, 525 (1948) (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)).

202 *See Am. Tobacco Co. v. United States*, 328 U.S. 781, 809, 811 (1946); *United States v. Paramount Pictures*, 334 U.S. 131, 174 (1948); *United States v. Griffith*, 334 U.S. 100, 107 n.10 (1948).

203 *See United States v. Paramount Pictures*, 334 U.S. 131, 174 (1948); *United States v. Griffith*, 334 U.S. 100, 107 n.10 (1948); *United States v. Aluminum Co. of Am.* (*Alcoa*), 148 F. 2d 416, 427 (1945);

204 *See Am. Tobacco Co. v. United States*, 328 U.S. 781, 809, 811 (1946); *United States v. Paramount Pictures*, 334 U.S. 131, 174 (1948). *See also* Eugene V. Rostow, *Monopoly Under the Sherman Act: Power or Purpose*? , 43 Ill. L. Rev. 745 (1949); *Mandeville Farms v. Sugar Co.*, 334 U.S. 219 (1948)

205 *See* Eugene V. Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745, 747 (1949).

206 *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

supposedly "led to the public outcry against monopolies" — higher prices, lower production, or deterioration in the quality of the monopolized product.[207] Over the late 1910s and 1920s, a new reactionary bench on the Court used this legalistic conception of monopoly in a trio of seminal cases — *United Shoe* (1918), *U.S. Steel* (1920), *International Harvester* (1927) — to develop an idea of "monopoly" that hinged almost exclusively, not on the existence of exclusive power itself, but on the obtainment and use of such power for "wrongful purposes," with "brutal methods," or to "evil" ends.[208]

In 1945, these two dichotomous understandings of monopoly finally came to a head in *Alcoa*.[209] The Justice Department argued that Alcoa's position "as the single producer of virgin [aluminum] ingot in the United States" for over 28 years was enough, "without more," to make it "an unlawful monopoly."[210] Alcoa argued the opposite — that being the sole producer of "virgin [aluminum] ingot in this country did not . . . give it a monopoly of the market" because it had no "specific intent" to "monopolize"; had acquired its position through "skill, energy, and initiative," not "unlawful methods"; and always faced competitive forces in the form of aluminum imports, substitute metals, and potential market entrants.[211] The Court sided decisively with the Justice Department. "Alcoa," the Court said, "meant to keep, and did keep" the substantially "complete and exclusive hold upon the [virgin aluminum] ingot market with which it started" after the expiration of its patent on aluminum in 1909.[212] That was to possess a "monopoly . . . of the kind covered by" the Sherman Act, "however innocently [Alcoa] otherwise proceeded."[213] Methodically building on this landmark decision in subsequent cases over the 1940s, the Court would go on to holistically repudiate, not only the "reasoning and spirit" of *United Shoe*, *U.S. Steel*, and *International Harvester*, but also "the basic attitudes which prevailed [in Sherman Act jurisprudence] during the 'twenties."[214] The paradigm shift was decisive. By 1950, when the trial judge presiding in *Alcoa* upon its remand reviewed "the change in substantive emphasis from abuse to power" declared in "the recent authoritative precedents," he flatly concluded that *International Harvester* and its companion cases "must be relegated to a now discarded stage of legal development."[215]

The foregoing discussion demonstrates that "monopoly," as a discrete term, was given a definite construction by the Supreme Court shortly before the Celler-Kefauver Act was enacted. When "administrative and judicial interpretations have settled the meaning" of a particular statutory term, the use of that same term in a new statute is presumed to "incorporate" its settled meaning.[216] Even

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[207] *Standard Oil Co. v. United States*, 221 U.S. 1, 52 (1911).

[208] *United States v. United Shoe Machinery Co.*, 247 U.S. 32 (1918); *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); *United States v. International Harvester Co.*, 274 U.S. 693 (1927).

[209] *United States v. Aluminum Co. of Am.* (*Aloca*), 148 F. 2d 416 (1945).

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *See* Eugene V. Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745 (1949); Eugene V. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567 (1947).

[215] *United States v. Aluminum Co. of Am.*, 91 F. Supp. 333 (S.D.N.Y. 1950).

[216] *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.").

if we assume otherwise, however, the interpretive result would be the same, because the Court's definition of "monopoly" in 1940s caselaw was fundamentally consistent with the meaning of "monopoly" in both legal and ordinary usage at the time.

Every edition of Black's Law Dictionary from 1910 to 1968 defined "monopoly" to encompass two things: (1) "the exclusive right (or *power*) to carry on a particular business or trade, manufacture a particular article, or control the sale of the whole supply of a particular commodity"; and (2) "the ownership or control of so large a part of the market-supply or output of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolist control over prices." This definition is representative of the word's meaning in the prime English and Law dictionaries of the era.[217] The gist of this definition is that a monopoly exists when a person or group has exclusive power to control a product. Such power, it says, can come from directly controlling the entire supply of that product — in which case it would exist by default — or from controlling a large enough portion so as to give the monopolist substantially comparable influence over the whole. This is just a longer way of saying that a monopoly consists in the power to exclude competition.

As defined in contemporary dictionaries, the verb "to exclude" means not only to "shut out" or expel an object by force, but also to "leave no place [for it]" and to "prevent [its] existence, occurrence or use."[218] If a person or group were to obtain the power to shut out or prevent the occurrence or use of — that is, to exclude — competition in a line of business or trade, that person or group would necessarily have sufficient "exclusive power" to constitute a monopoly under Black's definition. Not only that, but their power would also necessarily stifle competition, because

[217] For example, Webster's Third International Dictionary (1961) defines "monopoly" as "ownership or control that permits domination of the means of production or the market in a business or occupation . . . that is achieved through an exclusive legal privilege (as a governmental grant, charter, patent, or copyright) or by control of the source of supply (as ownership of a mine) or by engrossing a particular article or commodity (as in cornering a market) or by combination or concert of action." The Oxford English Dictionary (1st Ed. 1933) defines "monopoly" as "Exclusive possession of the trade in some article of merchandise; the condition of having no competitor in the sale of some commodity, or in the exercise of some trade or business." Webster's International Dictionary (2nd ed., Unabridged 1934) defines "monopoly" as "1. a. Exclusive possession of the trade in some article or exercise of some business. b. The exclusive right, privilege, or power of selling or purchasing a given commodity or service in a given market; exclusive control of the supply of any commodity or service in a given market; hence, often, in popular use, any such control of a commodity, service, or traffic in a given market as enables the one having such control to raise the price of a commodity or service materially above the price fixed by free competition." It also adds that: "Exclusive control of traffic constitutes a monopoly in the economic sense, whether acquired by state grant (as in case of patents or copyrights . . .), by control of sources of supply (as in case of mines), by engrossing an article (as in case of cornering the market), by combination or concert of action, or by any other means." Similarly, Funk & Wagnalls New Standard Dictionary of the English Language (1943) provides that "monopoly" ordinarily means "the exclusive right, power, or privilege of engaging in a particular traffic or business; or the resulting absolute possession or control." Finally, The Century Dictionary & Cyclopedia (1911) defines "monopoly" as "1. An exclusive privilege to carry on a traffic . . . 2. Specifically, in *Eng. Constitutional hist.*, and hence sometimes in *Amer. law*, such an exclusive privilege when granted by the crown or state . . . 3. In *polit. econ.*, control of the production, purchase, or sale of a commodity or service, so unified as to render possible the manipulation of prices in the interest of the person or persons in control."

Pope's Legal Definitions (1919) gives two primary definitions of monopoly. The first is drawn from a 1908 circuit court opinion by Judge Noyes, which was issued in the first monopolization suit brought against The American Tobacco Company. According to that definition, "[a] monopoly, in the modern sense, is created when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of commodities and thus to practically suppress competition." The second definition is from an 1896 California Supreme Court decision, *Herriman v. Menzies*, which concerned a combination of longshoremen in San Francisco. "A monopoly exists," Chief Justice Van Fleet wrote in that case, "where all, or nearly all, of an article of trade or commerce within a community or district is brought within the hands of one man or set of men, as to practically bring the handling or production of the commodity or thing within such single control to the exclusion of competition or free traffic therein."

[218] *See Exclude,* OXFORD ENGLISH DICTIONARY (1st ed. 1933).

competition would exist at their sufferance; it would restrict the freedom of commerce, because commerce would be subjected to their permission; and it would give them control over prices — a form of competition — by default.

The two definitions are also consistent in their particulars. Black's definition speaks in terms of exclusive power of control over a "*particular* business or trade," the manufacture of "a *particular* article," or the supply of "a *particular* commodity." Likewise, the Court's decisions found monopolies based on the defendant's possession of exclusive power in the trade, manufacture, or sale of specific products — *e.g.*, aluminum ingot in *Alcoa*, burley-tobacco cigarettes in *American Tobacco*, local movie theaters in *Griffith* and *Schine Theaters*, and so forth — without regard for their power vis-à-vis substitutes. Moreover, Black's definition describes monopoly as a type of "power" or "control" without specifying how that power or control is created, how it is used, the form it takes, or the intentions of those who possess it. The Court's decisions agree that these things — methods and forms, specific intents, and whether power is exercised to evil ends — are irrelevant to determining whether a monopoly exists.

The reference to prices in Black's definition of monopoly does not change its alignment with the Court's definition of the term — because it refers to "control over prices." Having control over the price of a particular commodity does not entail having the power to raise that price for consumers. "Control," per the Oxford English Dictionary of 1933, denotes "the fact . . . of checking and directing action; the function or power of directing and regulating[.]"[219] Thus, a person or group that "directs" or "regulates" the prices charged by all or substantially all of the competing sellers of a product necessarily "controls" the price of that product. How they, in turn, use that control — and, indeed, whether they manage to use it profitably — are derivative questions that have no bearing on whether that person or group does, in fact, have the required control. "The unintelligent exercise of monopoly power," as Eugene V. Rostow once remarked, "[is] no proof it [does] not exist."[220]

This distinction between the power to control prices and the power to raise them was illustrated in the Court's decision in *American Tobacco* (1946).[221] The defendants in that case — American, Reynolds, and Ligett — produced around 80% of the burley-tobacco cigarettes (then-known as "standard" cigarettes in the industry) consumed in America every year between 1931 and 1939.[222] By following a scheme of price leadership and parallel conduct, they regulated the price of all the burley-tobacco cigarettes which they directly produced, and their power obliged other manufacturers of comparable-grade cigarettes to follow their direction.[223] Notwithstanding this overwhelming control over industry prices — which extended beyond burley-tobacco cigarettes to other tobacco products — the Big Three still could not *raise* prices.

219 *See Control,* OXFORD ENGLISH DICTIONARY (1st ed. 1933).
220 Eugene V. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 585 (1947).
221 *American Tobacco Co. v. United States*, 328 U.S. 781 (1946)
222 *Id.*
223 *Id.*

As the Court's decision in *American Tobacco* recounts, when the Big Three initiated a 7% wholesale price hike on burley-tobacco cigarettes in 1931 (from $6.40 to $6.85 per thousand cigarettes), they promptly lost 10% of the market to new entrants producing cheaper-grade substitutes known as "ten-cent" cigarettes.[224] By early 1933, the Big Three were forced to reverse course. They initiated a price reduction, cutting the wholesale price of "standard" cigarettes down to $5.50 per thousand (14% under the pre-hike level of $6.40 a thousand) and requiring retailers to peg the consumer price of a "standard" cigarette pack to only 3 cents higher than a discount pack.[225] Together, these steps ultimately led to a strategic victory for the Big Three — many discounters' soon "pass[ed] out of the picture" and the Big Three's control over the industry was reasserted — but not a pricing victory. The Big Three were unable to raise the industry price of burley-tobacco cigarettes back to 1931 levels until the 1940s. In both directions, however — toward lower or higher prices — the Big Three controlled the price of substantially all cigarettes produced in America.[226] Thus, they met Black's definition of a monopoly, just as they met the Court's in *American Tobacco*.

In all events, interpreting the word "monopoly" in Section 7 to refer to a condition whereby a person or group, not only possesses exclusive power or control over a line of business, but also exhibits some other "wrongful" quality detrimental to the public (such as having the power to raise prices for consumers), is foreclosed by the statutory and jurisprudential history of the phrase in which the word is situated — "to tend to create a monopoly." As noted above, this phrase was derived from a test of illegality for Section 1 of the Sherman Act originating in the Supreme Court's pre-*Standard Oil* caselaw. Before 1911, the Court maintained that, where a combination does not "restrain trade . . . by [its] necessary operation," or "result" in a "complete monopoly," the combination may still be prohibited under Section 1 if it "tends to create a monopoly and to deprive the public of the advantages that flow from free competition." Although this test of illegality for the Sherman Act disappeared from the caselaw for over three decades after *Standard Oil*, it was formally restored to defining the scope of Section 1's prohibition in *Associated Press* (1945).[227] Thus, in defining the outer limits of liability under the Sherman Act, both in its pre-*Standard Oil* and post-*Associated Press* jurisprudence, the Court consistently held that a combination which "[had] not as yet resulted in restraint [of trade]"[228] should, at least, demonstrate two minimum tendencies to fall within the Act's prohibition — a tendency to create a monopoly *and* a tendency to harm the public. Yet, when Congress drafted both the Clayton Act in 1914 and the Celler-Kefauver Act in 1950, it chose to borrow only the *first* element of that test — the tendency to create a monopoly — and to exclude the *second* element from Section 7 entirely

[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Associated Press v. United States*, 326 U.S. 1, 18 n.16 (1945) (quoting *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463 (1941)).
[228] *Associated Press v. United States*, 326 U.S. 1, 12 (1945).

To adopt a definition of "monopoly" in Section 7 that entails some additional attribute of harm to the public beyond the exclusion of competition itself would be to practically nullify this legislative choice.[229] In reviewing a merger under such an interpretation, a court would not be able to determine whether the merger "tends to create a monopoly" simply by evaluating whether it conduces to a course of action or behavior that leads toward exclusivity of control or power in a line of commerce. The court would have to go further, and evaluate whether the merger would aid in bringing about a kind of competitive exclusion that is likely to result in public harms *downstream* from competition — such as price increases, output reductions, or quality deteriorations. If a merger conduces to actions or behaviors that lead to the exclusion of competition but is unlikely to detriment the public in the court's judgment, the court would be obliged to conclude that the merger does not "tend to create a monopoly" of the kind proscribed by the statute. In other words, the court would have to decide whether the merger "tends . . . to deprive the public of the *advantages* that flow from free competition" — an element that Congress conspicuously excluded from the text of Section 7 when it borrowed the phrase "tend to create a monopoly" from jurisprudence.

To summarize, the word "tend" in Section 7 means to conduce to an object in some degree or way. The word "create" means to bring an object about by a course of action or behavior. And the word "monopoly," according to both its ordinary and its legal usage at the time of the Celler-Kefauver Act's drafting, means the possession by one person or group of exclusive power or control over competition in a particular business or product. Thus, taken altogether, the phrase "tend to create a monopoly" in Section 7 extends its prohibition to mergers whose effect "may be substantially" to conduce, in some degree or way, to courses of action or behavior that can bring about a monopoly — a condition where a single person or group either (1) controls all or nearly all trade in a particular business or product to the exclusion of competition, or (2) has the power to exclude such competition and exercise comparable control over trade when they desire to do so. As in the case of the lessening-competition prong of "Section 7,"

e. "In any line of commerce . . . in any section of the country"

Section 7 prohibits mergers that "may" produce the proscribed effects "in any line of commerce or in any activity affecting commerce in any section of the country." This clause can be divided into three operative phrases. The first two ("in any line of commerce" and "in any activity affecting commerce") are prepositional phrases, which function adverbially to define "where" the proscribed "effect" of a merger "may" occur in order to trigger prohibition. The last phrase ("in any section of the country") is also a prepositional one, but it functions as an adjective for the preceding phrases, indicating the segment of the nation within which the aforementioned "line of commerce" or "activity affecting commerce" may be situated. Since the textual meaning of the second phrase ("in

[229] In borrowing terms from jurisprudence, Congress is presumed to understand "the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *See Morissette v. United States*, 342 U.S. 246, 263 (1952). *See also Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014) (quoting *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 292 (2012) (quoting *Molzof v. United States*, 502 U.S. 301, 307 (1992) (quoting *Morissette v. United States*,342 U.S. 246, 263 (1952)))).

any activity affecting phrase") has been explored in published work elsewhere,[230] we focus on the first and last phrase only: "in any line of commerce . . . in any section of the country."

Both of these phrases start with the words *in* and *any*. The word *in* is an "elastic preposition."[231] It indicates the "presence, existence, situation, inclusion, [or] action" of its subject within its object.[232] By contrast, the natural reading of the word *any* is categorical — meaning "one or some indiscriminately of whatever kind."[233] The use of *any* as a modifier without more restrictive language "le[aves] no basis in the text for limiting the phrase" it modifies.[234] Accordingly, at a minimum, it is plain that Section 7 does not limit the range of "lines of commerce" that can trigger a merger's prohibition. Nor does it limit the "sections of the country" within which such lines may be situated. Rather, Section 7 prohibits all mergers that produce a proscribed effect in "one or some" lines of commerce situated in "one or some" sections of the country "indiscriminately of whatever kind."[235]

i. "In any line of commerce"

The first phrase refers to *commerce*, which is a term the statute defines as "trade or commerce" among the states and territories and with foreign nations.[236] When the words *trade* and *commerce* are "used in juxtaposition," as they are in this statutory definition, "they impart to each other enlarged signification, so as to include practically every business occupation carried on for subsistence or

[230] *See* Daniel A. Hanley, *Redefining the Relevant Market: Abandonment or Return to* Brown Shoe 9-23 (2023), https://ssrn.com/abstract=4404081.

[231] *See in,* Black's Law Dictionary (3rd ed. 1933); *in,* Black's Law Dictionary (4th ed. 1951); *in,* Black's Law Dictionary (4th ed. Rev. 1957); *in,* Black's Law Dictionary (4th ed. Rev. 1968).

[232] *See in,* Black's Law Dictionary (3rd ed. 1933); *in,* Black's Law Dictionary (4th ed. 1951); *in,* Black's Law Dictionary (4th ed. Rev. 1957); *in,* Black's Law Dictionary (4th ed. Rev. 1968). *See also* Webster's Third New International Dictionary 1139 (1961) (defining "in" as "1.a. (1) — used as a function word to indicate location or position in space or in some materially bounded object <put the key ~ the lock> <travel ~ Italy> <play ~ the street> <wounded ~ the leg> <read ~ bed> <look up a quotation ~ a book> . . . b. — used as a function word to indicate position or location in something immaterial or intangible <saw him ~ my dreams> <the position of the artisan ~ society>").

[233] *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (Thomas, J.) (collecting cases supporting proposition that, where the legislature uses the modifier "any" without more restrictive language, Congress "la[eaves] no basis in the text" for limiting the scope of the phrase modified thereby).

[234] *See Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (holding that Federal Tort Claims Act provision, which barred claims arising from "detention of any goods by any officer of customs or excise or *any* other law enforcement officer," barred claims arising from detention of goods by *all* federal officers, whether or not they enforced customs or excise laws) (emphasis added); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (similar reliance on use of "any" in interpreting use-of-firearm sentence enhancement provision); *United States v. Alvarez–Sanchez*, 511 U.S. 350, 358 (1994) (same, interpreting statute governing admissibility of confessions); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588-89 (1980) (same, interpreting Clean Air Act); *Collector v. Hubbard*, 12 Wall. 1, 15 (1871) (same, interpreting statute barring tax claims in federal court before administrative remedies are exhausted).

[235] *See Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (Thomas, J.). *See also George Van Camp & Sons Co. v. Am. Can Co.*, 278 U.S. 245, 253 (1929) (holding that the phrase "in any line of commerce" in Section 2 of the Clayton Act is "clear" and "means that if the forbidden effect or tendency is produced in one out of all the various lines of commerce, the words 'in any line of commerce' literally are satisfied").

[236] *See* 15 U.S.C. § 12:

> "Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

profit, and into which the elements of bargain and sale, barter, exchange, or traffic, enter."[237] That leaves one term to be defined in the phrase — a *line* of such business occupations.

Around the time Section 7 was amended and re-enacted in 1950, the term *line* was commonly used in commercial parlance, but it had no specialized meaning in law or economics.[238] In business contexts, the term was used in two primary senses. In the day-to-day work of running a business, *line* was a concrete term — referring to "goods of a particular design," "the stock on hand" of such goods, or the "order[s] received" for them. Outside of that practical context, however, *line* was primarily used to refer to a "department of activity; a kind or branch of business or occupation."[239] Since Section 7 is not concerned with day-to-day business operations and refers to lines of commerce in general, the latter sense of *line* has a natural congruence with the word's immediate context. This gives the phrase "any line of commerce" a broad — but determinate — meaning that encompasses any kind, branch, or department of business occupation carried out for subsistence or profit in interstate or international commerce.

All three of those subsidiary terms in the definition of *line* — "kind," "branch," "department" — point in the same direction. Fundamentally, they all imply that a *line of commerce* is a category of business occupation which is defined by characteristics that separate or distinguish it from other categories of business occupation.[240] Under this definition, the fact that a group of business occupations offer substitute products from the perspective of consumers certainly could, at least in theory, qualify them as a "line" of commerce, but nothing in the phrase signifies that such substitutability is the *only* permissible basis for identifying a line of commerce. Indeed, using other characteristics that reasonably distinguish one business occupation from another — such as distinct products or services, peculiar know-how and operations, or divergent supply chains and distribution channels — to identify a line of commerce would be more consistent with the phrase's textual

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[237] *See Trade and Commerce,* Black's Law Dictionary (3rd ed. 1933); *Trade and Commerce,* Black's Law Dictionary (4th ed. 1951); *Trade and Commerce,* Black's Law Dictionary (4th ed. Rev. 1957); *Trade and Commerce,* Black's Law Dictionary (4th ed. Rev. 1968).

[238] From the enactment of the Sherman Act in 1890 to the enactment of the 1950 Amendments, the Supreme Court showed little interest in having litigants define a highly specific market. Instead, the Supreme Court interpreted the words of the Sherman Act and the Clayton Act broadly by adhering to the broad meaning of the words written in the text of the statutes. For purposes of Section 1 of the Sherman Act, "Every" meant every. For purposes of Section 2 of the Sherman Act and the Clayton Act, "any" in the phrases "any part of the trade or commerce" and "any line of commerce" meant "any" in its broadest sense. *See, e.g., United States v. E. C. Knight Co.*, 156 U.S. 1, 10 (1895); *Standard Oil Co. v. United States*, 221 U.S. 1, 61 (1911); *George Van Camp & Sons Co. v. Am. Can Co.*, 278 U.S. 245, 253 (1929); *Standard Oil Co. of California v. United States* (*Standard Stations*), 337 U.S. 293, 299 n.5 (1949). For a more detailed analysis on how the Supreme Court created the process to define relevant markets and how the relevant statutory phrases were interpreted, *see* Daniel A. Hanley, *Redefining the Relevant Market: Abandonment or Return to* Brown Shoe (2023), https://ssrn.com/abstract=4404081.

[239] *See Line*, Oxford English Dictionary (1933). *See also* Funk & Wagnalls New Standard Dictionary of the English Language 1439 (1943) (defining "line, n." as used in "commerce" to mean: "(1) A branch of mercantile business; as, a man in the hardware *line*. (2) An order received by a travelling agent for goods, or the goods so ordered. (3) A particular class or stock of goods; as, a heavy *line* of ribbons."); Webster's International Dictionary (2nd ed., Unabridged 1934) (defining "line, n.," as used in "trade" to mean: "a. A supply or stock of various qualities and values of the same general class of articles; as, a full *line* oof hosiery; a *line* of socks; a *line* of merinos. b. An order for goods given to a commercial traveler or agent; also, the good for which the order is given."); The Century Dictionary and Cyclopedia (1911) (defining "line, n." to mean: "11. In *com.*: *(a)* An order given to an agent or commercial traveler for goods. *(b)* The goods received upon such order. *(c)* The stock on hand of any particular class of goods. . . .15. The course in which anything proceeds or which any one takes; direction given or assumed: as, a *line* of policy or of argument; to market out a *line* of travel or of conduct; to pursue a certain *line* of business or of art.").

[240] *See Department*, OXFORD ENGLISH DICTIONARY (1st ed. 1933); *Kind*, OXFORD ENGLISH DICTIONARY (1st ed. 1933); *Branch*, OXFORD ENGLISH DICTIONARY (1st ed. 1933).

import. For the word "line" was ordinarily used to identify, with varying degrees of generality, the types of business a party was engaged in, not the markets it sold to or participated in.[241]

Dictionaries from around the time of Section 7's enactment in 1914 and re-enactment in 1950 define a *market* as "a place of commercial activity in which articles are bought and sold," or alternatively, as "the geographical or economic extent of commercial demand [for something]."[242] Although these definitions diverge in some ways, they are fundamentally entangled. When buyers seek to fill a need by going to buy things from "a place of commercial activity," they inevitably encounter sellers of different products that could serve their need to varying degrees of satisfaction. As they choose among those substitutes, their choices determine the "geographical or economic extent of demand" for each kind of product. Since products are not usually "bought and sold" outside of the geographic and economic areas in which there is demand for them, the shape of that demand necessarily drives the evolution of the "place of commercial activity" in which it is satisfied.

A "market," therefore, was identified with the area in which customers could find and choose among sellers and products. A "line," by contrast, was identified with practical distinctions between business occupations, or groups of business occupations, based on their qualitative characteristics. Thus, in *United States v. Standard Oil of California* (1949), the Court defined the relevant line of commerce simply as the production and sale of gasoline. It did not examine "where the purchasers" of gasoline could "turn" for "suppliers" of their fuel needs — that is, define markets — to identify this line of commerce.[243] It only made such an examination when it came to assessing the effect of the at-issue exclusive contracts on competition *within* that line of commerce. There, the Court said, an exclusive contract need not threaten a lessening of competition among suppliers of gasoline "nationwide" or in "the industry as a whole" to fall within Section 3's prohibition.[244] Rather, where purchasers could not, as a practical matter, turn to suppliers of gasoline outside of their "own area," an anticompetitive effect within that distinguishable "area of effective competition" — that specific regional market — was sufficient.[245] Since Standard Oil's exclusive requirements contracts with independent gas stations foreclosed competition for 6.4% of wholesale gasoline sales in that market, the Court found there was sufficient evidence that "the effect of [Standard's] requirements contracts" may have been "to lessen competition in both interstate and intrastate commerce."[246]

[241] *See* Cornelia Evans & Bergen Evans, A Dictionary of Contemporary American Usage 277 (1957) ("[L]ine. One meaning of *line* is business, profession, trade, sphere of economic activity. It probably developed from the *line* of goods that a salesman carried or sold (*Hardware, that's a good line. He's been in that line of work for thirty years.*).").

[242] *See, e.g.*, *Market,* Black's Law Dictionary (3rd ed. 1933); *Market,* Black's Law Dictionary (4th ed. 1951); *Market,* Black's Law Dictionary (4th ed. Rev. 1957); *Market,* Black's Law Dictionary (4th ed. Rev. 1968).

[243] *Standard Oil Co. of California v. United States* (*Standard Stations*), 337 U.S. 293, 299 n.5 (1949).

[244] *Id.*

[245] *Id.*

[246] *Standard Oil Co. of California v. United States* (*Standard Stations*), 337 U.S. 293, 314-15 (1949).

Although other pre-1950 Supreme Court cases under the Clayton Act generally did not break lines of commerce down into separated geographic markets like *Standard Stations* and *International Shoe* did, essentially all of them likewise found the relevant "line of commerce" was simply a line of business that either a defendant or a party affected by the defendant's conduct was engaged in.[247] For example, in *Fashion Originators' Guild* (1941), the Court used "line of business" interchangeably with "line of commerce," and defined the relevant line for the purposes of determining a Section 3 exclusive-dealing claim as simply the manufacture and sale of women's dresses.[248] Likewise in *Van Camp Sons* (1929), the relevant lines of commerce for determining a price-discrimination claim under Section 2 of the Clayton Act were the manufacturing and sale of tin cans, in which the defendant American Can Company was engaged, and the packing and sale of food products in tin cans, in which the plaintiff George Van Camp Sons Company was engaged.[249] In other cases, the line of commerce ranged from a single product line, such as automobile loans in *Ford Motor Company* (1948),[250] to an industry such as the manufacture and sale of candy in *Corn Products* (1945)[251] and the manufacture, sale, and distribution of cement in *Cement Institute* (1948).[252]

This variability did not spring from simplicity or lack of rigor on the part of practitioners of the era, but from the ordinary usage of "line" or "line of business" by people in business. It was not a mysterious concept. It essentially referred to some distinguishable and articulable class of business activity — a product line, a particular trade or specialty, an industry, or some other reasonable division based on the qualitative features of the business, like the processes involved, the materials used, the products sold, or the class of customer served.[253] Leading books on business management used the term in this way.[254] Businessmen writing about their business used it this way.[255] Indeed, the FTC used it this way in its own reports to Congress, such as its 1947 report on the merger movement which urged the passage of what became the Celler-Kefauver Act.[256] For illustration, here

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247 *See, e.g.*, *Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37 (1948) (retail grocery); *Standard Oil Co. of California v. United States* (*Standard Stations*), 337 U.S. 293, 325 (1949) (sale of gasoline); *Corn Products Co. v. Comm'n*, 324 U.S. 726 (1945) (manufacture an sale of candy); *Trade Comm'n v. Cement Institute*, 333 U.S. 683 (1948) (sale and distribution of cement); *Int'l Bus. Machs. Corp. v. United States* (*IBM*), 298 U.S. 131, 132-33 (1936) (tabulating cards); *George Van Camp & Sons Co. v. Am. Can Co.*, 278 U.S. 245, 252 (1929) (manufacture and sale of tin cans, and packing and selling canned food); *Standard Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922) (manufacture and distribution of patterns).

248 *Fashion Originators' Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457, 461-62 (1941).

249 *George Van Camp & Sons Co. v. Am. Can Co.*, 278 U.S. 245, 252 (1929).

250 *Ford Motor Co. v. United States*, 335 U.S. 303, 308 (1948).

251 *Corn Prod. Ref. Co. v. Fed. Trade Comm'n*, 324 U.S. 726, 731-32 (1945).

252 *Fed. Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 687 (1948).

253 For a full description of how the Supreme Court defined relevant markets during this time, *see* Daniel A. Hanley, *Redefining the Relevant Market: Abandonment or Return to* Brown Shoe 9-23 (2023), https://ssrn.com/abstract=4404081.

254 *See, e.g.*, WILLIAM CORNELL ET AL., FUNDAMENTALS OF BUSINESS ORGANIZATION AND MANAGEMENT 204 (1927) ("It is recognized that the efficient buyer must be a keen student of general business conditions. . . . He must be able to see his own company not only in relation to the *line of business of which it is a part*, but also in relation to *allied lines* and to general business conditions."); Webster Robinson, Fundamentals of Business Organization 16-17 (1925) ("In every well-organized, successful business the consensus of opinion seems to be that the fundamental general policy is not to be changed so long as that firm remains in the same line of business[.]").

255 For example, in Samuel Crowther's widely read collection of essays by businessmen published in 1920, *The Book of Business*, the term "line" was used variably to refer to the laundry business, the hotel business, the car dealing business, and so forth. *See* Samuel Crowther, The Book of Business (1920). In one passage, "shoes, clothing, stoves, harness, paint, implements, vehicles, and food products" were each described as a "line." *See id.* In another, the petroleum industry was said to include several "general lines" ranging "from the producing of oil from the well through the transportation and refining to its final sale and delivery to the consumer." *See id.*

256 *See, e.g.*, FED. TRADE COMM'N, THE PRESENT TREND OF CORPORATE MERGERS AND ACQUISITIONS 15 (March 7, 1947) ("[A]mong the beverage groups, brewers and soft drink manufacturers acquired other firms, mostly in *their own lines*. There was,

is a passage from a 1938 article in The Journal of Business of the University of Chicago, by J.D.A. Morrow, then-president of the Pittsburgh Coal Company:

> From my experience it is evident to me that many advantages would accrue from . . . voluntary concert of action among members of many, possibly of all, industries, though the extent and character of such benefit would vary with the conditions in *different lines of business or industry*.
>
> . . .
>
> At first thought it may seem that this program presents a picture of industry and business crystallizing into rigid forms without competition. This gives me no cause for worry. [T]here is greater degree of *competition between products of different lines of industry* than is generally understood. For instance, even if the several thousand bituminous-coal producers were miraculously organized into a few producing and selling combinations, they could not go far in raising the price of coal anywhere in the United States without immediately opening the way for greatly increased sales of oil, natural gas, and other competitive fuels. If copper gets too high in price, aluminum can take its place in surprising fashion. Cotton, silk, wool, and rayon compete against one another, and whenever the attempt is made to combine industries, interests, and products that are diverse . . . effective combination becomes impossible.[257]

What this passage makes clear is that, in common as in legal usage before 1950, the fact that two or more distinct lines of business or industry — that is, two or more lines of commerce — competed with each other did not transform them into one line. Since the language of Section 7 prohibits mergers whose effect "may be" to lessen competition or tend to the creation of a monopoly in "any line of commerce," it follows that a merger's effect must be assessed within the confines of any reasonably derived category of interstate business activity in which a lessening of competition or tendency to the creation of a monopoly could functionally take place. This necessarily includes any discrete product line, field of trade or business, or industry. As the Court held in *Van Camp Sons* (1929), "the phrase ['in any line of commerce'] is comprehensive and means that if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words 'in any line of commerce' literally are satisfied."[258]

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however, some *crossing of lines* as a ginger-ale producer purchased a distillery at the same time that another distiller acquired a carbonated water firm.").

[257] J.D.A. Morrow, *Industry Organization and the Role of Government*, 11(2) J. Bus. U. Chi. 125 (1938).

[258] *See George Van Camp & Sons Co. v. Am. Can Co.*, 278 U.S. 245, 253 (1929).

ii. "In any section of the country"

Finally, we turn to interpreting the phrase "in any section of the country." At the time of the Celler-Kefauver Act's passage, a "section" of an object typically referred to a "part separated or divided off from the remainder" of that object.[259] Around the same time, the word "country" was used "in common parlance, in historical and geographical writings, in diplomacy, legislation, treaties, and international codes" to denote, not only "the territory or dominions occupied by a community," but also "the population, the nation, the state or the government, having possession and dominion over [that] territory."[260] Thus, taken on its own, the phrase "any section of the country" could be any part of the geography, population, or other aspect of the national community that is distinguishable from the whole based on some characteristic.[261] The textual context and statutory history of Section 7, however, apply some brackets to the meaning of this phrase.

Prior to the Celler-Kefauver Act, Section 7 prohibited mergers whose effects may be to "restrain . . . commerce in any section or community, or to tend to create a monopoly in any line of commerce[.]" In the Celler-Kefauver Act, Congress dropped the word "community" from Section 7 and specified that the relevant "section" must be a "section *of the country*." At the time, use of the phrase "any community" would have encompassed any "body of individuals" living in the same locality or sharing some other circumstance or attribute in common.[262] In contrast, when used in political or legislative contexts, the word "section" implied "a district or portion of a town or country exhibiting uniform characteristics or considered as divided from the rest on account of such characteristics."[263] Since non-stylistic amendments are "presumed to entail a change in meaning,"[264] it stands to reason that Congress intended the phrase "any section of the country" to mean something different from the phrase "any community." Thus, a "section of the country" must mean a district or portion of the nation's territory or population that is characterized, not only by an internally shared attribute (such as a common interest among a group of individuals) or the attribute of locality alone (such as the fact of being a town in itself), but by an attribute that materially divides or separates the "section" from the rest of "the country."

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[259] *See, e.g.*, *Section*, OXFORD ENGLISH DICTIONARY (1st ed. 1933); *Section*, Webster's Second International Dictionary (1934).

[260] *See, e.g.*, *Country,* Black's Law Dictionary (3rd ed. 1933); *Country,* Black's Law Dictionary (4th ed. 1951); *Country,* Black's Law Dictionary (4th ed. Rev. 1957); *Country,* Black's Law Dictionary (4th ed. Rev. 1968).

[261] *See Section*, OXFORD ENGLISH DICTIONARY (1st ed. 1933) (defining "section, n.," as "2. A part separated or divided off from the remainder; one of the portions in which a thing is cut or divided. . . . e. . . . *(c)* Chiefly *U.S.* A district or portion of a town or country exhibiting uniform characteristics or considered as divided from the rest on account of such characteristics.");

[262] *See Community*, OXFORD ENGLISH DICTIONARY (1st ed. 1933).

[263] *See Section*, OXFORD ENGLISH DICTIONARY (1st ed. 1933) (defining "section, n.," as "2. A part separated or divided off from the remainder; one of the portions in which a thing is cut or divided. . . . e. . . . *(c)* Chiefly *U.S.* A district or portion of a town or country exhibiting uniform characteristics or considered as divided from the rest on account of such characteristics."). *See also* John Russell Bartlett, Dictionary of Americanisms (1848) (SECTION. A distinct part of a city, town, country or people; a part of a territory separated by geographical lines, or of a people considered as distinct. Thus we say, the Northern and Eastern *section* of the United States, the Middle *section*, the Southern or Western *section*.").

[264] *See* ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256-258 (2012) (quoting *United States v. Wells*, 519 U.S. 482 496-97 (1997)).

Examining this sense of a "section of the country" in the textual context of Section 7 sheds additional light on its meaning. The phrase "in any section of the country" in Section 7 functions adjectivally to modify the noun-phrase that immediately precedes it — "any line of commerce." At the time that the Celler-Kefauver Act was passed, a line of commerce (as discussed above in Part 2.e.i) had been interpreted to mean a line of interstate business activity, which could be examined for anticompetitive or monopolistic effects either "as a [nationwide] whole" or as undertaken in discrete geographic markets.[265] Thus, it was already established that a line of commerce — in and of itself — could be sectionalized based on the geographic boundaries of "areas of effective competition."[266] Indeed, as discussed above in Part 2.e.i, it is in the nature of the term "line" to permit the segmentation of business activities based on the qualitative characteristics of participating enterprises — such as the geographic area they can feasibly serve. When Congress amended Section 7 to modify the term "line of commerce" with the adjectival phrase "in any section of the country" — a phrase it excluded from all other sections of the Clayton Act — we should assume the amendment was not intended to simply repeat what was already understood from the pre-existing language.[267]

On the flipside, the adjectival relationship between the phrase "line of commerce" and the phrase "in any section of the country" limits cognizable sections of the country to those in which a merger-affected line of commerce is actually present. Since the prohibition of Section 7 applies where a merger threatens proscribed effects "in any line of commerce . . . *in* any section of the county," the presence of a line of commerce is necessary to give significance to any segment of the country under the statute. That is not to say, however, that a segment must contain the entirety of a line of commerce, or coincide with the areas of trade within a line of commerce. When the preposition "in" is used to express "the situation of something . . . within the limits or bounds of" a given space, it does not imply that said space is the *only* space where that thing is situated.[268] It just implies that said thing is "*not out of*" that particular space.[269]

Granted, there are some cases where the nature of the subject, or the circumstances, might foreclose the subject from being situated "in" more than one space at the same time. For example, if someone were to say that "John is in the pool," the implication for most of us would be that John is not simultaneously in his room. But the nature of a "line of commerce" raises no such implication.

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[265] *Standard Oil Co. of California v. United States* (*Standard Stations*), 337 U.S. 293, 299 n.5 (1949); *Int'l Salt Co. v. United States*, 332 U.S. 392, 396 (1947); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[266] *Standard Oil Co. of California v. United States* (*Standard Stations*), 337 U.S. 293, 299 n.5 (1949).

[267] *See, e.g.*, *Kungys v. United States*, 484 U.S. 759, 778 (1988) (Scalia, J., plurality opinion) (calling it "a cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant"); *Lower v. SEC*, 472 U.S. 181, 207 n.53 (1985) ("[W]e must give effect to every word that Congress used in the statute."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."); ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012) ("If possible, every word and every provision is to be given effect . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."). *See also*, *e.g.*, *United States v. Wells*, 519 U.S. 482 496-97 (1997); ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012); *Gozlon–Peretz v. United States*, 498 U.S. 395, 404 (1991) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[268] *See, e.g.*, *in*, OXFORD ENGLISH DICTIONARY (1st ed. 1933).

[269] *See, e.g.*, *in*, OXFORD ENGLISH DICTIONARY (1st ed. 1933).

It is, as explained above, simply a line of business activity carried on "among the several states and foreign nations."[270] That one set of enterprises can be engaged in a particular line of business in one section of the country while another set of enterprises is engaged in the same line of business in another section of the country seems rather obvious. Beyond that, it is important to remember that a "line of commerce" under Section 7 is a line of *interstate* commerce. It is a line of business activity carried on within the "practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer" across state lines.[271] As the Court explained in *American Building Maintenance Industries* (1975), to be engaged in a line of this kind, an enterprise must "directly" participate in the "production, distribution, or acquisition of goods or services in interstate commerce."[272] Given this, an enterprise's line-of-commerce activities are bound to be carried on in multiple *bona fide* sections of the country — the different States and their various economic configurations — by default. Plainly, then, the nature of a "line of commerce" does not require us to interpret the word "in" to imply that a "section of the country" must contain a whole "line of commerce" or a complete geographic market thereof.

What the text of Section 7 does require, however, is actuality — a proper section must contain a concrete amount of business activity affected by a merger. The *extent* of that existence in a cognizable section (as in, the size of the affected commerce in the section) is not given significance in the statutory text. Indeed, since Congress prohibited mergers that produce a proscribed effect "in *any* line of commerce in *any* section of the country," it has foreclosed us from making distinctions between a line of interstate business activity that exists in one section of the country and another line of interstate business activity that exists in the same or another section of the country — whether those distinctions are based on the magnitude of the activity or otherwise.[273]

In summary, a "section of the country" is a segment of the nation's geography or population that can be divided or separated from the rest of the country by some factual characteristic. A section of the country may be identified by a dividing characteristic other than being an "area of effective competition" for a line of business, but the mere fact that a particular segment is a town or other local community, or constitutes a group of people who share an attribute or circumstance, is not sufficient to demonstrate a cognizable dividing characteristic. Above this floor, any factual characteristic that divides, separates, or isolates a segment of the country from the rest is adequate as long as the segment identified contains a definite amount of interstate commerce affected by the challenged merger.

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[270] "Commerce," as defined by § 1 of the Clayton Act, 15 U.S.C. § 12, means "trade or commerce among the several States and with foreign nations[.]"

[271] *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974).

[272] *See United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 276 (1975).

[273] *Cf. United States v. Standard Oil Co. of California*, 78 F. Supp. 850, 864 (S.D. Cal. 1948) "The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication."

3. What Section 7 Prohibits

In light of the foregoing, the plain meaning of Section 7's text can be summarized as follows: Mergers and acquisitions are prohibited wherever they could possibly, in one or more realistic ways, either diminish competitive activity, or conduce to the centralization of exclusive power or control in a single person or group, in any line of business in any distinct segment of the nation's geography or population. For a merger to have a realistic possibility of causing anti-competitive or monopolistic effects, its concrete features must give it the potential to cause such effects, and that potential must not be foreclosed by prohibitive conditions in the merger's concrete environment. Where such a real possibility is demonstrated, the application of Section 7 cannot be stayed by the fact that non-existent future circumstances — *e.g.*, induced entry — are conceivable in which the merger's anticompetitive or monopolistic potential is not realized. More generally, a merger cannot be saved by the existence of alternative real possibilities — *e.g.*, that a merger might somehow "strengthen" competition — to a demonstrated possibility of forbidden effects. Not being the *only* way things could turn out is, after all, what makes an outcome a "possibility" and not a necessity.[274]

Since a prohibition-triggering possibility of anticompetitive or monopolistic effects under Section 7 must have "substance in reality," an unlawful merger must threaten to lessen competition or tend to the creation of a monopoly in a way that is more than fleeting, illusory, or only apparent. This *de minimis* threshold is not defined in the statutory text (at least not beyond the fact of being *de minimis* by implication of the words used), but it can easily be identified from the legislative history of the Celler-Kefauver Amendment. As discussed above in Part 1, legislators made no bones about which types of mergers and acquisitions they believed were "inconsequential" or "insignificant," or "would [make] no perceptible change" in competition. Those were: (1) acquisitions of failing companies, (2) transactions involving individuals or partnerships, and (3) mergers between small businesses. Absent certain contextual circumstances — such as high levels of existing concentration in relevant lines of business or a trend toward concentration — such mergers are typically incapable of causing cognizable effect at the scale of a section of the country.[275] For mergers that do not fall into any of these *de minimis* categories, the text's import is plain: The prohibition of Section 7 applies to all mergers that could realistically lessen competitive activity, or tend to the creation of a monopoly, in any any actual way.

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[274] As a general matter, a possibility can only be foreclosed by a necessity — something that really exists or must exist — and cannot be foreclosed by other possibilities. *See* Antje Rumberg, Dissertation: Transitions toward a semantics for real possibility, Utrecht University, 2016. We can illustrate this with an example. Imagine you are Jane at the airport. Jane just made it through security and has 12 minutes to reach gate A5 before her flight is closed. Gate A5 is about 0.5 miles away and there is nothing blocking the way (except an unsupervised Roomba vacuuming the floors). Jane is a professional soccer player who can easily run a 6-minute mile on the field, but right now she is carrying a purse, rolling a 20-lb. carry-on, and wearing a suit with heels (she has a big meeting right after landing). In this concrete environment, Jane certainly has a real possibility of making her flight, but a host of other real possibilities also exist. Jane could trip on the unsupervised Roomba. A heel could break and Jane could roll her ankle. One of the carry-on's wheels could give out, forcing Jane to lug the bag by hand. All of these possibilities are permitted by Jane's actual situation, and there is no insurance that they will not occur. None of them, however, forecloses the possibility that Jane may, in fact, make a flawless run to her gate in less than 15 minutes. If "Jane" were a merger and "Gate A5 "were lessening competition or tending to create a monopoly, Jane would be prohibited under Section 7.

[275] *See* Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74(2) HARV. L. REV. 226 (1960).

From this core meaning, the range of practical ways in which a merger could effectuate a proscribed possibility spreads outward into a margin of uncertainty, but at least a few of those ways are clear from the plain meaning of the two effect-defining phrases and from the nature of the "real possibility" required by the statutory text. With respect to Section 7's "tend to create a monopoly" prong, those include mergers that: (1) expand the volume of trade under a party's direct control; or (2) expand the arsenal of power a party could use to suppress, handicap, or compete with rivals. With respect to Section 7's "lessen competition" prong, they include mergers that: (1) remove a party from a market where it was engaged in material competitive activity; or (2) remove a competitive opportunity from a market where it had generated material competitive activity. Extending this prong to mergers that "may" have the proscribed effects brings at least one further class of mergers within its reach — those which preclude a party from engaging in material competitive activity it otherwise could realistically have engaged in.

a. Mergers That Tend to Create Monopolies

Every merger that gives a party control over a volume of trade in a product which it did not previously control brings that party an actual — not speculative — step closer to controlling the whole of that trade. This, without more, makes such mergers conducive to the prohibited end. Indeed, they are conducive to the oldest monopolistic course of action in the book: Using a series of "contracts [to] secur[e] the advantage of selling alone or exclusively all, or some considerable portion, of a particular kind of merchandise or commodity," as *E.C. Knight* put it in 1895.[276] Correspondingly, it was well-settled in 1950 that progressive "absorption, in non-predatory fashion, of all . . . competitors" until "sole possession of the field" is acquired necessarily creates a monopoly, as the district judge in *Alcoa* acknowledged upon remand.[277] When a merger conducts a party along such a course by expanding the volume of trade under its control, it tends to the creation of a monopoly by default.

Likewise, a merger is necessarily conducive to the creation of a monopoly where it gives a party an increment in power which that party could use to exclude competitors. A monopoly within the meaning of Section 7 arises whenever a party accumulates sufficient power to exclude all or nearly all competitors from trade in a given product or business. If a merger facilitates such accumulation by contributing to a party's exclusionary power, it conduces to the accomplishment of that monopolistic end by default. But what constitutes "exclusionary power"? Since the concept of *monopoly* in Section 7 is a functional one, and is agnostic about means and intents, any type of power can qualify as "exclusionary power" if it can be used by a party to achieve the end of excluding competition when the party desires to do so. The specific way that a party might deploy such power to that end — whether that way is predatory or honestly industrial, abusive or fair, in the judgment of a court — is immaterial. A monopoly within the meaning of Section 7 may exclude competitors

[276] *United States v. E. C. Knight Co.*, 156 U.S. 1, 10 (1895).

[277] *United States v. Aluminum Co. of Am.*, 91 F. Supp. 333 (S.D.N.Y. 1950). *See also United States v. Aluminum Co. of Am.* (*Aloca*), 148 F.2d 416, 432 (2d Cir. 1945).

through an ordinary course of competitive conduct (as in *Alcoa*[278] and *Griffith*[279]) just as well as through a deliberate course to handicap and suppress competition (as in *American Tobacco*[280] and *Paramount*[281]). Since power could be used to exclude competition through both predatory and competitive methods, it follows that "exclusionary power" includes not only the power to handicap or suppress rivals, but also the power to defeat them in rivalry. Thus, if a merger increases a party's power to handicap, destroy, or compete against its rivals, it directly facilitates that party's accumulation of exclusionary power — and inevitably tends to the creation of a monopoly.

When a party acquires a supplier or a distribution channel that is material to its rivals, that acquisition inherently grows whatever power the party already had to handicap its rivals in competition.[282] Similarly, when a merger gives a party a secondary product line it could realistically use in tying arrangements, or to cross-subsidize below-cost pricing schemes, the merger obviously increases whatever ability that party already had to eliminate rivals through these predatory methods. These, however, are not the only ways a merger can add to a party's arsenal of exclusionary power. Indeed, as Judge Hand found in *Alcoa*, no course of action leads to "more effective exclusion" than deploying accumulated capital of various kinds through "a great organization" to "face every newcomer," "anticipate [every] demand," and "progressively . . . embrace each new opportunity as it open[s]."[283] Thus, it is not only mergers that aid a party in accumulating structural leverage or other "unfair" forms of power which clearly "tend to create a monopoly" within the meaning of Section 7, but also mergers that materially facilitate a party's accumulation of any kind of economic power — including capital itself.

In either case, it is irrelevant what the parties to a merger intend to do, or have an incentive to do, with the material increment of trade share or exclusionary power they gain. Section 7 forbids mergers from conducing toward a functional state of monopoly that arises when a party *comes into possession* of the requisite degree of exclusionary power or control — regardless of how that possession comes about and whether, or to what end, that power or control is actually exercised. When a merger gives a party an increment in power or control, it necessarily helps that party move, in some degree or way, toward possessing the level of power or control required to constitute a monopoly. This inherent tendency "cannot be evaded by good motives," nor may Section 7's

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278 *United States v. Aluminum Co. of Am.* (*Aloca*), 148 F.2d 416, 432 (2d Cir. 1945)

279 *United States v. Griffith*, 334 U.S. 100 (1948)

280 *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946).

281 *United States v. Paramount Pictures*, 334 U.S. 131, 174 (1948)

282 *Cf.* Fashion Originators Guild (affirming FTC finding that exclusive dealing arrangements of textile and clothes manufacturers had actually "tended to create in themselves a monopoly" by "narrowing the outlets to which garment and textile manufacturers can sell and the sourcers from which retailers can buy").

283 *See United States v. Aluminum Co. of Am.* (*Aloca*), 148 F.2d 416, 432 (2d Cir. 1945). Likewise in *American Tobacco*, the Court made clear that, while the Big Three had used momentary below-cost pricing to suppress the ten-cent brands that had defied their regime, it was the *power* behind that abuse, not the manner of its exercise, that made the Big Three a monopoly. That power consisted in their accumulation of sufficient capital of various kinds — including net worth and net annual earnings, stocks of tobacco leaf, personnel and salesmen, and trade connections with dealers — to enable them to "dominate" competitors in "all phases of their industry" beyond their direct control. *See Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946).

prohibition on mergers that exhibit that tendency be ignored based on the "judgment of the courts" that "some good result" may flow from doing so in any given case.[284]

b. Mergers That Lessen Competition

"The disappearance from the market of a competitor," as FTC Bureau of Litigation Director Joseph Sheehy said in a 1958 speech on the test of illegality under Section 7, "necessarily means that whatever competition was waged by that concern has been eliminated."[285] If that competition was more than *de minimis* and new entry at the scale of the disappearing competitor is not a present constant of the relevant line of business, then the immediate consequence of the competitor's disappearance will necessarily be a material lessening of competitive activity. To be sure, guesswork can be indulged about whether consolidation might induce new entry in the future, or about whether a merger of former head-to-head rivals might somehow result in "more vigorous" competition, and these may well be real possibilities. But the statute is not concerned with all conceivable outcomes. It is concerned with "whether competition may be . . . *lessened*," and "it is not material whether in a particular case it may appear that the public interest would be better served, either in the short or long range, by something other than" the protection of existing competition.[286] Thus, when the outcome of a merger is to eliminate material pre-existing rivalrous activity between two competitors, it is prohibited regardless of what the merger's effect might be *after* this immediate lessening of competition, or whether this lessening might be remedied by "sky-darkening swarms" of new entrants at some point in the future.[287]

Mergers that enable a party to remove from the market a commercial opportunity for which it previously had to compete have a similar immediate effect on competition. When a party absorbs a supplier or customer whose business it previously had to rival others to get, the acquisition necessarily operates to eliminate some or all of the competitive activity which the absorbing party previously undertook to get that business. It also operates to give the party the power to foreclose its rivals from competing for the absorbed supplier or customer. If the concrete environment does not eliminate the potential that this power may be exercised, then there is a real possibility that the competitive activity of rivals will be diminished as well. Thus, where an acquisition operates to eliminate or diminish material competitive opportunities among rivals, it falls within the prohibition of Section 7 regardless of what the merging parties intend (or are incentivized) to do with their newfound control, or what alternative future possibilities might exist for how the acquisition's effect might unfold.

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[284] *Associated Press v. United States*, 326 U.S. 1, 16 n.15 (1945) (quoting *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912)).

[285] *See* Joseph E. Sheehy, *The Test of Illegality Under Section 7 of the Clayton Act*, 3 ANTITRUST BULL. 491, 494-95 (1958).

[286] *See also* Joseph E. Sheehy, *The Test of Illegality Under Section 7 of the Clayton Act*, 3 ANTITRUST BULL. 491, 494-95 (1958).

[287] *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126(3) Yale L. J. 710,. 734 (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 234 (1978). A similar logic applies to mergers that eliminate potential rivals. If an acquisition eliminates a potential entrant that participants in a relevant market have engaged in competitive activity to countermand, then the necessary effect of the acquisition is to eliminate some or all of that reactive competitive activity.

By extension, if a party enters a market by acquisition when it is objectively capable of entering that market by internal expansion, then one of the realistically possible effects of the acquisition is necessarily to have eliminated whatever competition the firm would have waged as a new entrant. Again, guesswork may be ventured about whether being acquired by the out-of-market party will make the acquired firm "more competitive," or whether the out-of-market firm would have, in fact, entered the market *de novo* had acquisition-by-entry not been an option. And again, both of these things may br real possibilities. But the statute predicates its prohibition on whether one of the real possibilities for how a merger's effect may unfold is a *lessening* of competition. And if a party's concrete characteristics give it the ability to enter into an area of competition as a new rival, and nothing in the commercial environment makes such entry impossible, then such entry is a genuine alternative for the future of competition in that area which the party's entry-by-acquisition would foreclose. Thus, the effect of such an acquisition "may [well] be" to lessen competition — bringing it within the scope of Section 7.

4. Comparison to Proposed Guidelines: Moving Toward a Merger Enforcement Policy That Enforces the Law

While the foregoing was not intended to provide a comprehensive review of all the potential ways a merger could run afoul of Section 7, we hope that it illustrates the true reach of that provision. Plainly, each of the classes of mergers identified as likely to violate the antitrust laws in the Proposed Guidelines falls squarely within that reach. Also plain, however, is that Section 7 imposes a far more restrictive and categorical prohibition on mergers and acquisitions by large corporations in interstate commerce. To give effect to the text and purpose of the governing statute, we recommend that the Agencies adopt three critical amendments and strategies in connection with the Proposed Guidelines.

First, the Agencies should harden the structural presumptions of the Proposed Guidelines by rejecting defenses that are plainly contrary to statutory text and purpose, such as "efficiencies" and "induced entry." As discussed more fully above, these defenses are antithetical to Congress's use of "may be" in the governing statute and the effect-defining phrases of Section 7. The fact that efficiencies *might* result from a merger, and *might* not be realizable in any of the other ways preferred by Congress, and *might* subsequently, if realized, be used by the merged firm in a way that conceivably *might*, somehow, improve the competitive process in the future, is simply irrelevant to applying the tests of illegality under Section 7 — which, after all, prohibits mergers based solely on whether their effect "may be . . . to *lessen* competition."[288] The fact that competition might, in fact, be *lessened*, but that new entrants *might* come into the market after such lessening has *already* taken place, and that said new entrants *might* then remedy whatever lessening had occurred, is likewise irrelevant. The point of the statute is to solely prevent lessenings of competition. These defenses ignore the

[288] The multiple orders of speculation that the Agencies or a court must reckon with in order to "isolate those cases in which increased competitive vigor would result from the cost savings made possible by [a] merger" are well described in Derek Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74(2) HARV. L. REV. 226, 320-21 (1960).

unidirectional, risk-based standard of the Clayton Act, open the door to the kind of wide-ranging inquiries permitted under the Sherman Act, and should be rejected.

Second, the Agencies should discard the hypothetical test entirely and emphasize that market definition is an instrumental vehicle for demonstrating the anticompetitive or monopolistic effect of a merger. While recent trial court decisions have arguably reified the "market definition" requirement into something akin to what is required in a Sherman Act monopolization proceeding,[289] neither the statute nor the governing precedent requires enforcers to map out product and geographic markets with metes and bounds.[290] As the Supreme Court said in *Brown Shoe*, "precision in detail is less important [in merger cases] than the accuracy of the broad picture presented."[291] The plaintiff's market-definition burden may be met by presenting a "graphic picture" or "fair sampling" of markets that "provide[s] a meaningful base upon which to build conclusions of the probable future effects of the merger."[292]

Third, the Agencies should explicitly define the condition of "monopoly" which Section 7 seeks to prevent from its "incipient" tendencies, and the activity of "competition" which Section 7 seeks to perpetuate and preserve. As demonstrated above, the manner in which those two words are understood has historically played a critical role in shaping judges' and enforcers' interpretations of Section 7 as well as other provisions of the Clayton Act.

II. The Agencies Should Vigorously Enforce the Proposed Guidelines Throughout America's Food System

The antitrust laws were enacted against a background of metastasizing consolidation in the agricultural sector and fears of a rising oligarchy of "food dictators." One of the most dangerous of these was felt to be the "Meat Trust," an oligopoly of the five dominant meatpackers known as the Big Five, which collectively held over 82% of cattle, 76% of calve, 61% of hog, and 86% of sheep and lamb markets nationwide.[293] "The unequal condition" this control engendered between "the man who *sells* in the yard and the man who *buys* [in it]," lawmakers observed in 1921, not only drove livestock growers to "financial ruin and disaster," but also threatened "the equal, inalienable rights of the producer and consumer."[294] To remedy this imbalance of power, Congress enacted a series of laws — the Sherman Act in 1890, the Clayton Act and the FTC Act in 1914, and the Packers and Stockyards Act in 1921 — designed to give the Antitrust Agencies far-reaching authority to "assure

[289] *See* BRIEF FOR AMERICAN ECONOMIC LIBERTIES PROJECT AS AMICUS CURIAE IN SUPPORT OF APPELLANT, United States v. United States Sugar Corp, Et. Al., NO. 1:21-cv-01644 (3rd Cir. Nov. 7, 2022).

[290] *See* BRIEF FOR AMERICAN ECONOMIC LIBERTIES PROJECT AS AMICUS CURIAE IN SUPPORT OF APPELLANT, United States v. United States Sugar Corp, Et. Al., NO. 1:21-cv-01644 (3rd Cir. Nov. 7, 2022).

[291] *See Brown Shoe Corp. v. United States*, 370 U.S. 294, 341 n.69 (1962).

[292] *See Brown Shoe Corp. v. United States*, 370 U.S. 294, 340, 342 n.70 (1962).

[293] *See* William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening*, 2004 Wis. L. Rev. 1497 (2004).

[294] *See* William E. Rosales, Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening, 2004 Wis. L. Rev. 1497, 1516 (2004) (quoting 61 Cong. Rec. at S2617 (statement of Sen. Kendrick); *id.* At 1516 (quoting 61 Cong. Rec. at S2617 (statement of Sen. Kendrick), *and* 61 Cong. Rec. at H4785 (statement of Rep. Schall) (1921)).

fair competition and fair trade practices" in the nation's agricultural markets.[295] We believe there has never been a more urgent time for the Agencies to exercise that authority — both to support vigorous enforcement of the Proposed Guidelines and beyond.

A. The Livestock Sector

The livestock sector encompasses the raising of cattle, poultry, hogs or other animal specie on farms, their procurement, slaughter, and conversion into meat and meat products by processors, and the distribution of those products at wholesale. Though dominated by the concentrated power of the Big Five at the beginning of the 20th century, vigorous antitrust enforcement in the 1920s resulted in a series of consent decrees that, together with the adoption of the Packers & Stockyards Act, "restructured the [livestock] market," securing for a period of time in the mid-20th century "open, fair marketplaces for all."[296] The proportion of total processing volume accounted for by the industry's largest firms declined rapidly during the 1930s and 1940s.[297] Following World War II, a wave of new independent single-species, single-story slaughter plants were built near production areas in rural communities — ending the Big Five's centralization of slaughter within large plants near terminal markets in large cities.[298] By 1963, the four-firm concentration ratio in slaughter markets reached as low as 26% for cattle, 33% for hogs, 14% for chicken, and 23% for turkeys.[299] The competition between meat processors was good for both producers and consumers: by 1970, fully 70% of the consumer's beef dollar went to cattle producers — and only 30% went to markups by processors and retailers.[300]

[295] *See* William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening*, 2004 Wis. L. Rev. 1497 (2004). Going "further than any previous [antitrust] law," 61 Cong. Rec. at H1801 (statement of Rep. Haugen), the Packers & Stockyards Act prohibited livestock dealers and processors from using "any unfair, unjustly discriminatory, or deceptive practice," from imposing "any undue or unreasonable preference or . . . prejudice" on any "particular person or locality," and from engaging in any course of business "for the purpose or with the effect of manipulating or controlling prices" — all in addition to prohibiting meatpackers from monopolizing or restraining commerce. *See* ch. 64, Title II, § 202, 42 Stat. 161 (Aug. 15, 1921) (codified in 7 U.S.C. § 192). The Act also gave the Secretary of Agriculture the authority to interpret and enforce its provisions in a manner that "keeps pace" with "issues of [market] access and industry practices" as they evolve over time. *See* ch. 64, Title IV, § 407(a), 42 Stat. 169 (Aug. 15, 1921) (codified in 7 U.S.C. § 228(a))

[296] Agricultural Marketing Service, "Inclusive Competition and Market Integrity Under the Packers and Stockyards Act": Notice of Proposed Rule, 87 Fed. Reg 60010, 60011

[297] James M. MacDonald, Michael E. Ollinger, Kenneth E. Nelson, and Charles R. Handy, "*Consolidation in U.S. Meatpacking*," USDA Economic Research Service, February 2000, https://www.ers.usda.gov/webdocs/publications/41108/18011_aer785_1_.pdf?v=108.4; USDA Economic Research Service, "*Beefpacker Concentration*," https://www.ers.usda.gov/webdocs/publications/47232/17816_tb1874e_1_.pdf?v=0.

[298] USDA Economic Research Service, "*Beefpacker Concentration*."

[299] James M. MacDonald, Michael E. Ollinger, Kenneth E. Nelson, and Charles R. Handy, "*Consolidation in U.S. Meatpacking*," USDA Economic Research Service, February 2000, https://www.ers.usda.gov/webdocs/publications/41108/18011_aer785_1_.pdf?v=108.4;

[300] Mike Callicrate, *Story of the Steer and a Theft of Epic Proportions,* NO-BULL FOOD NEWS (Nov. 16, 2021) https://nobull.mikecallicrate.com/2021/11/16/story-of-the-steer-and-a-theft-of-epic-proportions/.

Since the retreat of antitrust enforcement in the 1980s, however, consolidation among the largest meat processors has returned with a vengeance. By 2020, the four biggest packers slaughtered over 73% of the nation's cattle, 67% of its hogs, and 54% of its chicken.[301] Beyond horizontal consolidation, dominant processing firms have also extended their power vertically upstream and downstream from the farm in each specie's supply chain.[302] They have also merged across specie lines to become "protein" conglomerates.[303] For example, both JBS and Tyson are now dominant across all three major protein industries — beef, pork, and poultry processing[304] — and are also expanding into other protein sectors, such as salmon[305] and alternative proteins.[306] Without the other protein industries to check prices, these corporations have become more capable of executing coordinated price increases, such as those we saw after the COVID-19 pandemic.

On the flipside, a key tool that dominant processors have used to avoid competing against each other and maximize their buying power vis-a-vis farmers has been the consolidation of plant processing capacity. As of 2021, 21 large plants (annual capacity of 500,000+) processed over two-thirds (67.4%) of all cattle processed in the United States, while 12 mega-plants with an annual capacity of 1,000,000+ alone processed nearly half (49%).[307] Fourteen plants processed nearly 6 out of every 10 hogs (59%), each with an annual capacity of 4,000,000+ hogs, and almost all hogs (91.4%) were processed in large plants with 1,000,000+ capacity.[308] Before meatpacking consolidation took off, in 1982, only 28% of cattle and only 59% of hogs were processed in large plants with 500,000+ head or 1,000,000+ hog capacity, respectively.[309] By concentrating processing capacity in two or three dozen locations for each species, meatpackers appear to have eliminated inter-plant competition for farmers' cattle, hog, and poultry in the majority of geographic regions.[310] In the following sections, we provide an in-depth discussion of these dynamics in the beefpacking (cattle processing) and poultry processing industries.

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301 Mary K. Hendrickson et al., "The Food System: Concentration and its Impacts."

302 *Id.*

303 *Id.*

304 Shefali Sharma, *Companies: Dominating the Market from Farm to Display Case*, INST. FOR AGRIC. & TRADE POL'Y (Sept. 8, 2021) https://www.iatp.org/companies-dominating-market-farm-display-case.

305 Cliff White, *JBS Moves to Acquire 100 Percent of Australia's Huon Aquaculture*, SEAFOODSOURCE (Aug. 6, 2021) https://www.seafoodsource.com/news/business-finance/jbs-acquires-100-percent-of-australia-s-huon-aquaculture.

306 6 Chloe Sorvino, *The World's Largest Meat Seller Embraces Plant-Based Proteins as Pandemic Demand Surges*, FORBES (June 18, 2020) https://www.forbes.com/sites/chloesorvino/2020/06/18/the-worlds-largest-meat-seller-embraces-plant-basedproteins-as-pandemic-demand-surges/?sh=6f3c6ef43e1e.

307 "Livestock Slaughter 2022 Summary, April" United States Department of Agriculture National Agricultural Statistics Service (Apr. 19, 2023) https://downloads.usda.library.cornell.edu/usda-esmis/files/r207tp32d/8p58qs65g/g445dv089/lsan0423.pdf.

308 *Id.*

309 "2023 Farm Bill Antimonopoly Reforms." (2023). Economic Liberties. Available at: economicliberties.us/wp-content/uploads/2023/08/20230711_AELP_Farm_Brief_v6.pdf

310 Joe Van Wye. (2022). "Comment by Farm Action on the Agricultural Marketing Service's Proposed Rule concerning Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, RIN 0581-AE05." Available at: https://farmaction.us/wp-content/uploads/2023/01/P-S-Act-Market-Integrity-Comment-1.17.23.pdf; Timothy A. Wise and Sarah E. Trist. (2010). "Buyer Power in U.S. Hog Markets: A Critical Review of the Literature." Global Development and Environment Institute Working Paper No. 10-04. Available at: https://sites.tufts.edu/gdae/files/2020/03/10-04HogBuyerPower.pdf.

1. Beefpacking: Industry Structure & Anticompetitive trends

The beefpacking industry procures, slaughters, and processes cattle into beef products for wholesale distribution. Most firms in the industry are independent operators that offer slaughter and processing services to ranchers but are not vertically integrated into cattle procurement and beef distribution. However, the share of annual cattle processing volume held by independent operators is small. The vast majority of cattle processing — around 80%— is controlled by four vertically integrated protein conglomerates: Tyson Foods (20-25%),[311] JBS USA (20-25%),[312] Cargill (15-20%),[313] and National Beef (~14%).[314] Almost all fresh and processed beef products in the conventional segment of the market are produced by the Big Four, while small and medium-sized beefpackers tend to focus on niche, value-added segments for organic, grass-fed, and sustainably raised beef.[315] These niche segments have witnessed significant growth in recent years and offer higher profit margins, creating a market opportunity for small beefpackers (and the ranchers who supply them) to make sustainable returns at a lower volume of production.[316] Until recently, the largest firms in the sustainable beef segment were independents like Panorma Meats, Niman Ranch, Iowa Premium, and Grass Run Farms.[317] Since 2017, however, all of these firms have been acquired by either one of the Big Four or Perdue Farms, a dominant chicken processor.[318]

Beefpacking concentration has not always been with us. In 1980, the four-firm concentration ratio in cattle processing was only 36%.[319] Since then, however, "the four largest meatpackers have used a wave of mergers to increase their share of the market from 36% to 85%, according to the U.S. Department of Agriculture."[320] The move towards heightened concentration among processors has been accompanied by growing beefpacker control over cattle production and marketing channels. For most of the mid-20th century, producers sold fed cattle[321] primarily through public

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[311] "Tyson Food Facts." Tyson. September 18, 2023. https://ir.tyson.com/about-tyson/facts/default.aspx

[312] Mary K. Hendrickson, Phillip H. Howard, Emily M. Miller, and Douglas H. Constance. (2020). "The Food System: Concentration and Its Impacts." Farm Action. Available at: https://farmaction.us/wp-content/uploads/2021/05/Hendrickson-et-al.-2020.-Concentration-and-Its-Impacts_FINAL_Addended.pdf ; Luke Runyon. (2017). "JBS, World's Largest Meat Company, Mired in Multiple Corruption Scandals in Brazil." Iowa Public Radio. Available at: https://www.iowapublicradio.org/2017-08-03/jbs-worlds-largest-meat-company-mired-in-multiple-corruption-scandals-in-brazil.

[313] Mary K. Hendrickson, Phillip H. Howard, Emily M. Miller, and Douglas H. Constance. (2020). "The Food System: Concentration and Its Impacts." Farm Action. Available at: https://farmaction.us/wp-content/uploads/2021/05/Hendrickson-et-al.-2020.-Concentration-and-Its-Impacts_FINAL_Addended.pdf .

[314] U.S. Premium Beef 2022 Annual Report. U.S. Premium Beef. Accessed September 18, 2023. Available at: https://www.uspb.com/DocumentItem.aspx?ID=135

[315] "Cattle Market in United States 2023-2027." Industry Report - January 2023. Available at: https://d3qw6hv0dhy8ej.cloudfront.net/public/doc/rlk/gen/9f8d88efd05f0010e1bf8363bdcdcdd8.pdf.

[316] Ibid.

[317] Ibid.

[318] Ibid.

[319] 87 Fed. Reg. at 60011

[320] Peter S. Goodman. "Record Beef Prices, but Ranchers Aren't Cashing In." The New York Times. Published December 27, 2021. Available at: https://www.nytimes.com/2021/12/27/business/beef-prices-cattle-ranchers.html.

[321] "There are three distinct segments within the live cattle industry, representing each segment of the cattle's life cycle: The first and largest (by participant volume) is the cow/calf segment that annually births the calves that are sent downstream in the supply chain after they are weaned from their mothers. The second is the backgrounding segment that grows the calves after they are weaned until they reach a weight suitable for grain-based feeding. The last segment is the feedlot segment where lighter-weight, backgrounded calves are fed a high-concentration, grain-based diet for the last several months of their life cycle and then sold to the packer for harvest." *See* Bill Bullard, CEO, R-CALF USA, Chronically Besieged: The U.S. Live Cattle Industry, Presentation at the Big Ag & Antitrust Conference at Yale Law School 5 (Jan. 16, 2021) *available at* https://www.r-calfusa.com/wp-

markets, in which prices were established transparently through open auctions attended by many buyers and many sellers.[322] Since beefpackers began consolidating in the 1980s, however, the pool of buyers available to cattle producers has dwindled. Today, "there are commonly only one or two buyers in [many] local geographic markets, and few sellers have the option of selling fed cattle to more than three or four packers."[323]

As a result of this concentration, open, spot-negotiated cash markets for cattle have largely dried up.[324] Bilateral, long-term production and marketing contracts between large packers and large feedlots have taken their place as the primary distribution channel for fed cattle in nearly every part of the country.[325] The Big Four beefpackers (and their predecessor entities) began shifting away from sourcing live cattle through cash market purchases and toward sourcing through contractual arrangements with select feedlots in the 1990s.[326] Today, that shift is almost complete. Between 1995 and 2022, the percentage of cattle sold through forward marketing contracts rose from 18.1% to 73%.[327] Over the same period, the percentage of cattle sold through negotiated cash trades plummeted from 81.9% to about 27%.[328] Moreover, the latest available data suggests that around a third of U.S. cattle are being raised pursuant to dedicated production contracts with packers.[329]

These statistics reflect the state of cattle marketing nationally; however, in three out of the country's five USDA-designated cattle procurement regions, the health of cash markets is substantially worse. In recent years, the percentage of cash-market procurement has reached as low as 12.5% of total cattle sales in the Kansas (KS) region, 8.3% in the Colorado (CO) region, and an alarming 2.6% in the Texas-Oklahoma-New Mexico (TX-OK-NM) region.[330] Only the Iowa-Minnesota (IA-MN) region has reliably maintained cash-market procurement of 50% or more of marketed cattle,[331] while the Nebraska (NE) region's percentage has hovered around 30-40%.[332]

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content/uploads/2021/01/210116-Chronically-Beseiged-The-U.S.-Live-Cattle-Industry-Final.pdf. In this comment, we use the term "fed-cattle producers" to refer to operations within the last "feedlot" segment of the live cattle industry.

322 Lina Khan, *Obama's Game of Chicken,* Wash. Monthly (Nov. 9, 2012), *available at* https://washingtonmonthly.com/2012/11/09/obamas-game-of-chicken/ ("For the most part, [in the mid-twentieth century] farmers were able to sell their products relatively freely on the open market, and prices were established transparently through open bidding, in public auctions attended by many buyers and many sellers."); 87 Fed. Reg at 60011 ("[In 1921,] the Department of Justice (DOJ) brought enforcement cases under the Sherman Act against the packing industry, which resulted in a series of consent decrees (judicially overseen agreements) that restructured the market. The consent decrees, together with the adoption of the P&S Act, reformed market practices by eliminating packer ownership of cattle and their means of transporting it, and reinforced market structures that — for a period of time in the 20th century — secured open, fair marketplaces for all, such as terminal auction yards regulated as stockyards by the Packers and Stockyards Administration of USDA.").

323 87 Fed. Reg. at 60011.

324 *Id.* at 60012.

325 *Id.* at 60012.

326 *Id.* at 60012.

327 87 Fed. Reg. at 60011-12; Bullard, Chronically Besieged, *supra* n. 139, at 20.

328 87 Fed. Reg. at 60011-12; Bullard, Chronically Besieged, *supra* n. 139, at 20.

329 87 Fed. Reg. at 60011-12

330 *See* Letter from Bill Bullard, CEO, R-CALF USA, to William P. Barr, U.S. Att'y Gen. 2 (Mar. 28, 2019), *available at* https://www.r-calfusa.com/wp-content/uploads/2019/03/190328-Letter-to-DOJ-re-National-Beef-and-Iowa-Premium-Beef-Merger.pdf.

331 *Id.*

332 *Id.*

This transformation of cattle markets over the past four decades has dramatically undermined the viability of ranching operations with less than 1,000-head capacity, driving tremendous consolidation in the live cattle industry. Between 1980 and 2011, nearly 36,000 small fed-cattle operations — out of a total of 110,000 feedlots of all sizes — exited the market.[333] Since then, small operations have only disappeared faster; just between 2011 and 2019, the country lost over 49,000 of them.[334] The mass disappearance of these ranchers has led to a dramatic polarization in the fed-cattle segment of the live cattle industry — with dominant meatpackers and corporate feedlots coalescing on one end, and independent ranchers and processors on the other.

To begin with, the relative size and sales of small fed-cattle producers have become minuscule compared to other producers. Out of approximately 28,000 feedlot operations left in the United States in 2019, about 26,000 were small producers, but their share of the total volume of cattle marketed by U.S. feedlots was less than 13%.[335] In contrast, the remaining 2,000 or so large producers finished over 87% of such cattle.[336] By 2020, the majority of the nation's cattle inventory was controlled by around 200 large producers with +24,000-head capacity each — and just 74 mega-feedlots with +50,000-head capacity each controlled over 33%.[337] At the same time, the relative incomes of small fed-cattle producers have also diverged from those of large producers. Compared to fed-cattle producers with more than 1,000-head capacity, small producers generally do not receive forward contracting arrangements from packers; are denied the favorable bonus, financing, and risk-sharing terms that have often attended such arrangements; and are required to sell their cattle to packers on at-will cash markets for lower aggregate compensation.[338]

This differential procurement channeling by large packers has structurally restricted the ability of small, independent ranchers to access conventional markets. Through forward contracting, the largest packers have given large fed-cattle producers guaranteed market access in exchange for a dedicated cattle supply they can use to meet "high probability demand for beef."[339] The institutionalization of these captive-supply relationships over the past two decades has, in effect, partially integrated the largest feedlots with the largest packers.[340] As a result, the regional cash markets — and the small producers who sell on them without a forward contract — have been relegated into an "insurance" or "residual" source of cattle supply for the largest packers, to which they resort only to satisfy "low probability demand" for beef.[341] By controlling a full or near-full

[333] *See* Bill Bullard, CEO, R-CALF U.S.A., Chronically Besieged: The U.S. Live Cattle Industry, Presentation at the Big Ag & Antitrust Conference at Yale Law School 5 (Jan. 16, 2021).

[334] *Id.*

[335] *Id.*

[336] *Id.*

[337] *Id. See also "Cattle on Feed,"* National Agricultural Statistics Service (NASS), Agricultural Statistics Board, United States Department of Agriculture (USDA) (Feb. 21, 2020) https://www.nass.usda.gov/Publications/Todays_Reports/reports/cofd0220.pdf.

[338] *See* 87 Fed. Reg. at 60023-24; Diana L. Moss & C. Robert Taylor, *Short Ends of the Stick: The Plight of Growers and Consumers in Concentrated Agricultural Supply Chains*, 2014 Wis. L. Rev. 337, 351-52 (2014); C. Robert Taylor, *Harvested Cattle, Slaughtered Markets*? 2, 3, 27-30, 27 n. 59 (2022), a*vailable at* https://www.r-calfusa.com/wp-content/uploads/2022/04/220428-C.-Robert-Taylor-Cattle-Report-Final.pdf; Bullard, Chronically Besieged, *supra* n. 334, at 28; Letter from Bill Bullard to William Barr, *supra* n. 331, at 3-5.

[339] *See* Taylor, Slaughtered Markets, *supra* n. 155, at 25-28, 34-36.

[340] *See id.*

[341] *See id.*

supply of cattle through forward contracts at any given time, the largest beefpackers are increasingly wielding not just significant buyer power, but also the power to deprive small producers from access to markets entirely. Unsurprisingly, as dominant meatpackers have consolidated this gatekeeping power over the past three decades, the profitability of independent fed-cattle producers has trended downward — going from an average profit of about $50 per head in 1990 to an average loss of about $50 per head in 2021.[342]

In this context, small fed-cattle producers in the conventional supply chain — particularly the many, if not most, who operate in localities where they can only feasibly sell their products to one or two packers — have become profoundly vulnerable to economic abuse. Required to use their packer as their sole distribution channel, small producers are isolated from alternative trading channels. In highly concentrated local cash markets — and, indeed, in the entire Colorado trading region — opacity about actual market conditions has become entrenched, as the USDA no longer publishes price information because of potential confidentiality concerns.[343] Simultaneously, as packers have reportedly used their power to threaten and intimidate those who speak out about abusive industry practices, small producers have even become isolated from law enforcers and public officials.[344]

Facing inhibited market access and depressed profitability in the conventional supply chain, independent ranchers have increasingly turned to small and midsize processing facilities[345] — including ones they open themselves — and to niche, value-added markets for local, grassfed, and organic beef in order to generate sustainable returns. Smaller processors, in turn, have increasingly relied on the ability of independent ranchers to access premiums in these niche markets in order to profitably slaughter and process cattle at relatively low volumes. These symbiotic relationships between small-to-midsize ranchers and processors have contributed to a revitalization of America's local food systems since the mid-2000s.[346]

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[342] *See* C. Robert Taylor, *Harvested Cattle, Slaughtered Markets*? 2, SSRN 4094924 (2022).

[343] *See id.* at 21-22; Letter from Bill Bullard to William Barr, *supra* n. 148, at 3 (citing U.S. Gov't Accountability Off., GAO-18-296, Additional Data Analysis Could Enhance Monitoring of U.S. Cattle Market 19 (2018)). *See also* Michael K. Adjemian et al., *Thinning Markets in U.S. Agriculture: What Are the Implications for Producers and Processors?* USDA ERS Economic Information Bulletin No. 148 1, 2 (2016), https://www.ers.usda.gov/webdocs/publications/44034/56926_eib148.pdf?v=0.

[344] *See* 87 Fed. Reg. at 60013-14.

[345] *See* Sarah A. Low et al., ERS, USDA, Trends in U.S. Local and Regional Food Systems: A Report to Congress at 23 (January 2015) ("Access to meat processors with required inspection processes and the ability to customize orders is key to providing customers with locally produced meat products. While large processers typically produce standardized products, allowing for greater economies of scale, many small processors gain comparative advantage by providing customized products like special cuts, sausages, cured meats, and custom packaging/labeling. Difficulty aggregating animals of similar size and biosafety concerns limit the ability of large meat processors to serve small meat producers. Small producers and processors alike are faced with the need to manage costs without the benefit of economies of scale, requiring meat producers to identify small processors that can match their size and unique needs.").

[346] Sales of local food in the United States nearly doubled between 2008 and 2014, going from $5 billion to $11.7 billion. *See* Tom Vilsack, "Tapping into the Economic Potential of Local Food Through Loods, Local Places," White House Rural Council Blog (July 1, 2015). Around the same time, between 2002 and 2012, the number of farms selling direct-to-consumer increased by nearly 24 percent and total direct-to-consumer farm sales grew by over 60 percent. *See* Sarah A. Low et al., ERS, USDA, Trends in U.S. Local and Regional Food Systems: A Report to Congress at 5 (January 2015). By 2012, an estimated 163,675 farms were making an estimated $6.1 billion in local sales through both direct-to-consumer and intermediated channels. *See id.* at 9. Livestock operations accounted for 119,520 of local-selling farms, and they generated nearly half of all direct-to-consumer sales reported to USDA in 2012. *See id.* at 22. Local food marketing channels themselves experienced dramatic growth during this period beginning in the mid-2000s. Between 2006 and 2014, the number of farmers' markets in the United States increased by 180 percent, reaching 8,268 in 2014, and

Over the same period, however, the Big Four meatpackers have cultivated a new tool to undermine the competitive position of independent ranchers and processors — imports and misbranding. Over the past 30 years, the U.S. has consistently imported more beef and cattle than it exports, causing a 30-year cumulative trade deficit of more than 20 million metric tons or about 44 billion pounds of beef and cattle, according to R-CALF U.S.A., a trade association representing independent ranchers.[347] As Farm Action detailed in comments on the USDA's proposed rule on "Product of U.S.A" labeling fraud recently, lower-cost imports of cattle and beef have allowed the Big Four to structurally undercut independent ranchers and processors in the niche markets on which they increasingly depend. Without truthful "Product of U.S.A." labeling, the Big Four have been able to deceive consumers about the origin of their lower-cost products and dilute the primary competitive advantage of independent producers — their relationship to consumers as neighbors and stewards of the land instead of nameless industrial operations halfway around the world. More broadly, in the words of grassfed rancher Will Harris, the unfair competition facilitated by lax enforcement against misbranding of all kinds — from origin-laundering to green-washing — has made a "fair return" on a "regenerative, compassionate, and fair" ranching operation "elusive."[348] Harris is a member of the board of the American Grassfed Association and the owner of White Oak Pastures, a 25-year-old regenerative ranch producing grassfed beef in Bluffton, Georgia.[349] "I'm appalled at what the deception has done to the economies of our membership," he continued. "It has moved the needle from [grassfed] beef producers being profitable, to being a very break-even — or, if you're not careful, a losing — proposition."[350]

2. Poultry Processing: Industry Structure & Anticompetitive Trends

The poultry sector has become increasingly concentrated in recent decades and is one of the most vertically integrated parts of the food system.[351] More than 60% of the national poultry market is controlled by just four processors — Tyson Foods (~25%), Pilgrim's Pride (~20%), Sanderson Farms (~8%), and Perdue Farms (~7%) — and fully one half of growers have a choice of only one or two poultry dealers to work with in their locality.[352] Simultaneously, poultry processors (called "integrators" in the field) own and control nearly every aspect of the chicken production process, from genetic lines and hatcheries to feed mills and medication to transportation and processing —

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the number of regional food hubs (enterprises that aggregate locally sourced foods to meet wholesale, retail, institutional, or individual demand) increased by 288 percent. *See id.* at 2.

[347] *See* Bill Bullard, R-CALF U.S.A., "*Imports of cattle and beef hit historical high in 2020*", www.r-calfusa.com (Feb. 11, 2021).

[348] *See* Joe Fassler, "*How rampant mislabeling puts America's grass-fed beef producers out of business*," The Counter (July 16, 2018); Will Harris, "*Greenwashing Is Destroying The Regenerative Farming Movement,*" White Oak Pastures Blog (Dec. 9, 2019).

[349] *Id.*

[350] *Id.*

[351] *See* AMS, Transparency in Poultry Grower Contracting and Tournaments, 87 Fed. Reg. 34,980, 34,982-983 (June 8m 2022) (to be codified at 9 C.F.R. pt. 201).

[352] *See* 87 Fed. Reg 60010, 60011; Farm Action, Comment on Proposed Final Judgments, Stipulations, and Competitive Impact Statement in *United States v. Cargill Meat Solutions Corp., et al.*, Civil Action No. 22-cv-01821, at 21 (Nov. 15, 2022), *available at* https://farmaction.us/wp-content/uploads/2022/11/Farm-Action-Comment-on-Sanderson-Cargill-Wayne-Consent-Decree.pdf; Lina M. Khan, Chair, FTC, Written Submission in Response to Poultry Growing Tournament Systems: Fairness and Related Concerns, at 2, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/Comment%20of%20Lina%20M.%20Khan%20on%20USDA%20ANPR%20re%20Poultry%20Growing%20Tournament%20Systems.pdf (last visited Jan. 13, 2023).

essentially every activity except raising the birds.[353] The integrators outsource that part to contract growers.

More than 95% of the nation's poultry production occurs under contract for integrators.[354] Since there is no open market for live poultry ready for processing, conventional (non-specialty) poultry growers have no viable alternatives to the contract growing system.[355] Under these contractual arrangements, "poultry growers do not own the chickens they raise or the food or medicine they use in their trade."[356] The integrators provide these items, "maintaining tight control over the inputs into the chicken-rearing process[.]"[357] When a flock of chickens matures, "the growers return the chickens to the [integrators] for processing."[358] In this context, contract growers are effectively held captive by their integrator — and it shows in the degree of control that integrators exercise over them. In 2018, the Inspector General of the Small Business Administration found that contract growers had so little independence from integrators in the operation of their farms that they were effectively employees.[359]

This coerced *de facto* integration between poultry growers and integrators is exacerbated by the payment system that integrators have generally opted to compensate growers under, known as the "tournament" system. Under this system, an integrator is allowed to adjust the price it pays for a grower's chickens up or down based on how — in the integrator's judgment — the grower performed in raising their chickens relative to other growers in the locality. This system "enables [integrators] to maintain wide discretion over the prices they pay and keep growers largely in the dark about how those prices are set."[360] In this context, the prices integrators pay to growers tend to vary significantly from year to year, and those fluctuations deeply impact growers' earnings.[361] One study has found that growers lose money two years out of every three,[362] while another found that integrators were setting prices so low that "nearly three quarters of growers whose sole source of income is chicken farming live below the poverty line."[363] Importantly, these impoverishing outcomes have not reflected the fair market value of grower's product, but the ability of integrators to capture that value for themselves: Between 1988 and 2016, the wholesale price of chicken

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[353] Farm Action Comment on *Cargill et al.*, *supra* n. 353 at 21; Khan Comment on Poultry Growing Tournaments, *supra* n. 353 at 3-4.

[354] *Broiler Chicken Industry Key Facts 2021*, Nat. Chicken Council, https://www.nationalchickencouncil.org/about-the-industry/statistics/broiler-chicken-industry-key-facts/ (last visited Jan. 11, 2023); Dan Nosowitz, *After a Decade, the USDA 'Addresses' Unfairness in Meat Production*, Mod. Farmer (Jan. 23, 2020), https://modernfarmer.com/2020/01/after-a-decade-the-usda-addresses-unfairness-in-meat-production/; *See* James M. MacDonald, *Technology, Organization, and Financial Performance in U.S. Broiler Production*, USDA Economic Research Service (June 2014).

[355] C. Robert Taylor and David A. Domina, "Restoring Economic Health to Contract Poultry Production," 3, May 13, 2010 (report prepared for Joint DOJ and USDA/GIPSA Public Workshop on Competition Issues in the Poultry Industry).

[356] Khan Comment on Poultry Growing Tournaments, *supra* n. 353 at 3-4.

[357] *Id.*

[358] *Id.*

[359] *Evaluation of SBA 7(A) Loans Made to Poultry Farmers*, U.S. Small Bus. Admin. Off. of the Inspector Gen. 7, 9 (Mar. 6, 2018), https://www.sba.gov/document/report-18-13-evaluation-sbas-7a-loans-poultry-farmers.

[360] Khan Comment on Poultry Growing Tournaments, *supra* n. 353 at 3.

[361] *Id.*

[362] *See generally* Taylor & Domina, *supra* n. 356.

[363] Khan Comment on Poultry Growing Tournaments, *supra* n. 353 at 3 (citing *The Business of Broilers: Hidden Costs of Putting a Chicken on Every Grill*, Pew Charitable Trs. 1 (Dec. 20, 2013), https://www.pewtrusts.org/en/research-and-analysis/reports/2013/12/20/the-business-of-broilers-hidden-costs-of-putting-a-chicken-on-every-grill).

increased by 17.4 cents a pound for consumers — but the average pay of a poultry grower rose by just 2.5 cents a pound.[364]

Even as they have depressed the income of poultry growers through the tournament system, integrators have also used their leverage to force growers "to bear most of the capital costs of production, including land, buildings, and equipment."[365] After entering a contract with an integrator, growers are typically required to incur enormous financial risks to build and repeatedly upgrade facilities to integrators' standards in order to continue receiving flocks.[366] In 2016, the average loan to a beginning poultry grower was $1.4 million.[367] Since the growing facilities built with these loans are highly specialized, their value plummets between 62% and 94% when a grower loses their integrator contract — making the facilities themselves functionally "worthless," according to a report by the Small Business Administration Inspector General.[368] While growers take on millions of dollars in debt to finance long-term capital investments, however, most contracts commit integrators to provide growers with flocks of chicks for a very short period — if at all. In 2017, for example, 42% of growers were on flock-to-flock contracts that allowed the integrator to stop placing flocks with the grower at any time for any reason. In contrast, only 31% of grower contracts were for a term longer than five years.[369] Even then, almost all growing contracts can be terminated with 90 days' notice.[370] Naturally, this leaves growers in a deeply vulnerable position.[371] They must either accept whatever treatment they are given by their integrator — and stay on their integrator's good side — or risk bankruptcy.

In this dependent position, poultry growers are structurally isolated from alternative market opportunities and therefore deeply vulnerable to abuse. Bound to use their integrator as both their source of supplies and their distribution channel in most localities, the growers are isolated from alternative trading partners. Often bound by draconian non-disclosure agreements in their contracts with integrators, they are also typically isolated from each other.[372] Moreover, the near-complete control exercised by integrators over growers, the growing process, and the tournament system

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[364] Isaac Arnsdorf, *Chicken Farmers Thought Trump Was Going to Help Them. Then His Administration Did the Opposite*, ProPublica (June 5, 2019), https://www.propublica.org/article/chicken-farmers-thought-trump-was-going-to-help-them-then-his-administration-did-the-opposite

[365] Khan Comment on Poultry Growing Tournaments, *supra* n. 353 at 4 (citing Transcript of U.S. Dep't of Justice and U.S. Dep't of Agriculture Public Workshop Exploring Competition in Agriculture: Poultry Workshop (May 21, 2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/11/04/alabama-agworkshop-transcript.pdf.).

[366] *See id.* (also citing *Technology, Organization, and Financial Performance in U.S. Broiler Production*, U.S. Dep't of Agric. Econ. Rsch. Serv., Econ. Info. Bull. No. 126 at 12 (June 2014)); *Evaluation of SBA 7(A) Loans*, *supra* note 121 at 2, 5, 7, 9; Farm Action Comment on *Cargill et al.*, *supra* n. 353 at 21-22.

[367] *Evaluation of SBA 7(A) Loans*, *supra* note 121 at 5.

[368] *Id.* at 8.

[369] Siena Chrisman, *Under Contract: Farmers and the fine print*, viewers guide, Rural Advancement Found. Int'l 17 (2017), https://rafiusa.org/undercontractfilm/wp-content/uploads/2017/01/Under_Contract_Viewers-Guide_2017_ReducedFileSize.pdf.

[370] Zephyr Teachout, *Break 'Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money* 20 (Macmillan 2020).

[371] *See* 87 Fed. Reg. 35,005 ("Even where multiple growers are present, there are high costs to switching, owing to the differences in technical specifications that integrators require. The growers likely need to invest in new equipment and learn to apply different operational techniques due to different breeds, target weights and grow-out cycles.").

[372] *See* 87 Fed. Reg. at 35,007 ("Confidentiality restrictions have historically prevented broiler growers from releasing details of contract pay and performance[.]"); Teachout, *supra* n. 132 at 20 ("The [contract growers], who are already forbidden to talk to each other, know that there is not a single price for a pound of chicken [in an integrator's tournament], but a changing one, and while they can see their own paycheck, they can't compare it to others. . . . It is a structure reminiscent of Jeremy Bentham's panopticon, a vision of a jail designed to maximize control and quell dissent, where a jailer can see all the inmates, but the inmates cannot see each other.").

creates intractable opacity about actual market prices, the quality of poultry inputs, and the fairness of poultry grading — leaving growers powerless to catch, much less police, unlawful conduct by integrators.[373] As integrators have reportedly used their power over growers to punish those who speak out about industry abuses, poultry growers have even become isolated from law enforcers, public officials, and their own communities.[374]

3. Merger Enforcement Concerns

It is clear that competition in markets for livestock is already diminished. On a national scale, the beefpacking industry is highly concentrated, with an HHI ranging between 1,777 and 2,016 between 2005 and 2019.[375] While concentration in poultry processing is slightly lower than concentration in beefpacking on a national level, it is more severe at regional levels. Given the perishable nature of livestock, the relevant markets for evaluating competition and market power tend to be very local rather than nationwide.[376] In the beefpacking context, Studies have shown that competition levels can vary substantially from region to region, and that less competition by packers in given regions was associated with lower purchase prices of cattle from growers.[377] Likewise, when compared to poultry growers who have access to multiple dealers in their area, growers operating in monopsonized localities were found to receive lower payments for their flocks and less favorable terms with respect to contract duration, guaranteed flock placements, hold-up time between flocks, and required capital investments.[378]

[373] Farm Action Comment on *Cargill et al.*, *supra* n. 353 at 23; Khan Comment on Poultry Growing Tournaments, *supra* n. 353 at 3-4.

[374] Farmers have long and repeatedly shared how integrators have "wielded market power to control growers through both the threat of and actual retaliation." *See* Khan Comment on Poultry Growing Tournaments, *supra* n. 353 at 3 (citing Transcript of U.S. Dep't of Justice and U.S. Dep't of Agriculture Public Workshop Exploring Competition in Agriculture: Poultry Workshop at 165 (May 21, 2010), https://www.justice.gov/ sites/default/files/atr/legacy/2010/11/04/alabama-agworkshop-transcript.pdf. ("Let me say that numerous growers are not attending these workshops because of being afraid of retaliation on them by their integrator. A grower this morning has already been threatened by his service person if he attends and speaks at this forum."). For example, leading up to a proposed 2010 rule change in the Packers and Stockyards Act, then Attorney General Eric Holder and Secretary of Agriculture Tom Vilsack held a series of hearings across the U.S. to "assess the state of consolidation in agricultural markets." Tyson, Pilgrim's Pride, and others, attempted to prevent contracted farmers from attending hearings or speaking out by threatening retaliation. *E.g.,* Zephyr Teachout & Lina M. Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 Duke J. L. & Pub. Pol'y 37, 50-51 (2014). In at least one documented instance, Koch Foods followed through on that promise. Isaac Arnsdorf, *How a Top Chicken Company Cut Off Black Farmers, One by One*, ProPublica (June 26, 2019) https://www.propublica.org/article/how-a-top-chicken-company-cut-off-black-farmers-one-by-one (Koch Foods canceled Mississippi contract poultry farmer's contract the same day he testified at a hearing in Alabama).

[375] Nathan Miller et. all, "Buyer Power in the Beef Packing Industry: An Update on Research in Progress" (Apr. 13, 2022) nathanhmiller.org/cattlemarkets.pdf.

[376] In the poultry processing industry, for example, the USDA has previously found that 90 percent of birds processed in poultry processing plants were sourced within 60 miles of the plant. *See* James M. MacDonald, *Technology, Organization, and Financial Performance in U.S. Broiler Production*, USDA ERS EIB No. 126, 29-30 (2014). In the beefpacking industry, similarly, one study found that 53% of cattle purchased by packers were purchased from sellers within 100 miles of the meatpacking plant, with an additional 32% purchased from sellers between 100-300 miles away. *See* Nathan Miller et. all, "Buyer Power in the Beef Packing Industry: An Update on Research in Progress" (Apr. 13, 2022) nathanhmiller.org/cattlemarkets.pdf; Oral Capps, Jr. et al, *Examining Packer Choice of Slaughter Cattle Procurement and Pricing Methods*, 28 Agric. and Res. Econ. Rev. 15, 17 (1999).

[377] *Additional Data Analysis Could Enhance Monitoring of U.S. Cattle Market*, GAO 15-16 (Apr. 2018), https://www.gao.gov/assets/gao-18-296.pdf.

[378] 87 Fed. Reg. 34,980, 34,982.

Against this background, it is critical that the agencies act vigorously to protect the competition that remains in local livestock markets — particularly for the cattle, poultry, and hogs of small producers — and preserve all possibilities of eventual deconcentration. Of particular concern in this regard are two kinds of acquisitions by dominant processors: (1) acquisitions of small or midsize processors; and (2) product- or market-extension acquisitions. Generally, the dominant firms in each livestock sector are well-capitalized and possessed of sufficient other resources to make *de novo* entry into practically any adjacent market. When one of them enters a new line of business or geographic area by acquisition rather than internal expansion, the acquisition almost certainly eliminates a possibility of new competition they objectively could have offered. More directly, they also tend to eliminate or diminish *actual* competition for the livestock of small farmers — particularly in the cattle sector. As explained more fully above, dominant beefpackers are not a pound-for-pound competitive substitute for small and mid-size processors. Whereas smaller processors generally use regional cash markets to source the bulk of their cattle supply, the Big Four meatpackers use the cash markets only for "insurance," that is, to fulfill unexpected demand. Therefore, whether a Big Four meatpacker is acquiring a small or midsize processor in the same market or in a different market, its effect may well be to lessen competition for the cattle of small producers.

A recent acquisition by National Beef, the nation's fourth largest beefpacker, provides a powerful example of this anticompetitive dynamic. In 2019, National Beef acquired Iowa Premium, the largest beef processor in Iowa and a critical competitor for the fed cattle of independent producers in the Iowa-Minnesota procurement region.[379] Since National Beef was not active in the Iowa-Minnesota region before this acquisition, the transaction had no immediate impact on concentration, and it was ignored by enforcers. The strategic impact of the Iowa Premium acquisition likely went beyond basic questions of market share and concentration, however. As mentioned above, a large portion of the cattle sold in U.S. livestock markets today take the form of alternative marketing arrangements (AMAs), which are typically contracts between packers and producers for future delivery of cattle with a price to be determined at the time of delivery based on contemporaneous prices in the "spot" cash market for cattle, or other contemporaneous prices such as wholesale prices.[380] In theory, such arrangements should allow for cattle producers and beefpackers to rationally contract in ways that evenly distribute the risks to each party of particularly high or low prices at the time of delivery.[381]

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[379] Claire Kelloway, "Beef Packing Merger Threatens America's Last Competitive Cash Cattle Market," Open Markets Institute, (April 11, 2019), https://www.openmarketsinstitute.org/publications/beef-packing-merger-threatens-americas-last-competitive-cash-cattle-market.

[380] *See*, *e.g.*, C. Robert Taylor, *Risk Shifting via Partial Vertical Integration: Beef Packers' Acquisition of Slaughter Cattle* (Nov. 13, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4276805.

[381] Other theoretical benefits of AMAs include the predictability of available supply for packers and expanded access to credit for producers and feeders. However, many of the supposed benefits of AMAs are either illusory or not unique to the AMA structure. *See* Peter C. Carstensen, *Dr. Pangloss as an Agricultural Economist: The Analytic Failures of The U.S. Beef Supply CHain: Issues and Challenges*, *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049230*

In practice, however, AMAs as used today leave packers with a variety of tools to manipulate the prices they pay producers at the time of delivery, allowing them to consistently put a thumb on the scale of having producers assume the downside risks of changes in the spot market. Indeed, recent research found that every one-percent increase in the fraction of cattle purchased under an AMA is associated with a nearly six percent reduction in the cash market price for cattle, consistent with packers' incentives and ability to drive cash market prices down when taking delivery of cattle under an AMA.[382]

Packers sign AMAs with beef growers while retaining direct ownership of some cattle that they can sell on the cash market, and can fluidly switch between the two sources of supply depending on which provides a more favorable price.[383] Further, in most areas of the market, cash markets have become so "thin" and uncompetitive that they no longer provide reliable price signals for reference in AMAs. With extremely low volumes of spot market sales reported, packers can exert substantial influence over spot market prices by conducting a small number of sales, lowering spot market prices in order to lower the prices they pay for cattle at the time of delivery.[384] Further, in markets where large packers have minimal competition from other buyers, packers are able to set spot market prices via an "all or nothing" approach, putting out a request for a quantity of cattle at a particular price and forcing producers to either accept or reject the offer without engaging in a competitive negotiation.[385]

Thus, packers who predominantly rely on AMAs are incentivized to make sure the cash market is less robust, so that more growers are forced to sign AMAs which are likely to provide favorable terms to packers, and so that packers maximize their direct influence over cash market prices. Cash transactions, as noted above, have been declining as a portion of cattle transactions for decades.[386]

These market dynamics are crucial to understanding the effects of the Iowa Premium acquisition, because in 2019, the Iowa-Minnesota region was the last region of the country where over half of all cattle were still sold on the cash market.[387] In this particular region, small and midsize meatpackers like Iowa Premium were a substantial factor, and they sourced their supply primarily on the cash market from independent producers.[388] The importance of this last competitive cash market to the nation's small cattle feeders could not be overstated. It directly sustained more than a quarter

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[382] Francisco Garrido, et al., *Buyer Power in the Beef Packing Industry: An Update on Research in Progress* 1, 12-13 (Apr. 13, 2022), http://www.nathanhmiller.org/cattlemarkets.pdf. *See also* Taylor, *supra* n. 187 at 9 (finding that higher rates of captive supply, including contract sales, correlates with higher levels of volatility and risk in the cash markets, consistent with cash markets functioning as "an insurance market for packers" that has transferred risk to producers in captive arrangements without compensating them.).

[383] *See* Taylor, *supra* n. 381 at 25-27.

[384] *Id.* at 21-22, 25-26.

[385] *Id.* at 30-31.

[386] *Additional Data Analysis Could Enhance Monitoring of U.S. Cattle Market*, GAO 1, 33-34 (Apr. 2018), *available at* (https://www.gao.gov/products/gao-18-29).

[387] R-CALF USA Letter to Department of Justice Re: Request to U.S. Department of Justice to Block the Proposed Acquisition of Iowa Premium by National Beef Packing Company, (March 28, 2019) https://www.r-calfusa.com/wp-content/uploads/2019/03/190328-Letter-to-DOJ-re-National-Beef-and-Iowa-Premium-Beef-Merger.pdf; Claire Kelloway, "Beef Packing Merger Threatens America's Last Competitive Cash Cattle Market," Open Markets Institute, (April 11, 2019),

[388] *Id.*

of the nation's fed-cattle producers with under 1,000-head capacity in Iowa alone — around 5,500 in total — and maintained the least consolidated cattle feeding industry in the country. And, crucially, the existence of a functioning cash market where producers could get competitive prices for their cattle in the Iowa-Minnesota region gave producers in *other* regions a benchmark against which to compare the prices they were getting.[389]

Indeed, recent years have shown the cash market continuing to decline during and since the Iowa Premium merger; while cash market sales ranged from 60-75% of all sales in the Iowa-Minnesota market between 2005-2011, that number began to decline in the mid-2010s. In 2021, the percentage of cattle sales in cash dropped below 50% for the first time.[390] USDA has found that as cash markets thin down in this manner, asymmetries of information can develop that systematically benefit processors over producers:

> Market observers and regulators find less data to use, analyze, and publish, and producers are left to wonder whether they are being paid a fair price in a shrinking cash market or in contracts where price benchmarks may not be available. Additionally, because the contracting process involves real transactions costs, it poses several new risks to some thin-market producer.
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> . . .
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> [Further,] because thin market prices may not be disclosed publicly, processors who interact with several producers have an advantage during negotiation — for example, processors who successfully contracted with nearby producers have a clearer picture of a similar producer's likely costs and the lowest price they are willing to accept.[391]

Given the precarious state of competition in the livestock sector, we urge the Agencies to guard carefully against future incipient threats to competition like those posed by the National Beef–Iowa Premium acquisition, and take action to remedy the effects of those threats where they are unapprehended.

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[389] *Id.*

[390] *Id.* In 2022 and 2023, cash share of sales ticked back over 50 percent, but only in the context of an extraordinary western U.S. drought, which forced mass liquidation of cow herds. *See*, *e.g.*, Tom Polansek, *Update 1-U.S. beef cow herd falls to lowest level since 1962, USDA says*, Reuters (Jan. 31, 2023), https://www.reuters.com/article/usa-cattle-herd-idAFL1N34G2JD; Vanessa Yurkevich, *Farmers forced to sell their cows as drought conditions worsen across U.S.*, CNN Business (July 25, 2022), https://www.cnn.com/2022/07/25/business/drought-farmers-cows/index.html.

[391] Michael K. Adjemian et al., *Thinning Markets in U.S. Agriculture: What Are the Implications for Producers and Processors?* USDA ERS Economic Information Bulletin No. 148 1, 2, 14 (2016), https://www.ers.usda.gov/webdocs/publications/44034/56926_eib148.pdf?v=0.

B. The Dairy Sector

The dairy sector encompasses six distinct stages. The first is production: Raw milk is produced on dairy farms. The second is marketing. A dairy farmer can sell their raw milk through a direct transaction with a processor, or they can participate in a cooperative to market their raw milk together with other dairy farmers. Once a sale is made, the raw milk is tested, loaded onto trucks, and hauled to the processor. Finally, the processor turns the raw milk into fluid milk, which is either bottled and distributed, or processed further into other manufactured dairy products (*e.g.*, butter, cheese, etc.). Most participants in the dairy sector are small, single-stage operators who are not vertically integrated across the various stages of dairy production. But the share of milk produced, marketed, and processed by these operators is relatively small.

1. Industry Structure & Anticompetitive Trends

At the farm level, the largest 10% of dairies — those with +1,000 dairy cows each — produce nearly 45% of American raw milk annually, according to the latest Census of Agriculture (2017). A single cooperative, Dairy Farmers of America (DFA), aggregates and markets 30% of the country's milk from over 14,000 dairies, and the eight largest milk cooperatives together account for over 54% of the annual milk production.[392] DFA's power is magnified by virtue of its vertical integration downstream from the farm into testing, hauling, processing, and distribution.[393] Indeed, DFA is the nation's largest milk processor, holding nearly 15% of milk and milk product sales.[394] Accordingly, it buys much of the raw milk its marketing branch sells, and enjoys a near-monopsony on raw milk in many regions because of the lack of alternative plants to which local dairies could feasibly ship their milk.[395] Taken together, the top four milk processors — DFA, Land O' Lakes (~10-12%), Saputo Inc. (~7%), and Nestle (~7%/) — control nearly 44% of milk sales nationwide.[396]

An important factor driving consolidation in the dairy sector is backward vertical integration into milk processing by the nation's largest grocery chains — Walmart, Kroger, and Albertsons, specifically. Kroger was the first to move into milk processing in 1975. By the 2000s, Kroger was processing and bottling between 90% and 100% of the milk sold in its stores. Walmart and Albertsons followed Kroger's lead only recently, in the 2010s.[397] Albertson's opened its first plant in

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[392] Walmart, Kroger Bottle Their Own Milk and Shake Up American Dairy Industry - WSJ; How rural America got milked | The Counter (wpengine.com); Dairy Farmers of America Agrees to Buy the Remains of the Country's Biggest Milk Company - Modern Farmer

[393] "*The Dairy 100*," Dairy Foods (Producer sales from 2023) (2023) https://www.dairyfoods.com/2023-Dairy-100); "*Industry at a Glance*," IBISWorld (Market Size at a Glance) (https://my.ibisworld.com/us/en/industry/31151/industry-at-a-glance).

[394] Dan Kaufman, "Is it Time to Break Up Big Ag?" The New Yorker (Aug, 17, 2021) https://www.newyorker.com/news/dispatch/is-it-time-to-break-up-big-ag.

[395] David Yaffey-Bellany, "*A Giant Milk Industry Merger Moves Closer With a $425 Million Deal*" The New York Times (Feb. 17, 2020) https://www.nytimes.com/2020/02/17/business/milk-merger-dean-foods.html; Leah Douglas, "*How Rural America Got Milked*" The Counter (January 18, 2018) https://thecounterorg.wpengine.com/how-rural-america-got-milked/.

[396] "*The Dairy 100*," Dairy Foods (Producer sales from 2023) (2023) https://www.dairyfoods.com/2023-Dairy-100); "*Industry at a Glance*," IBISWorld (Market Size at a Glance) (https://my.ibisworld.com/us/en/industry/31151/industry-at-a-glance).

[397] Jacob Bunge and Jaewon Kang, "Walmart, Kroger Bottle Their Own Milk and Shake Up American Dairy Industry," The Wall Street Journal (July 27, 2020) https://www.wsj.com/articles/walmart-kroger-bottle-their-own-milk-and-shake-up-american-dairy-industry-1159587.

2014. Walmart announced that it would open its first plant in 2016. These moves had an immediate effect on the dairy industry.

Dean Foods — the leading dairy processor at the time — had sold 15-20% of its production to Walmart for years at that time. In early 2015, there was a dispute between the companies: Walmart wanted Dean to lower its prices in tandem with milk commodity prices so Walmart could make more profit. Dean declined. Walmart responded by lowering the price of its private-label milk steeply below Dean's branded milk. Sales of Dean's brand milk slowed to a crawl at Walmart stores. By the end of 2016, Dean Foods had lost around 5% of its total sales, translating into nearly 50% of its net revenue.[398] But the hits did not stop there. Food Lion, a grocer with 1,000 stores on the East Coast, ended its contract with Dean in early 2018 — opting to buy its milk supply from Kroger.[399] By the time Walmart's plant opened a few months later, Dean was in bad shape. By August of that year, Dean was reporting a quarterly net loss, cutting its financial outlook, and closing plants across six states. Walmart continued expanding its milk processing capacity. In February 2019, Dean reported another quarterly loss—showing the percentage of its sales going to Walmart had declined from 18% to 15%. By November, it had filed for bankruptcy.[400] DFA — which had been closely aligned with Dean Foods for decades prior to its bankruptcy — ended up buying Dean Foods assets out of bankruptcy, including 44 of its 60 processing plants.

2. Merger Enforcement Concerns

The primary merger enforcement concerns in the dairy context relate to buyer power and vertical foreclosure. On the one hand, Walmart bought 15% of Dean Foods' total fluid milk production. It did not have to divert all of its purchases in order to drive Dean into bankruptcy. Granted, Dean Foods was in tough shape before Walmart's milk plant opened in 2018, but that was also primarily caused by Walmart's decision to cut the price of its private-label milk. If such a relatively small amount of market share being foreclosed due to internal expansion by a grocer could drive the once-largest dairy processor in America to bankruptcy, the Agencies should address mergers that increase vertical foreclosure in buyer markets in their incipiency — not wait until it reaches 50%.

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[398] Cathay Siegner, "*As Large Retailers Process Milk, Dairy Companies Worry*" Grocery Dive (Oct. 16, 2017) https://www.grocerydive.com/news/grocery--as-large-retailers-process-milk-dairy-companies-worry/534599/.

[399] Jacob Bunge and Jaewon Kang, "Walmart, Kroger Bottle Their Own Milk and Shake Up American Dairy Industry," The Wall Street Journal (July 27, 2020) https://www.wsj.com/articles/walmart-kroger-bottle-their-own-milk-and-shake-up-american-dairy-industry-1159587.

[400] Jacob Bunge and Jaewon Kang, "Walmart, Kroger Bottle Their Own Milk and Shake Up American Dairy Industry," The Wall Street Journal (July 27, 2020) https://www.wsj.com/articles/walmart-kroger-bottle-their-own-milk-and-shake-up-american-dairy-industry-1159587; Heather Haddon, Benjamin Parkin "*Retailers Are Bottling Their Own Milk, Raising Pressure on Dairy Companies*," The Wall Street Journal (Oct. 13, 2017); Heather Haddon, "Dean Foods Falters in More Concentrated Milk Market" The Wall Street Journal (*May 5, 2019) https://www.wsj.com/articles/dean-foods-falters-in-more-concentrated-milk-market-11557064801?mod=article_inline*; Cathay Siegner, "*As Large Retailers Process Milk, Dairy Companies Worry*" Grocery Dive (Oct. 16, 2017) https://www.grocerydive.com/news/grocery--as-large-retailers-process-milk-dairy-companies-worry/534599/.

C. The Synthetic Fertilizer Sector

The synthetic fertilizer sector encompasses four stages of production: (1) the collection of raw materials; (2) the conversion of raw materials into fertilizer; (3) the storage of fertilizers in terminals to await orders; (4) and the retail sale of fertilizer blends and their distribution to farmers. There are three kinds of fertilizer — nitrogen-based fertilizers, phosphorus-based fertilizers, and potassium-based (or potash) fertilizers — and each is produced from different elements. Nitrogen fertilizer is made by capturing nitrogen from the air and combining it with hydrogen derived from natural gas. Phosphorus fertilizer comes from phosphate rock found in fossil remains, deposits of which manufacturers mine and convert into fertilizer. Potassium fertilizer is similarly created by mining potash and processing it into fertilizer. Each kind of fertilizer provides a different form of plant nutrition, and they are blended in different ways at the retail level to suit the soil, crop, and other characteristics of customers' farms. Many fertilizer companies are expanding offerings to include so-called specialty fertilizers (*e.g.*, micro-nutrients and/or microbe-based formulations) and digital agriculture.

1. Industry Structure & Anticompetitive Trends

The global fertilizer industry has historically operated in export cartels organized by fertilizer type (sometimes government-sanctioned and involving state-owned companies). State ownership of national fertilizer production and trade is common abroad. So is ownership by Eastern European oligarchs. Described as infected with a "corporate sociology of collusion," the global fertilizer industry has a history of cartels tracing to the 1880s. As a report by the American Antitrust Institute explained in 2013:

> A 1949 report by the Federal Trade Commission (FTC), for example, documents cartels in nitrogen, phosphorus, and potash from before World War I to just after World War II. Connor identifies 83 known hard-core international fertilizer cartel episodes over the period 1902 to 2010, comprising 20 percent of primary industry cartels and 12 percent of identified international cartels. Twenty fertilizer cartels were detected from 1990-2010. Numerous conditions make the fertilizer industry conducive to cartelization, for individual nutrients and all three nutrients together. These factors include: inelastic demand, high barriers to entry, easy explicit and tacit communication between members, and corporate and government control of limited reserves. Observed sustained high profit margins, excess capacity, and the concomitant movement of nitrogen, phosphorus, and potash prices are also consistent with cartel behavior.[401]

[401] C. Robert Taylor and Diana L. Moss, "*The Fertilizer Oligopoly: The Case for Global Antitrust Enforcement*," The American Antitrust Institute (2013) antitrustinstitute.org/wp-content/uploads/2013/10/FertilizerMonograph.pdf (citing FEDERAL TRADE COMMISSION, ANNUAL REPORT 18-21 (1949).

The American fertilizer industry has not been immune to such corruption. Since the early 1900s, associations of fertilizer producers have repeatedly been formed for the ostensible purpose of export coordination under the Webb-Pomerene Act, only to be caught fixing prices and suppressing independent firms domestically and forced to disband by the Antitrust Agencies.[402] Until the 1980s, however, this collusive tendency was held somewhat in check, not only by vigorous antitrust enforcement, but also by the fact that industry was not concentrated.[403] For example, as late as 1984, many small and medium-sized firms — 46 in total — produced nitrogen fertilizer, and they did so in quantities that generally met or exceeded domestic demand.[404]

That all changed starting in the 1980s. Depressed commodity prices led to depressed demand for fertilizers. Since anti-merger restrictions were loosened, the industry responded with a wave of mergers, consolidating dramatically. In the nitrogen fertilizer segment, the number of domestic producers declined to 27 by 2,000 and 13 by 2,010.[405] Today, just four companies — CF Industries, Nutrien, Koch, and Yara-USA — control 75% of domestic nitrogen-fertilizer production.[406] Two companies — Nutrien and Mosaic — control 100% of domestic potash-fertilizer production and around 83% of potash-fertilizer imports.[407] These two companies also substantially control the U.S. supply of phosphate fertilizer.[408]

Nutrien, the largest fertilizer company in the world, was recently formed in 2016 out of a merger between The Potash Corporation and Agrium, in "a deal that created a fertilizer and farm retailing giant worth more than $25 billion[.]" The merged firm controlled over 60% of North America's potash capacity, 30% of its nitrogen and phosphate supply, and the continent's largest network of farm retail dealers.[409] Nutrien became the largest fertilizer supplier overall and gained a nationwide channel for distributing its products directly to farmers.[410] This gave Nutrien a mechanism to exercise price leadership for the fertilizer industry as a whole — with its publicly advertised retail prices serving as a signal for the market to follow without any need for private or direct communications.

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402 C. Robert Taylor and Diana L. Moss, "*The Fertilizer Oligopoly: The Case for Global Antitrust Enforcement*," The American Antitrust Institute (2013) antitrustinstitute.org/wp-content/uploads/2013/10/FertilizerMonograph.pdf.

403 The Changing Structure of the Fertilizer Industry in the United States on JSTOR

404 *Access to Fertilizer: Competition and Supply Chain Concerns*, Federal Register, Vol. 87, No. 52 (March 17, 2022) https://www.govinfo.gov/content/pkg/FR-2022-03-17/pdf/2022-05670.pdf.

405 *Id.*

406 *Id.*

407 *Id.*

408 Verbeck, Dennis, *Comments on Access to Fertilizer: Competition and Supply Chain Concerns*, (Jun. 2022), https://www.regulations.gov/comment/AMS-AMS-22-0027-0056.

409 Rod Nickel and Diane Bartz, "Potash Corp, Agrium talk merger; competition scrutiny expected," Reuters, August 30, 2016, https://www.reuters.com/article/us-agrium-m-a-potashcorp/potash-corp-agrium-talk-merger-competition-scrutiny-expected-idUSKCN1151UT; Reuters, "Farmers' groups fear a possible Agrium-Potash merger: 'It's like the movie 'Mad Max' — one company owns everything'," Financial Post, September 1, 2016, https://financialpost.com/commodities/agriculture/farmers-groups-fear-a-possible-agrium-potash-merger-its-like-the-movie-mad-max-one-company-owns-everything#:~:text=Farmers%27%20groups%20fear%20a%20possible%20Agrium-Potash%20merger%3A%20%27It%27s,of%20farm%20retail%20come%20to%20an%20agreement%20Reuters

410 Reuters, "Farmers' groups fear a possible Agrium-Potash merger."

The consequences of this consolidation of fertilizer producers for America's crop farmers were swift and severe. In 2021, the prices U.S. farmers paid for fertilizers increased by over 60%.[411] Nitrogen fertilizer prices increased 95% while potash fertilizer prices increased 70%.[412] Although the fertilizer companies claimed these price hikes were attributable to supply chain shocks increasing input costs, their own course-of-business documents refuted these claims.[413] Nutrien's 2021 financial statements indicated that its gross margins in nitrogen production shot up more than six-fold (680%) over the year as fertilizer prices increased, but its cost-of-goods-sold rose by only one-half (51%).[414]

Indeed, consolidation appears to have made outright price-fixing for fertilizer remarkably easy. When Farm Action analyzed fertilizer prices during this period, it found that producers seemed to move prices in tandem. These price changes were not tied to demand or cost or some other legitimate business factor, but simply with the variation in grain prices.[415] "[W]hat actually appears to drive fertilizer prices," the group concluded, "is a collusive calculation" based on "the farmers' ability to pay" and "the maximum profit which can be extracted from [them]."[416] Other studies suggest that when high commodity prices in 2021 presented opportunities for farmers, ballooning prices from these new fertilizer giants consumed all of the increased revenue—and then some.[417]

2. Merger Enforcement Concerns

The consolidation of the fertilizer sector among a handful of firms — which are themselves organized into international cartels, the most relevant for the U.S. market being Canada's Canpotex, consisting of Nutrien and Mosaic — has effectively eliminated competition. The sheer market shares of Nutrien and Mosaic, the extreme magnitude of the price hikes they along with Yara, Kock, and CFI implemented in 2021, the lockstep alignment of fertilizer prices at various outlets observed by Farm Action — all of these facts serve to indicate the existence of a monopoly in fertilizer production and distribution. They also make the Nutrien-Agrium merger a prime candidate for a retrospective review. Indeed, it is hard to imagine a merger that more clearly tends to create, not just a dominant firm, but an outright monopoly; that more directly makes existing coordination among oligopolists more stable and effective; or that is followed by more brazen exploitation of resultant pricing power. Beyond that, a divestiture remedy would not even require complex dissolutions — mines and facilities are separable assets, and no argument can be made that Nutrien's retail arm has

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[411] *Access to Fertilizer: Competition and Supply Chain Concerns*, Federal Register, Vol. 87, No. 52 (March 17, 2022) https://www.govinfo.gov/content/pkg/FR-2022-03-17/pdf/2022-05670.pdf.

[412] *Id.*

[413] Sarah Carden, "Big Fertilizer"; Farm Action Letter to Department of Justice, December 8, 2021, https://farmaction.us/wp-content/uploads/2021/12/FFAA_DOJ_Fertilizer_Investigation_Final.pdf.

[414] Sarah Carden, "Big Fertilizer"; Farm Action Letter to Department of Justice, December 8, 2021, https://farmaction.us/wp-content/uploads/2021/12/FFAA_DOJ_Fertilizer_Investigation_Final.pdf.

[415] Sarah Carden, "Big Fertilizer"; Farm Action Letter to Department of Justice, December 8, 2021, https://farmaction.us/wp-content/uploads/2021/12/FFAA_DOJ_Fertilizer_Investigation_Final.pdf.

[416] Sarah Carden, "Big Fertilizer"; Farm Action Letter to Department of Justice, December 8, 2021, https://farmaction.us/wp-content/uploads/2021/12/FFAA_DOJ_Fertilizer_Investigation_Final.pdf.

[417] Agricultural and Food Policy Center at Texas A&M University, "Economic Impact of Higher Fertilizer Prices on AFPC's Representative Crop Farms," January 2022, https://afpc.tamu.edu/research/publications/files/711/BP-22-01-Fertilizer.pdf.

been so thoroughly integrated with Nutrien's mining and refining operations that it cannot be severed.

D. The Seed & Agrochemicals Sector

The seed and agrochemicals sector is dominated by four multinational firms — Bayer, Corteva, ChemChina, and BASF — that are fast-evolving into all-purpose agriculture biotechnology conglomerates. The consolidation of power over biological farm inputs in the "Big Three" is the direct product of a series of mergers in the late 2010s. The U.S. chemical and biotechnology firms Dow and Dupont merged in 2017 and later that year spun off into three companies, one of which was an agriculture-focused firm named Corteva. In 2018, ChemChina acquired Syngenta (Switzerland), and Bayer (Germany) acquired Monsanto (US). At enforcers request, Bayer divested some of Monsanto's seed divisions to BASF (Germany) and Dupont divested some of its pesticide assets to FMC Corporation (US.), but the transactions were consummated in substantially the shape anticipated by the companies. When the dust settled, Bayer, Corteva, and ChemChina became the agriculture biotechnology industry's undisputed global leaders, with BASF as an additional significant — though smaller and less vertically integrated — player.[418]

1. Industry Structure & Anticompetitive Trends

This spate of mergers enabled these four multinationals to consolidate overwhelming shares in relevant markets. Globally, the Big Three gained control over an estimated 50-60% of the world's seed and agrochemicals market.[419] By 2020, around 40% of the global seed market was controlled by just Bayer (23%) and Corteva (17%), while ChemChina and BASF rounded out the top four spots, with 7% and 4% of sales worldwide, respectively.[420] The global agrochemical market saw even greater concentration, with ChemChina (24.6%), Bayer (16%), BASF (11.3%), and Corteva (10.4%) controlling over 62% of sales.[421] In the United States, the 2017-2018 mergers gave the Big Three

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418 Mary K. Hendrickson, Philip H. Howard, Emily M. Miller, and Douglas H. Constance, "The Food System: Concentration and its Impacts," Farm Action, May 6, 2021, https://farmaction.us/wp-content/uploads/2021/05/Hendrickson-et-al.-2020.-Concentration-and-Its-Impacts_FINAL_Addended.pdf; James M. MacDonald, "Mergers in Seeds and Agricultural Chemicals: What Happened?" USDA Economic Research Service, February 15, 2019, https://www.ers.usda.gov/amber-waves/2019/february/mergers-in-seeds-and-agricultural-chemicals-what-happened/; Claire Kelloway, "Bayer-Monsanto Deal Closes as Farmers Warn of Higher Prices and Less Resiliency," Food and Power, June 7, 2018, https://www.foodandpower.net/latest/2018/06/07/bayer-monsanto-deal-closes-as-farmers-warn-of-higher-prices-and-less-resiliency; Leah Douglas, "Bayer Plans Sell-Off that would Worsen Competition in Seeds, Chemicals," Food and Power, March 2, 2018, https://www.foodandpower.net/latest/2018/03/02/bayers-plans-sell-off-that-would-aggravate-agribusiness-concentration.

419 Claire Kelloway, "Bayer-Monsanto Deal Closes"; Mary K. Hendrickson et al., "The Food System: Concentration and its Impacts"; Testimony of Diana L. Moss, "Consolidation and Competition in the U.S. Seed and Agrochemical Industry," American Antitrust Institute, September 20, 2016, https://www.judiciary.senate.gov/imo/media/doc/09-20-16%20Moss%20Testimony.pdf.

420 ETC Group. 2022. Food Barons 2022: Crisis Profiteering, Digitalization and Shifting Power. Available at: https://www.etcgroup.org/files/files/food_barons-summary-web.pdf. The fifth-through-eighth rankings in the global seeds market are occupied by, in descending order, Limagrain (4%), KWS (3%), DLF Seeds (3%), and Sakata (1%). *See id.*

421 ETC Group. 2022. Food Barons 2022: Crisis Profiteering, Digitalization and Shifting Power. Available at: https://www.etcgroup.org/files/files/food_barons-summary-web.pdf. The fifth-through-eighth rankings in the global agrochemicals market are occupied by, in descending order, UPL (7.9%), FMC (7.4%), Sumitomo Chemical (6.4%), and Nufarm (5.6%). *See id.* ChemChina's share of the agrochemicals likely expanded significantly after this data was collected, due to a merger within another major chinese agrochemical and fertilizer company, SinoChem. *See id.* A 2017 report estimated that global concentration in pesticides had a CR3 of 58%, a CR5 of 74%, and a CR7 of 86%. *See* Global Corporate Concentration in Pesticides: Agrochemicals Industry by Georgia Tsolomyti, Anastasios Magoutas, and Giannis T. Tsoulfas.

plus BASF control over 70% of soybean, 80% of corn, and 90% of cotton seed markets.[422] In seed genetics, Bayer-Monsanto and BASF alone likely wound up holding around 90% of trait acres for corn, soybeans, and cotton in the United States.[423]

Consolidation in the seed industry is a relatively new phenomena. The four largest seed firms accounted for no more than 25% of the global market as recently as 1994.[424] In the 1960s, there were more than seventy substantial pesticide manufacturers in the United States, and the majority of the market remained in the hands of small firms through the 1980s.[425] After the Supreme Court ruled that genetically modified seeds could receive patent protection in 1980,[426] however, that began to change. Major biotech companies developed strong incentives to enter the seed market, both to develop and license new patented genetically-modified seeds, and to "consolidate patent portfolios" and avoid patent infringement litigation.[427] Aided by the loosening of merger enforcement under the Reagan and Clinton administrations, they pursued these incentives through an aggressive M&A strategy.[428] The result was an explosion of biotechnology investment in the seed market and a wave of corporate acquisitions that would transform the seed and pesticide industries.

Between the 1980s and the early 2000s, the Big Six (the predecessor firms to today's Big Three and BASF) acquired the vast majority of conventional and hybrid seed-breeding companies — locking in the bulk of the biotechnological intellectual property related to their seeds and germplasm.[429] One study notes that, "by 2002, 95 percent of patents originally held by seed or small ag-biotech firms had been acquired by large chemical or multinational corporations."[430] That these were calculated acquisitions for control is suggested by the significant price premiums that acquiring firms paid for seed companies, which frequently exceeded three times annual sales.[431] As observers at the time noted, these premiums suggested an expectation that investment would be recouped at higher-than-prevailing rates of profit in the future.[432] Over the same time period, the Big Six also

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[422] Claire Kelloway, "Bayer-Monsanto Deal Closes"; Mary K. Hendrickson et al., "The Food System: Concentration and its Impacts"; Testimony of Diana L. Moss, "Consolidation and Competition."

[423] Claire Kelloway, "Bayer-Monsanto Deal Closes"; Testimony of Diana L. Moss, "Consolidation and Competition."

[424] Fuglie, Keith, Paul Heisey, John L. King, Kelly Day-Rubenstein, David Schimmelpfennig, Sun Ling Wang, Carl E. Pray, and Rupa Karmarkar- Deshmukh. 2011. Research Investments and Market Structure in the Food Processing, Agricultural Input, and Biofuel Industries Worldwide. Economic Research Report—130. Washington, DC: USDA Economic Research Service.

[425] USITC Executive Briefings on Trade (2018) ("In the 1960s, there were approximately seventy pesticide manufacturers in the United States. By 2000, the market had consolidated to eight dominant multi-national manufacturers who controlled the majority of the domestic US market. By 2015, the global pesticides market was commonly referred to as the 'Big 6,'comprising Bayer, BASF, Dow, DuPont, Monsanto, and Syngenta.").

[426] *Diamond v. Chakrabarty*, 447 U.S. 303, 317-18 (1980). *See also* Who Owns Nature? Corporate Power and the Final Frontier in the Commodification of Life; ETC Group: Ottawa, CA, USA, 2008.

[427] *Tracking the trend towards market concentration: The case of the agricultural input industry*, UN Conference on Trade and Development (2006) 1, 25-26.

[428] *Tracking the trend towards market concentration: The case of the agricultural input industry*, UN Conference on Trade and Development (2006) 1, 25-26.

[429] Testimony of Diana L. Moss, "Consolidation and Competition"; Caius Z. Willingham and Andy Green, "A Fair Deal for Farmers"; Testimony by Todd Leake, "FTC - DOJ Merger Guidelines Listening Forum"; Sarah Carden Statement; https://farmaction.us/wp-content/uploads/2022/08/SC-testimony-listening-session-seed-competition.pdf

[430] UNCTAD, *supra* n. {} at 26 (citing David Schimmelpfennig and John King, "Mergers, Acquisitions and Flows of Agbiotech Intellectual Property," in International Trade and Policies for Genetically Modified Products, Eds. R.E. Evenson and V. Santeniello (CABI Publishing, 2005).).

[431] Sieker, B. Focus: Seed; The Context Network: West Des Moines, IA, USA, 2009.

[432] Harl, N.E. The age of contract agriculture: consequences of concentration in input supply. J. Agrib. 2000, 18, 115-128.

negotiated exclusive contracts with agriculture universities to access their germplasm and obtained germplasm from a variety of international seed collections.[433]

The commercialization of full patent-protected transgenic seeds in the 1990s created another avenue for the Big Six to consolidate market control: Exclusive dealing.[434] Patented seeds were bundled with other inputs to protect profits in agrochemical divisions. Monsanto, for example, contractually required farmers who purchased its herbicide-tolerant transgenic seeds to use Monsanto's proprietary glyphosate herbicide, rather than a generic.[435]

As a result of these maneuvers, by the mid-2010s, CR4 ratios reached over 75% across major seed groups.[436] Beyond giving the Big Six — and now the Big Three — significant market shares, however, these maneuvers gave them control over critical intellectual property. IP and licensing regimes mean that companies in the seed market don't simply accumulate and exercise power through sales but also as gatekeepers for the other industry participants at various levels of the market. Seed companies independent of the Big Three are often dependent upon the Big Three for particular traits that they may wish to breed into their own offerings; they may be required to license those traits, and in doing so lock themselves into agreements that restrict their ability to work with other competitors or require them to use a big four company's traits in a minimum number of their seeds.[437] Moreover, the Big Three (particularly Monsanto, which has since been purchased by Bayer) are also known to aggressively litigate to protect their exclusive licensing agreements or target farmers who may have unknowingly planted seeds with patented traits, meaning that "farmers almost exclusively had to use Monsanto's products to avoid liability."[438] And these companies are able to tie patented GMO crops to herbicides tailored to avoid harming those crops, bundling them together for farmers.[439]

Since the mid-2010s, the business model and acquisitions strategy of the Big Six (and now the Big Three) have been shifting to further leverage their control over transgenic traits, transgenic seeds, and crop protection chemicals. As a report by ETC Group (formerly RAFI) explained in 2022, "The new business model" seems to be vertical restraint "under the pretext of management services[.]" Instead of selling seeds plus a linked herbicide (e.g., Roundup-Ready corn seeds and Roundup, in the case of Bayer), the Big Three "are selling (the prospect of) high-yielding, weed-free, pest-free fields." The products and services for sale include "data-driven input recommendations by a company-linked consultant/agronomist" platform, "modelling of potential profits based on input like predicted weather," application of "in-field sensors conducting soil sampling," and even "drone

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433 Testimony of Diana L. Moss, "Consolidation and Competition"; Caius Z. Willingham and Andy Green, "A Fair Deal for Farmers"; Testimony by Todd Leake, "FTC - DOJ Merger Guidelines Listening Forum"; Sarah Carden Statement.

434 Srinivasan, C.S. Concentration in ownership of plant variety rights: some implications for developing countries. Food Policy 2003, 28, 519-546.

435 Hayenga, M. Structural change in the biotech seed and chemical industrial complex. AgBioForum. 1998, 1, 43-55.

436 *Id.* at 9-10.

437 Caius Z. Willingham and Andy Green, *A Fair Deal for Farmers*, Center for American Progress (2019), https://www.americanprogress.org/article/fair-deal-farmers/.

438 Bethany Sumpter, *The Growing Monopoly in the Corn Seed Industry: Is it Time for the Government to Interfere?* 8 Tex. A&M L. Rev. 633, 651 (2021).

439 *Id.*; *See also* Caius Z. Willingham and Andy Green, "A Fair Deal for Farmers."

field-scouting." The acquisition of data and capabilities related to those products has, in turn, become a focal point of the Big Three's corporate transactions and joint venture activity. For example, Monsanto acquired The Climate Corporation in 2013, Syngenta acquired The Cropio Group in 2019, and this year Corteva acquired Symborg. Meanwhile, in 2021, Bayer entered a joint partnership agreement with Microsoft to co-develop the "go-forward infrastructure for digital farming solutions and data science capabilities."[440]

This accumulation of market control, data, and IP in the seed and agrochemicals sector has given rise to exotic supply arrangements mirroring the sorts of complex contracts that poultry, cattle, and hog farmers are increasingly subject to in livestock markets. Seed companies are beginning to experiment with risk-sharing agreements instead of flat rates for agricultural inputs, that would allow them to claim portions of farmers' profits if their products overperform expectations.[441] These contract structures give seed companies unprecedented access to information about their customers' operations and profitability, while the systems that seed companies use to set benchmark performance levels are largely a "black box" to farmers, leaving farmers to negotiate for inputs from a position of deep information asymmetry; and increasingly without viable alternative suppliers to turn to.[442]

Over the course of decades of consolidation, seed prices for genetically-modified seeds have "risen sharply," driven in large part by "the market power that firms derive from their [intellectual property rights] over new, commercially viable crop varieties."[443] Over the past 20 years, the price of commodity-crop seeds has risen faster than the price for any other farm input — and those price increases have generally outpaced yield increases over the same period.[444] Consolidation in the industry has likely resulted in less R&D expenditure, reflecting less need for innovation, and fewer choices for farmers when seeking to source seeds.[445] Against this backdrop, a perhaps telling Deloitte report on the agrochemicals industry predicted that "'capturing' rather than 'selling' value might more likely describe the strategic maneuvers that [sector incumbents] make" going forward.[446]

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[440] Carly Scaduto, **"**Bayer, Microsoft Enter into Strategic Partnership to Optimize and Advance Digital Capabilities for Food, Feed, Fuel, Fiber Value Chain" Climate Fieldview (Nov. 17, 2021) https://climate.com/press-releases/bayer-microsoft-strategic-partnership/#:~:text=Under%20the%20agreement%2C%20Bayer%20will%20work%20with%20Microsoft,supply%20chain%20improvement%2C%20and%20ESG%20monitoring%20and%20measurement.

[441] Claire Kelloway, "*Big Ag Eyes Cut of Farmers' Profits*" Food and Power, (March 12, 2020); Gil Gullickson, "*Get Set for Outcome-Based Pricing*" Successful Farming (Sept. 26, 2019).

[442] Id.*; See also* AMS-AMS-22-0025-0033_attachment_1.pdf; Sarah Carden testimony.

[443] James M. McDonald, Xiao Dong, and Keith O. Fuglie, *Concentration and Competition in U.S. Agribusiness*, USDA Economic Research Service, Economic Information Bulletin No. 256 1, 25 (June 2023).

[444] Sarah Carden Statement; Testimony of Diana L. Moss, "Consolidation and Competition"; Testimony by Todd Leake, "FTC - DOJ Merger Guidelines Listening Forum"; USDA-Comment-Agbiotech-6-10-22-REVISED-FINAL-FOR-AAI-WEBSITE.pdf

[445] *See* Bethany Sumpter, *The Growing Monopoly in the Corn Seed Industry: Is it Time for the Government to Interfere?* 8 Tex. A&M L. Rev. 633 (2021).(noting that Bayer's R&D budget after acquiring Monsanto is substantially less than the prior combined budgets of the two companies).

[446] Duane Dickson, Shay Eliaz, and Aijaz Hussain, "The future of agrochemicals - Capturing value through innovation, resourcefulness, and digital alchemy," Deloitte, 2019, https://www.readkong.com/page/the-future-of-agrochemicals-capturing-value-through-1191398.

2. Merger Enforcement Concerns

In light of the foregoing, it is clear that competition in the seed and agrochemicals sector has been substantially curtailed. The Big Three and their predecessor firms have indefatigably sought to consolidate control over every critical product, service, or input that an actual or existing rival needs in order to effectively compete in the seed or agrochemicals market. Simultaneously, the broad patent claims, threats of litigation, and exclusive deals to which the Big Three have subjected both consumers and trading partners have served to entrench their oligopoly and raise barriers to entry for new and smaller firms.[447] It is clear that the Big Three — and BASF with regard to many types of seeds — have a dominant position in any number of markets, if not because of their individual market shares, then because of their apparent power to increase prices for seed-and-agrochemical "cropping systems" of declining efficacy.[448]

In this context, if opportunities for deconcentration are to be preserved, no further mergers or acquisition by these dominant firms must be allowed to remove any rival — large or small — from any relevant market. Their acquisitions into digital farming — which blocked their rivals from accessing data network effects and technologies they could have used to compete more effectively, not to mention facilitated the Big Three's use of bundling and price discrimination to raise switching costs — should be retrospectively investigate and not allowed to continue. Finally, considering the decades-long pattern of acquisitions aimed at strategic control of the market by the Big Three and their predecessor firms, we urge the Agencies to investigate the entire series of acquisitions for both monopolistic intent and anticompetitive effect.

E. The Crop Insurance Sector

Farmers purchase crop insurance to protect against environmental hazards, crop failures, and market volatility. Obtaining crop insurance is also often required by farm lenders, making access to crop insurance policies a critical condition for young and small farmers to access financing. Most crop insurance in America is sold in conjunction with a federal subsidy program operated by the Federal Crop Insurance Corporation (FCIC). FCIC authorizes private-sector insurance companies — called Authorized Insurance Providers (AIPs) — on a yearly basis to underwrite and sell crop insurance policies pursuant to reinsurance agreements. Under these agreements, FCIC provides AIPs with: (1) protection against a portion of their losses on policies sold; (2) an operating subsidy equal to 12% or 20.1% of the premium value of issued policies (percentage varying by policy type); and (3) the terms on which FCIC will pay a farmers' premium subsidy to AIPs. In return, AIPs agree to comply with regulations promulgated by the USDA's Risk Management Agency and to compete

[447] Lesser, W. Intellectual property rights and concentration in agricultural biotechnology. AgBioForum. 1999, 1, 56-61.
[448] Testimony of Diana L. Moss, "Consolidation and Competition"; Caius Z. Willingham and Andy Green, "A Fair Deal for Farmers"; Testimony by Todd Leake, "FTC - DOJ Merger Guidelines Listening Forum"; Sarah Carden Statement.

with each for the opportunity to underwrite policies for crop insurance agencies, which sell policies directly to farmers.[449]

1. Industry Structure & Anticompetitive Trends

The efficacy of this Medicare Advantage-style scheme in delivering federally subsidized crop insurance to small and midsize, fruit-and-vegetable, and diversified farms has been critically undermined in recent years by a wave of consolidation among both AIPs (carriers) and insurance agencies. Although public information about the number, identity, and market share of crop insurance carriers and agencies is limited, the available evidence suggests that both segments have consolidated dramatically in recent years. "Crop insurance was once a sector full of smaller players," an Insurance Journal article summarizing a proprietary report on the industry by Conning noted in 2017, but a wave of mergers and acquisitions had left the sector with "fewer and larger carriers," and made "corporate owners a dominating force" among agencies. "The high degree of M&A activity in the sector," the article continued, had also shifted the ownership of crop insurance policies "toward large corporate customers, which accounted for 93% of premiums in 2016."[450]

Driven in part by depressed grain prices (which reduce crop values and, in turn, policy premiums, while increasing the risk of payouts), several large carriers sold their crop insurance divisions and exited the market in the last decade. For example, John Deere sold its crop insurance arm to Farmers Mutual Hail in 2014. A year later, Wells Fargo sold its Rural Community Insurance Services division, one of the largest U.S. crop insurers, to Zurich Insurance Group. That same year, OneBeacon Insurance Group transferred its crop insurance business to AmTrust, while AgriLogic Insurance, a Kansas-based crop insurer and agriculture consultant, was bought by Aspen Insurance Holdings.[451] These and other transactions consolidating the carrier segment have decreased the number of APIs in the federal crop insurance program, according to the Congressional Research Service, leaving only 16 national, regional, and single-state AIPs to underwrite 379.9 million acres of farmland for FCIC-subsidized policies.[452] As of 2011, "the largest five garner[ed] approximately two-thirds of the business."[453]

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[449] AIPs are supposed to compete with each other for the opportunity to underwrite farmers' crop insurance policies. Unlike a typical private-sector insurance product, AIPs cannot compete by offering different premium pricing. USDA sets premium prices, and all AIPs must offer the same premium rates to any given farmer. Moreover, AIPs do not have direct relationships with their farmer customers. Farmers work with an insurance agent, who may in turn contract with multiple AIPs. Insurance agents can play a key role in determining which AIPs underwrite the policies for the farmers that the agents represent. Therefore, instead of competing based on price, AIPs compete primarily based on (1) the service they provide to the insurance agents, and (2) the compensation they provide to insurance agents. *See* Federal Crop Insurance: A Primer (congress.gov).

[450] Conning, "*How Consolidation Has Changed Crop Insurance Sector,*" Insurance Journal (Nov. 17, 2023) https://www.insurancejournal.com/news/national/2017/11/17/471553.htm.

[451] *Id.*

[452] Stephanie Rosch, "*Federal Crop Insurance: A Primer*" Congressional Research Service (Feb. 18, 2021) https://crsreports.congress.gov/product/pdf/R/R46686.

[453] Steve Griffin, "*RMA Shakes Up Crop Insurance*" Successful Farming (Oct. 30, 2012) https://www.agriculture.com/farm-management/crop-insurance/rma-shakes-up-crop-insurce_303-ar27165.

As carriers have consolidated upstream and farms have consolidated downstream, crop insurance agencies have followed suit. "Running crop insurance agencies has become more difficult in recent years, with a lot of mega agencies changing," Tyler Silveus, CEO of Silveus Insurance Group, said in an interview with DTN-Progressive Farmer. "As farms continue to consolidate, agencies will too." Silveus Group bought out Cargill's crop insurance agency in 2015 to become the nation's largest crop insurance agency, with 90 brokers selling policies in every state. As Silveus has scaled, it has developed proprietary software to manage and support "a large, mobile agent force" in selling insurance policies and grain hedging instruments aligned closely with the needs of large agribusiness operations. Outside of "mega-agencies" such as Silveus, however, the broader agency segment appears to have grown moribund and insular. While about 12,000 agents are listed on RMA's website, industry observers estimate only two-thirds are likely to be active, and relatively few beginning agents are entering the business every year.[454]

As a result of these developments among carriers and agents, the crop insurance industry is leaving small and midsize farms behind and focusing almost exclusively on subsidy-eligible grain operations. As of 2019, 94% of the federally-subsidized policies issued by AIPs were for grain crops, and around half of the farms insured by AIPs were larger than 500 acres. In contrast, less than 15% of insured farms had fewer than 100 acres, and only 4% of policies were for specialty crops or multiple crops.[455]

This agribusiness-heavy skew in crop insurance enrollment is driven by the business incentives of the sector's dominant carriers. As industry consultancy Conning found in 2017, the primary features that have made crop insurance underwriting attractive to large carriers are "large premium volumes," "low consumption of capital," and "low correlation to other perils."[456] A carrier with a business model focused on these goals would naturally prefer insuring large, monoculture operations, which can be underwritten with streamlined procedures and are relatively insulated from market and environmental risks by federal commodity programs. In comparison, underwriting a crop insurance policy for a small or midsize farm — particularly a specialty crop or diversified one — would likely result in a lower premium, require more underwriting resources, and receive substantially less (if any) protection from federal programs. In this context, AIPs have a clear incentive to prefer serving established agribusinesses over smaller and non-conventional farms.

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[454] Marcia Zarley Taylor, "*Silveus to Buy Cargill Crop Insurance Agency*" Progressive Farmer (Dec. 29, 2015) https://www.dtnpf.com/agriculture/web/ag/news/article/2015/12/29/silveus-buy-cargill-crop-insurance.

[455] *See* Stephanie Rosch, "*Federal Crop Insurance: A Primer*" Congressional Research Service (Feb. 18, 2021) https://crsreports.congress.gov/product/pdf/R/R46686. Statement also supported by analysis of data on size of farms enrolled in crop insurance program in 2017 Census of Agriculture (Table 71).

[456] Conning, "*How Consolidation Has Changed Crop Insurance Sector,*" Insurance Journal (Nov. 17, 2023) https://www.insurancejournal.com/news/national/2017/11/17/471553.htm.

These carrier incentives matter because, although APIs cannot modify the policies or prices established by RMA, they have wide discretion to structure the compensation of agents to encourage them to sell preferred types of policies.[457] Agents, for their part, have shown little interest in serving beginner, small, or diversified farms, and even in learning about the types of policies geared toward their needs, such as the Whole Farm Revenue Protection (WFRP) policy authorized by FCIC in 2015.[458]

Until 2015, the low number of non-grain-crop farms enrolled in the federal crop insurance program could have been attributed, at least in part, to the types of policies that FCIC had approved for AIPs to issue. Historically, FCIC-approved policies covered a single crop at a time. This tended to make obtaining insurance for a diversified farm logistically difficult, as farmers (and their insurance agents) had to apply for, and then manage, a separate policy for each crop they planted and each type of livestock they integrated. For nearly a decade now, however, FCIC and RMA have worked to eliminate this logistical barrier. In 2015, FCIC authorized AIPs to issue WFRP policies, which insure a farm's total revenue regardless of what it produces.[459] Since then, RMA has taken successive steps to streamline the underwriting process for WFRP policies and reduce paperwork burdens for small and midsize farms, including by introducing a Micro-Farm Insurance Program that minimized requirements for farms with less than $100,000 in annual revenue.[460]

After WFRP was introduced in 2015, enrollment expanded rapidly — almost tripling in two years. After 2017, however, WFRP enrollment first stagnated and then declined. Even as RMA progressively lightened the applicable requirements, the number of WFRP policies fell from almost 3,000 in 2017 (covering $2.8 billion in crops) to fewer than 2,000. While farmers who seek WFRP policies continue to lament that it is more burdensome to enroll in a WFRP policy than a single-crop one, the real reason enrollment has retreated even as RMA has streamlined the underwriting process appears to be sabotage by carriers and apathy from agents.[461] According to the National Sustainable Agriculture Council, farmers have not only "lament[ed] the program's uniquely high paperwork burden," but "also report[ed] becoming disillusioned with WFRP after their indemnity payments [were] reduced at the time of claim." Farmers also "routinely express an inability to find crop insurance agents who are willing to sell — or even have knowledge about — WFRP, despite the

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[457] "The compensation that AIPs provide to agents can affect the types of policies that agents choose to recommend to their farmer clients, the incentive agents have to provide outreach to farmers who may have been previously underserved by the FCIP, and the incentive agents have to become familiar with new FCIP product offerings, such as insurance options for organic producers and other new offerings. For example, some stakeholders have suggested that one reason for low uptake of whole farm revenue protection policies is due to limited promotion of the policies by insurance agents. The SRA limits the amount AIPs are allowed to pay agents to not more than 80% of A&O and CAT LAE by state. However, an AIP may pay compensation up to 100% of A&O and CAT LAE by state if certain conditions are met. There is no limitation on how much any given agent may receive so long as it is within the maximum amount allowable per state." *See* *Federal Crop Insurance: A Primer (congress.gov)

[458] "A frequently noted challenge to access to and uptake of WFRP is the dearth of crop insurance agents knowledgeable of and interested in or willing to sell such policies." Farm-Viability-Report.pdf (farmbilllaw.org)

[459] Esther Akwii et. all, "*Farm Viability,"* Farm Bill Law Enterprise, (July 2022) https://www.farmbilllaw.org/wp-content/uploads/2022/07/Farm-Viability-Report.pdf.

[460] *Id.*

[461] *See* National Sustainable Agriculture Coalition, "*Whole-Farm Revenue Protection Analysis: A Few Bad Apples*" (Apr. 20, 2022) https://sustainableagriculture.net/blog/whole-farm-revenue-protection-analysis-a-few-bad-apples/; National Sustainable Agriculture Coalition, "NSAC's 2023 Farm Bill Priorities" (Dec. 2022) https://sustainableagriculture.net/publications/2023-farm-bill-platform/.

legal requirement for [AIPs] to sell the product." One farmer noted at an NSAC listening session, "It is not just that they don't understand [WFRP], but in my experience, they are outwardly hostile to a different insurance program."[462]

2. Merger Enforcement Concerns

These structure-driven dynamics in the crop insurance sector raise several merger enforcement concerns under the Proposed Guidelines. The first is whether consolidation has eliminated head-to-head competition among carriers for the business of insurance agents, particularly the subset of agents who primarily serve small-to-midsize and specialty-crop or diversified farms. In an increasingly consolidated grain farming sector, there is a market opportunity for carriers and agents who would emphasize serving the crop-insurance needs of *other* farmers — especially considering that crop insurance is so heavily subsidized that insured farms tend to receive around $2 in claim payments for every $1 they spend on premiums.[463] Yet no one, it seems, can be bothered to sell policies that meet the needs of those other farmers, like WFRP policies, and administer them properly.

That leads to the second enforcement concern — which is whether consolidation has increased concentration, eliminated mavericks, or aligned major-carrier incentives in this transparent, regulated market to a degree that coordinated rent-seeking in the lucrative grain-farm sub-market defeats the incentive for carriers and agents to pursue opportunities in other markets. Finally, mergers of crop insurance agencies and AIPs raise concerns about the elimination of actual potential entrants into either sector, as well as the potential for control over products, services, or information that rivals could use to compete. We urge the Agencies to scrutinize both past and future mergers in the carrier and agency segment of the federally subsidized crop insurance sector to maintain and restore competitive service to small-to-midsize, specialty crop, and diversified farms.

III. Conclusion

Seventy years ago, the FTC urged Congress to enact the anti-merger legislation that became the Celler-Kefauver Act with a stark warning: "Either this country is going down the road toward collectivism, or it must standard and fight for competition as the protector of all that is embodied in free enterprise." This warning had been forgotten in high places for nearly half a century. Since the 1980s, judges and enforcers alike had ignored the letter and spirit of the antitrust laws to let capital freely consolidate power over the nation's markets — leaving the American public with the greatest degree of economic concentration we have seen in living memory. That ends today. With the Proposed Guidelines, the FTC and DOJ revert to their original antitrust mission: To safeguard competition, and to resist monopolistic tendencies in their incipiency. We thank the Agencies for taking this historic step.

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[462] National Sustainable Agriculture Coalition, "*Whole-Farm Revenue Protection Analysis: A Few Bad Apples*" (April 20, 2022) https://sustainableagriculture.net/blog/whole-farm-revenue-protection-analysis-a-few-bad-apples/.

[463] Natalie Tawil et. all, "*Options to Reduce the Budgetary Costs of the Federal Crop Insurance Program*," Congressional Budget Office (December, 2017) https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53375-federalcropinsuranceprogram.pdf.