AMERICAN ECONOMIC LIBERTIES PROJECT

Creating Mothra to Fight Godzilla Just Makes More Destructive Monsters:

Why Merge-to-Compete Arguments Are Contrary to the Letter and Spirit of Antitrust Laws and How Resulting Mergers Have Harmed the Public

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A seemingly never-ending parade[1] of corporations has attempted to justify illegal mergers by claiming the need to combine forces in order to successfully compete with other giant corporations. Kroger and Albertsons, the largest and second-largest traditional supermarket chains in the United States, are two of the most recent corporations to invoke this tired playbook by arguing that a merger would give them "the best opportunity to successfully compete with the non-union behemoths — Walmart, Costco, and Amazon — that have come to dominate the retail grocery industry, both in stores and online." They say these behemoths are "a threat to the very existence of the corner grocery store."[2]

One effect of this argument is to distort public discourse surrounding harmful mergers. Oftentimes, monopolists deploy a public relations strategy that focuses on *national* market shares and statistics to argue that they need to "merge to compete." Media outlets sometimes repeat this argument without considering where competition actually happens. Kroger and Albertsons made much of the fact that their combined national share of the grocery market was smaller than that of Walmart—a misleading and largely irrelevant statistic given the hyper-local nature of grocery competition. Indeed, Kroger and Albertsons each *already* have higher market shares than Walmart in many local markets.

But even when taken at face value, the "merge to compete" argument fails to hold up to reality and legality. Fortunately, a federal judge in Oregon and a state court judge in Washington both saw through this meritless argument en route to granting injunctions to halt the proposed merger between Kroger and Albertsons. This brief outlines why "merge to compete" arguments are bogus, with examples of consummated mergers of giant corporate competitors that ***promised*** to increase competition but instead

[1] *See, e.g.*, T-Mobile-Sprint, Kroger-Albertsons, Capital One-Discover, AT&T-Time Warner, etc.
[2] Despite this rhetoric, Kroger and Albertsons chose not to raise a "failing firm" defense that would allow consummation of an otherwise illegal deal if one party is facing a true prospect of bankruptcy. Notably, at the same time Albertsons announced termination of the merger in light of losing two court cases, it also filed a lawsuit against Kroger for breaching the Merger Agreement.

had the ***opposite effect***, with disastrous consequences for competition, consumers, workers, and the public.

Other courts should follow the lead of these judges in rejecting "merge to compete" arguments as contrary to the letter and the spirit of the antitrust laws.

1. Merge-to-compete arguments are contrary to the letter and spirit of the antitrust laws and Supreme Court precedent

I. The Supreme Court has recognized that the alleged benefits of merge-to-compete arguments do not override merger harms

Proponents of illegal mergers claim they are ultimately "pro-competitive" as they will allow the newly conjoined companies to challenge entrenched behemoths. However, antitrust laws are designed to block illegal mergers and acquisitions whose effect "may be substantially to lessen competition or tend to create a monopoly" in "any section of the country."[3] The Supreme Court has explained that "[p]ossible economies" that result from an anticompetitive merger "cannot be used as a defense to illegality."[4] That includes efficiency benefits that might help a merged entity compete more vigorously against industry giants.[5] As the Supreme Court put it, "[i]f anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating [Section 7 of the Clayton Act], embark on a series of mergers that would make it in the end as large as the industry leader."[6] However, some lower court judges — without any grounding in statutory language, legislative history, or Supreme Court precedent — have decided that "pro-competitive benefits" can play a role in their analyses.

Fortunately, a growing number of judges are rejecting merge to compete arguments. In Judge Nelson's decision granting the Federal Trade Commission's motion for a preliminary injunction to halt the proposed merger between Kroger and Albertsons, she addressed this argument head on:

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[3] 15 USC Sec. 18; U.S. Department of Justice, "The Antitrust Laws," https://www.justice.gov/atr/antitrust-laws-and-you.

[4] *F.T.C. v. Procter & Gamble Co*., 386 U.S. 568, 580 (1967); Jerry Cayford, "A Misreading of Procter & Gamble Has Long Hampered Antitrust Enforcement," ProMarket, September 30, 2024, https://www.promarket.org/2024/09/30/a-misreading-of-procter-gamble-has-long-hampered-antitrust-enforcement/.

[5] U.S. Department of Justice and the Federal Trade Commission, "Merger Guidelines," 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf. The updated merger guidelines from the FTC and DOJ faithfully apply congressional intent and Supreme Court case law. *See*, e.g., Guideline 3.3, which says pro-competitive efficiencies will only be considered if they are "verifiable" and merger-specific rather than "vague or speculative" and "must be of a nature, magnitude, and likelihood that no substantial lessening of competition is threatened by the merger in any relevant market."

[6] *United States v. Philadelphia National Bank*, 374 U.S. 321, 370 (1963). Scholars and lower court judges have also recognized that "antitrust rejects [the argument that] possible injuries to competition in one market are offset by efficiency benefits in a different market." IVA Philip E. Areeda and Herbert Hovenkamp, Antitrust Law, 972, at 57 (4th ed. 2016); *FTC v. Meta Platforms*, 1:20-cv-03590, D.I. 384, (D.D.C.) November 13, 2024, p. 82, https://storage.courtlistener.com/recap/gov.uscourts.dcd.224921/gov.uscourts.dcd.224921.384.0_2.pdf.

> "Both defendants gestured toward a future in which they would not be able to compete against ever-growing Walmart, Amazon, or Costco. Without the scale afforded by the merger, defendants argue, it will be more difficult for traditional supermarkets to survive in the long term… The overarching goals of antitrust law are not met, however, by permitting an otherwise unlawful merger in order to permit firms to compete with an industry giant."[7]

Judge Marshall Ferguson similarly recognized that Albertsons did not argue that it was a "failing firm" at risk of bankruptcy if the deal did not go through, and found that the "merger is not necessary to enable Kroger and Albertsons to compete with Walmart and non-traditional retailers" because those supermarket chains had both "thrived" alongside such behemoths for decades.[8]

Judges have also rejected the proposition that increased bargaining leverage against industry giants could justify an otherwise illegal merger. In *FTC v. Meta*, Judge James Boasberg rejected Meta's merge to compete defense for acquiring WhatsApp. Specifically, Meta argued that the WhatsApp acquisition would increase its "bargaining leverage" against Apple and Google — and that this bargaining leverage qualified as a pro-competitive justification for an otherwise illegal merger. Judge Boasberg granted summary judgment striking this affirmative defense, noting there was no case law "authority for such a proposition, which would be theoretically available to any monopolist that sought to entrench its position via anticompetitive acquisitions."[9] Boasberg also noted that it is not clear that the alleged increased bargaining leverage "serve[d] a purpose other than [to] protect[] Meta's monopoly."[10]

Section 2 of this brief outlines several examples of how acceptance of merge-to-compete arguments by some lower court judges has been disastrous for consumers, workers, and businesses.

II. Congress adopted "anti-merger" laws to prevent excess concentration before it begins

Courts have regularly acknowledged that the congressional intent of the antitrust laws is to prevent consolidation in its incipiency. In *Brown Shoe Co. v. United States*,[11] the Supreme Court recognized that Congress intended to "arrest restraints of trade in their incipiency"

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[7] *FTC v. Kroger Co. and Albertsons Companies, Inc.*, 3:24-cv-00347-AN, D.I. 521 (D. Or. Dec. 10, 2024), at p. 70, https://storage.courtlistener.com/recap/gov.uscourts.ord.178374/gov.uscourts.ord.178374.521.0_3.pdf

[8] For example, Judge Ferguson noted that "Kroger's stock price has increased by approximately 2,000 percent in the last 30 years" and although "Defendants' counsel suggested that Kroger and Albertsons need to merge in order to compete effectively with Costco's scale… but Kroger's grocery revenues are larger than Costco's." paras. 330-332.

[9] *FTC v. Meta Platforms*, 1:20-cv-03590, (D.D.C.) November 13, 2024, p. 91, https://storage.courtlistener.com/recap/gov.uscourts.dcd.224921/gov.uscourts.dcd.224921.384.0_2.pdf.

[10] *FTC v. Meta Platforms*, 1:20-cv-03590, (D.D.C.) November 13, 2024, p. 91, https://storage.courtlistener.com/recap/gov.uscourts.dcd.224921/gov.uscourts.dcd.224921.384.0_2.pdf.

[11] *Brown Shoe Co v. United States*, 370 U.S. 294 (1962).

and prevent "even small mergers that add[] to concentration in an industry."[12] Instead of promoting mergers, Congress preferred a policy of promoting "internal expansion." Reflecting this policy, Congress passed an amendment in 1950 that closed a loophole in antitrust law, known as the "Anti-Merger Act." As the Court explained:

> "A *company's history of expansion through mergers presents a different economic picture than a history of expansion through unilateral growth. Internal expansion is more likely to be the result of increased demand for the company's products and is more likely to provide increased investment in plants, more jobs and greater output. Conversely, expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity, jobs or output. It was for these reasons, among others, Congress expressed its disapproval of successive acquisitions.*"[13]

III. Merger guidelines emphasize prevention of consolidation trends

The Department of Justice (DOJ) Antitrust Division and FTC's updated merger guidelines — which outline for businesses and the public how the agencies identify potentially illegal mergers — focus on transactions that threaten competition, regardless of alleged benefits.[14]

There are numerous guidelines that especially address the illegitimate merge-to-compete argument. For example, Guideline 7 focuses on transactions in an already consolidated industry, examining "whether it [an industry trending toward consolidation] increases the risk a merger may substantially lessen competition or tend to create a monopoly." This may take into account general concentration trends, a trend toward vertical integration, serial deals, or potential mergers that if consummated would "gain bargaining leverage over other firms that they transact with." Guideline 1 focuses on transactions that "significantly increase concentration in a highly concentrated market," while Guideline 6 focuses on transactions that "entrench or extend a dominant position." These merger guidelines confirm that the antitrust agencies — like Congress and the courts — do not condone arguments that accelerate consolidation trends.

2. Merge-to-compete arguments are contrary to market realities

I. Dominant players tilt the playing field

Entrenched giants are able to utilize their market power in various ways to squash competition. They spend their ill-gotten gains on lobbying and campaign contributions in

[12] *Id.* at 323 n.39, 376.
[13] *Id.* at 345, n. 72.
[14] U.S. Department of Justice and the Federal Trade Commission, "Merger Guidelines," 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

order to influence antitrust enforcement along with many other areas of the law to maintain their monopoly power, preventing rivals from gaining market share.[15] For example, large incumbents such as Meta (Facebook) buy up, copy, or undercut their competitors.[16] They can also undermine rivals by charging prices below cost to squeeze their competitors. Amazon, for example, took a $200 million loss to stop Diapers.com from growing and competing with the company.[17]

While mergers and acquisitions may be quicker than organic growth, they are often riskier, more expensive, and lead to shorter-term growth. They are sometimes driven more by the interests of executives and external advisers rather than the best interests of shareholders (much less workers or consumers).[18] For example, in 2019 Judge Richard Leon refused to block telecom giant AT&T's $85 billion megamerger with media conglomerate Time Warner because he believed the deal would generate "cost efficiencies" and was sympathetic to AT&T's claims that the merger was necessary for it to compete with Big Tech giants such as Google (YouTube), Facebook, Netflix, and Amazon.[19] The merged entity then not only hiked prices for consumers and laid off 77,000 workers[20] but performed so poorly that just three years later AT&T sold off Time Warner at a heavy discount, harming shareholders too.[21] The only people who benefited were the top executives who collectively earned over $100 million in golden parachutes and merger bonuses, and the bankers, lawyers, and other advisers who pushed the deal through.[22]

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[15] Thomas Philippon, "The Economics and Politics of Market Concentration," December 1, 2019, https://www.nber.org/reporter/2019number4/economics-and-politics-market-concentration; Thomas Philippon, "Entry Costs and the Macroeconomy," March 13, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346337; German Gutierrez and Thomas Philippon, "Investment-less Growth: An Empirical Investigation," January 2017, https://www.nber.org/papers/w22897.

[16] Florian Ederer and Song Ma, "Do Companies Buy Competitors in Order to Shut Them Down?," Yale Insights, June 4, 2018, https://insights.som.yale.edu/insights/do-companies-buy-competitors-in-order-to-shut-them-down; Josh Edelson, "Facebook is a social network monopoly that buys, copies or kills competitors, antitrust committee finds," CNBC, October 6, 2020, https://www.cnbc.com/2020/10/06/house-antitrust-committee-facebook-monopoly-buys-kills-competitors.html.

[17] Timothy B. Lee, "Emails detail Amazon's plan to crush a startup rival with price cuts," Ars Technica, July 30, 2020, https://arstechnica.com/tech-policy/2020/07/emails-detail-amazons-plan-to-crush-a-startup-rival-with-price-cuts/; Lina Khan, "Amazon's Antitrust Paradox," Yale Law Journal, Vol. 126, January 31, 2017, https://ssrn.com/abstract=2911742.

[18] University of Cambridge, Judge Business School, "New book asks why ever more is spent on mergers when so many fail," July 13, 2022, https://www.jbs.cam.ac.uk/2022/why-ever-more-is-spent-on-mergers-when-so-many-fail/.

[19] Hadas Gold, "How Netflix and Amazon helped save the AT&T-Time Warner deal," CNN, February 27, 2019, available at https://www.cnn.com/2019/02/27/business/netflix-amazon-streaming-att-doj.

[20] Iain Morris, "AT&T has let go of 77,400 employees in just four years," LightReading, January 27, 2022, https://www.lightreading.com/aiautomation/atandt-has-let-go-of-77400-employees-in-just-four-years/d/d-id/774870; Michael Hiltzik, "AT&T got nothing but pain from its WarnerMedia merger. It's well deserved," The Los Angeles Times, May 18, 2021, https://www.latimes.com/business/story/2021-05-18/att-warnermedia-merger.

[21] Lauren Feiner, "AT&T battled the DOJ to buy Time Warner, only to spin it out again three years later," CNBC, May 17, 2021, https://www.cnbc.com/2021/05/17/att-fought-doj-for-time-warner-only-to-spin-out-three-years-later.html.

[22] Chris Isidore, "Top Time Warner executives set for $180 million payout," CNN, June 13, 2018, https://money.cnn.com/2018/06/13/media/time-warner-exit-package/index.html; Patrick Temple-West, AT&T executives were paid $9m for controversial Time Warner deal," The Financial Times, May 27, 2021, https://www.ft.com/content/3fc00aeb-b56c-4209-823b-b8ca5206da31.

This is an ineffective and unsustainable way to grow a business — and systemically harmful for society.[23] Instead, a company's first choice should be turning to innovation and internal expansion for long-term growth. This includes competing by coming up with innovative products and services, improving quality, focusing on customer satisfaction and relationships with suppliers,[24] refining go-to-market strategies, and training and investing in employees.

Cases that rejected anti-competitive mergers have borne out the wisdom of this policy:

- In 1967, the U.S. Supreme Court found that Procter & Gamble's acquisition of Clorox "may have anticompetitive effects" and required the divestiture of Clorox from the company.[25] As a result, in the 1970s, Clorox boasted about the company's "in-house development" and "R&D" which led to a "strongly diversified company."[26]
- In 2023, China blocked Intel's purchase of chip foundry Tower.[27] The company instead shifted to internal expansion, with Intel "building [a] manufacturing line," "hir[ing] a lot of people," and "buil[ding] up [Intel's] customer team."[28] Intel's CEO Pat Gelsinger later said this was a "silver lining" of the deal being denied.[29]
- One of the first mergers the FTC blocked under Chair Lina Khan was between chip designer ARM and chip maker Nvidia.[30] The following year, ARM went public on the Nasdaq and its stock value increased by 25%,[31] far surpassing what Nvidia offered to pay. Meanwhile, Nvidia hit a record market cap of $3.4 trillion in October 2024 by focusing on its AI chip business.[32] In other words, blocking the merger was probably one of the better things to happen to both companies and their shareholders, since they successfully focused on their core businesses and neither firm got entangled in a messy integration.

[23] BDC, "Organic growth or mergers and acquisitions: Choosing the right growth strategy," https://www.bdc.ca/en/articles-tools/business-strategy-planning/manage-growth/organic-growth-mergers-acquisitions-choosing-right-growth-strategy; Guerdon Associates, "Research Indicates Executives Are Using Buybacks and M&A for Short Terms Gains," October 11, 2017, https://www.guerdonassociates.com/articles/research-indicates-executives-are-using-buybacks-and-ma-for-short-term-gains/.
[24] MoginRubin LLP, "As Feds Stalk Anticompetitive Mergers, What Can Competitors Do?," Lexology, June 11, 2024, https://www.lexology.com/library/detail.aspx?g=6a2a54f9-5d79-4f63-a4bb-27fc5b499e52.
[25] *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967), https://supreme.justia.com/cases/federal/us/386/568/.
[26] X, Daniel Hanley, April 4, 2023, https://x.com/danielahanley/status/1643322874520797187/photo/1.
[27] Anirban Sen, "Intel scraps $5.4 bln Tower deal after China review delay," Reuters, August 16, 2023, https://www.reuters.com/technology/intel-walk-away-54-bln-acquisition-tower-semiconductor-sources-2023-08-16/.
[28] X, Matt Stoller, November 9, 2023, https://x.com/matthewstoller/status/1722647129431199841.
[29] *Id.*; Anirban Sen, "Intel scraps $5.4 bln Tower deal after China review delay," Reuters, August 16, 2023, https://www.reuters.com/technology/intel-walk-away-54-bln-acquisition-tower-semiconductor-sources-2023-08-16/.
[30] The Federal Trade Commission, "Statement Regarding Termination of Nvidia Corp.'s Attempted Acquisition of Arm Ltd.," press release, February 14, 2022, https://www.ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-nvidia-corps-attempted-acquisition-arm-ltd.
[31] Rohan Goswami and Kif Leswing, "Arm climbs 25% in Nasdaq debut after pricing IPO at $51 a share," CNBC, September 14, 2023, https://www.cnbc.com/2023/09/14/arm-ipo-arm-starts-trading-on-the-nasdaq-in-win-for-softbank.html.
[32] Kif Leswing, "Nvidia closes at record as AI chipmaker's market cap tops $3.4 trillion," CNBC, October 14, 2024, https://www.cnbc.com/2024/10/14/nvidia-shares-hit-a-record-as-chipmaker-market-cap-tops-3point4-trillion.html.

II. *Allowing companies to merge to compete has failed businesses, consumers, and workers: the reality of post-merger broken promises*

Academic research and real-world examples demonstrate the stark and less rosy reality that emerges when corporations attempt to justify their illegal mergers with empty promises.

Research shows that consolidation hurts consumers, workers, small businesses, democracy, innovation, and communities. Increases in concentration lead to:

- weak productivity growth, declining investment,[33] and stifled innovation;[34]
- rising corporate profit rates and markups,[35] resulting in higher prices for consumers;[36]
- stagnant and reduced wages for workers;[37]
- and fewer startups pursuing new, bold, innovative products that directly compete with incumbents, due to both uninvestable "kill zones" around monopolized technologies, and incentives that drive startups to tailor their technologies as incremental add-ons to monopolized technologies with the ultimate aim of acquisition rather than competition.[38]

Real-life examples paint a similar picture:

- In 2015, grocer Albertsons acquired Safeway for $9.4 billion. This deal was approved by the FTC on the condition that the two companies sell nearly 200

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[33] Thomas Philippon, "The Economics and Politics of Market Concentration," The Reporter, December 1, 2019, https://www.nber.org/reporter/2019number4/economics-and-politics-market-concentration; Thomas Philippon, "Causes, Consequences, and Policy Responses to Market Concentration," ASPEN Economic Strategy Group, November 21, 2019, https://www.economicstrategygroup.org/publication/causes-consequences-and-policy-responses-to-market-concentration/; C. Lanier Benkard, Ali Yurukoglu, and Anthony Lee Zhang, "Concentration in Product Markets," FTC, April 2021, https://www.ftc.gov/system/files/documents/public_events/1588356/zhangyurukoglubenkard.pdf.

[34] Mitsuru Igami, Shoki Kusaka et al., "Welfare Gains from Product and Process Innovations: The Case of LCD Panels, 2001-2011," July 11, 2024, p. 4, https://conference.nber.org/conf_papers/f205854.pdf.

[35] Joel Stiebale and Florian Szucs, "Mergers and market power: evidence from rivals' responses in European markets," The RAND Journal of Economics, Volume 53, Issue 4, November 14, 2022, https://onlinelibrary.wiley.com/doi/full/10.1111/1756-2171.12427.

[36] Thomas Philippon, "The Economics and Politics of Market Concentration," The Reporter, December 1, 2019, https://www.nber.org/reporter/2019number4/economics-and-politics-market-concentration; Thomas Philippon, "Causes, Consequences, and Policy Responses to Market Concentration," ASPEN Economic Strategy Group, November 21, 2019, https://www.economicstrategygroup.org/publication/causes-consequences-and-policy-responses-to-market-concentration/; C. Lanier Benkard, Ali Yurukoglu, and Anthony Lee Zhang, "Concentration in Product Markets," FTC, April 2021, https://www.ftc.gov/system/files/documents/public_events/1588356/zhangyurukoglubenkard.pdf.

[37] Thomas Philippon, "Causes, Consequences, and Policy Responses to Market Concentration," ASPEN Economic Strategy Group, November 21, 2019, https://www.economicstrategygroup.org/publication/causes-consequences-and-policy-responses-to-market-concentration/; Thomas Philippon, "The Economics and Politics of Market Concentration," The Reporter, December 1, 2019, https://www.nber.org/reporter/2019number4/economics-and-politics-market-concentration.

[38] Steven Callander and Niko Matouschek, "The Desire to Be Acquired Is Stifling Innovation at Startups," KelloggInsight, July 1, 2022, https://insight.kellogg.northwestern.edu/article/the-desire-to-be-acquired-is-stifling-innovation-at-startups; U.S. House of Representatives, "Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations, Part I," Jerrold Nadler, Chair of the Committee on the Judiciary and David N. Cicilline, Chair of the Subcommittee on Antitrust, Commercial, and Administrative Law, 117th Congress, Published July 2022, pp. 6, 29, https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf.

stores, with Haggen Holdings — a small regional grocer that was owned by a private equity firm — buying the majority of them. But when Haggen couldn't handle the major expansion, it filed for bankruptcy in 2016, with over 8,000 workers losing their jobs.[39]

- In 2018, T-Mobile and Sprint claimed they needed to merge to compete with AT&T and Verizon "more effectively."[40] The new company, they argued, would "provide U.S. consumers and businesses with lower prices, … greater competition" and create "thousands of new [] jobs."[41] Instead, the merger of T-Mobile and Sprint in 2020, which consolidated the market from four to three large players, has resulted in higher prices for the combined companies' customers,[42] along with multiple rounds of layoffs after the company promised the opposite.[43]
- In 2023, Microsoft acquired Activision Blizzard for $69 billion.[44] The company claimed the deal would put "players and creators first" and ensure the "continued success in an increasingly competitive industry."[45] However, earlier this year, only three months after the merger was finalized, Microsoft laid off nearly 2,000 employees — the vast majority from Activision Blizzard — as a part of the "post-acquisition team structure."[46] In the FTC's continued challenge of the deal, it was revealed that Microsoft is exercising market power post-merger with price increases and product degradation by raising prices by 17% and eliminating its cheapest product, requiring an 81% price increase for those customers.[47] More recently, Microsoft laid off another round of workers, including those who tried to

[39] The American Economic Liberties Project, "The Courage to Learn," pp. 51-52, https://www.economicliberties.us/wp-content/uploads/2021/01/Courage-to-Learn_12.12.pdf; X, BalanceCrafting, August 28, 2024, https://x.com/BalanceCrafting/status/1828926411555692754; PRNewswire, "Albertsons and Safeway Complete Merger Transaction," January 30, 2015, https://www.prnewswire.com/news-releases/albertsons-and-safeway-complete-merger-transaction-300028412.html; San Diego Free Press, "Haggen Stores Closing: Corporate Greed Costs Eight Thousand Jobs in California," September 25, 2015, https://sandiegofreepress.org/2015/09/haggen-stores-closing-corporate-greed-costs-eight-thousand-jobs-in-california/.

[40] Stephanie Denning, "The Benefits of the Sprint and T-Mobile Marriage," Forbes, December 21, 2018, https://www.forbes.com/sites/stephaniedenning/2018/12/21/the-benefits-of-sprint-and-t-mobile-tying-the-knot/.

[41] T-Mobile, "T-Mobile and Sprint to Combine, Accelerating 5G Innovation & Increasing Competition," press release, April 29, 2018, https://www.t-mobile.com/news/press/5gforall.

[42] Mike Scarcella, "T-Mobile loses bid to appeal key ruling in Sprint merger lawsuit," Reuters, May 16, 2024, https://www.reuters.com/legal/litigation/t-mobile-loses-bid-appeal-key-ruling-sprint-merger-lawsuit-2024-05-16/.

[43] Jasmine Hicks, "The T-Mobile/Sprint merger hasn't created jobs – it's cut thousands," The Verge, September 1, 2022, https://www.theverge.com/2022/9/1/23333124/t-mobile-sprint-layoffs-5g-merger-jobs-promise; Amritpal Kaur Sandhu-Longoria, "T-Mobile to lay off 5,00 people nationwide, after Sprint merger promised more jobs," USA Today, August 25, 2023, https://www.usatoday.com/story/money/2023/08/25/t-mobile-layoffs-cut-workers-jobs-nationwide/70680602007.

[44] Reuters, "Microsoft's $69 billion acquisition of Activision Blizzard," December 6, 2023, https://www.reuters.com/markets/deals/microsoft-activision-ubisoft-deal-helps-win-britains-nod-2023-10-13.

[45] Microsoft, "Microsoft to acquire Activision Blizzard to bring the joy and community of gaming to everyone, across every device," Microsoft News Center, https://news.microsoft.com/2022/01/18/microsoft-to-acquire-activision-blizzard-to-bring-the-joy-and-community-of-gaming-to-everyone-across-every-device/.

[46] Tom Warren, "Microsoft lays off 650 more Xbox employees," The Verge, September 12, 2024, https://www.theverge.com/2024/1/25/24049050/microsoft-activision-blizzard-layoffs; Leah Nylen and Cecilia D'Anastasio, "FTC Dings Microsoft Over Activision Blizzard Layoffs in Court," Bloomberg, February 7, 2024, https://www.bloomberg.com/news/articles/2024-02-07/ftc-knocks-microsoft-over-activision-blizzard-layoffs-in-court?sref=q0qR8k34.

[47] *FTC v. Microsoft Corporation*, 23-15992, (9th Cir. July 18, 2024), https://www.courtlistener.com/docket/67605176/121/ftc-v-microsoft-corporation/.

unionize (after Microsoft promised not to contest any union elections if the government approved the merger).[48] A few days later, Microsoft announced $60 billion in stock buybacks.[49]

- Consolidation in the telecommunications industry has resulted in U.S. consumers paying twice as much for cellphone and internet services as residents in other countries.[50]
- Airline consolidation has led to higher prices for consumers,[51] and route closures and massive layoffs in various communities.[52]

3. Accepting merge-to-compete arguments leads to contagious consolidation

A fundamental problem with merge-to-compete arguments is that there is no limiting principle. Each merger justified with a merge-to-compete argument would tend to justify a subsequent merger by other actors to compete with the newly merged entity. Merger Guideline 7 provides an example of one way this happens: some mergers may create an "arms race for bargaining leverage" where "distributors merge … to gain leverage against suppliers, who then merge to gain leverage against distributors, spurring a wave of mergers that lessen competition." And there are other ways this pattern manifests. For example, a gatekeeping technology platform might pursue an acquisition to leverage its platform power into new lines of business, thereby extending its dominance across sectors — and spurring additional consolidation as existing competitors feel pressure to acquire similar lines of business to compete with the merged entity. As current FTC Chair Lina Khan wrote earlier in her career, "[c]oncentration begets concentration."[53]

That was, of course, the concern that drove Congress to pass the Clayton Act, so that antitrust law would reach not only existing monopolies and collusive behavior but also arrest any trend toward consolidation in its "incipiency."[54] In other words, merge-to-compete arguments turn the Clayton Act on its head by *accelerating* rather than *restraining* transactions that "tend to create a monopoly."[55]

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[49] Reuters, "Microsoft approves new $60 billion share buyback program," September 17, 2024, https://www.reuters.com/technology/microsoft-approves-new-60-billion-share-buyback-2024-09-16/.
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[51] AELP, "Here We Go Again: Airline Mergers Beget More Mergers and Flyers, Workers, and Local Communities Can't Afford Alaska-Hawaiian," press release, December 4, 2023, https://www.economicliberties.us/press-release/here-we-go-again-airline-mergers-beget-more-mergers-and-flyers-workers-and-local-communities-cant-afford-alaska-hawaiian/.
[52] William J. McGee, "Before the Department of Justice and The Federal Trade Commission, Docket ID FTC-2022-0003: Comments Concerning the U.S. Airline Industry Response to 'Request for Information on Merger Enforcement,'" American Economic Liberties Project, April 2022, https://www.economicliberties.us/wp-content/uploads/2022/04/2022-04-20-AELP-DOJ-FTC-Airlines-McGee.pdf.
[53] Lina M. Khan, "The Ideological Roots of America's Market Power Problem," The Yale Law Journal Forum, p. 962, June 4, 2018, https://www.yalelawjournal.org/pdf/Khan_hxxcykpx.pdf.
[54] *Brown Shoe Co v. United States*, 370 U.S. 294 (1962).
[55] 15 USC Sec. 18.

4. Conclusion: Regulators and the courts must reject the bogus merge-to-compete argument

Corporations seeking market dominance often claim mergers with other large competitors will make it easier for them to compete with rivals and offer savings to consumers. But as this Quick Take demonstrates, the opposite is almost always the case.

The only winners from consolidation are dominant corporations, executives, and wealthy shareholders.[56] By taking over a competitor, the dominant corporation is now even more dominant. These large firms then spend money on lobbying and campaign contributions in order to maintain their monopoly power[57] because companies in concentrated industries have higher markups[58] and higher profits to invest in lobbying. Since stock buybacks — once an illegal form of stock manipulation — were legalized in the 1980s, monopolies have also increasingly used stock buybacks to manipulate their share prices.[59] CEOs and other executives of merging companies[60] also receive increased compensation once a deal is finalized.[61] The monopolization also makes it harder for remaining rivals to keep up. This allows the monopolists to raise prices and lay off

[56] Balanced Economy Project, "Breaking Up The Giants of Harm," July 2024, https://static1.squarespace.com/static/65c9daef199ea70aa66592fe/t/669f0cc835d34a76dcb9328d/1721699547182/Breaking+Up+the+Giants+of+Harm%2C+Balanced+Economy+Project_July+2024.pdf Another example is the airline industry. Alaska and JetBlue continue to have reliability, safety, and "cost-control" issues, as the companies use their dominant position to invest in illegal mergers, executive compensation, and stock buybacks instead of innovation or quality. As a result, consumers and communities have been hit with higher prices, route and hub closures, and massive layoffs since the industry has become more consolidated in the last 40 years. Leslie Josephs, "Alaska Airlines 2024 forecast tops estimates after loss from Boeing Max Grounding," CNBC, April 18, 2024, https://www.cnbc.com/2024/04/18/alaska-airlines-2024-forecast-tops-estimates-after-loss-from-boeing-max-grounding.html; Meghna Maharishi, "JetBlue Posts a Loss as It Struggles With Elevated Capacity in Popular Markets," Skift, April 23, 2024, https://skift.com/2024/04/23/jetblue-posts-a-loss-struggles-with-elevated-capacity/; American Economic Liberties Project, "Here We Go Again: Airline Mergers Beget More Mergers and Flyers, Workers, and Local Communities Can't Afford Alaska-Hawaiian," press release, December 4, 2023, https://www.economicliberties.us/press-release/here-we-go-again-airline-mergers-beget-more-mergers-and-flyers-workers-and-local-communities-cant-afford-alaska-hawaiian/; William J. McGee, "Before the Department of Justice and The Federal Trade Commission, Docket ID FTC-2022-0003: Comments Concerning the U.S. Airline Industry Response to 'Request for Information on Merger Enforcement,'" American Economic Liberties Project, April 2022, https://www.economicliberties.us/wp-content/uploads/2022/04/2022-04-20-AELP-DOJ-FTC-Airlines-McGee.pdf.

[57] Thomas Philippon, "The Economics and Politics of Market Concentration," The Reporter, December 1, 2019, https://www.nber.org/reporter/2019number4/economics-and-politics-market-concentration; Gustavo Grullon, Yelena Larkin, and Roni Michaely, "Are U.S. Industries Becoming More Concentrated?," Swiss Finance Institute, October 15, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612047.

[58] Matias Covarrubias, German Gutierrez, and Thomas Philippon, "From Good to Bad Concentration? US Industries over the Past 30 Years," New York University, CEPR, and NBER, 2019, https://www.journals.uchicago.edu/doi/full/10.1086/707169; Jan De Loecker, Jan Eeckhout, and Gabriel Unger, "The Rise of Market Power and the Macroeconomic Implications," May 2020, https://academic.oup.com/qje/article-abstract/135/2/561/5714769.

[59] Matias Covarrubias, German Gutierrez, and Thomas Philippon, "From Good to Bad Concentration? US Industries over the Past 30 Years," New York University, CEPR, and NBER, 2019, https://www.journals.uchicago.edu/doi/full/10.1086/707169; Gustavo Grullon, Yelena Larkin, and Roni Michaely, "Are U.S. Industries Becoming More Concentrated?," Swiss Finance Institute, October 15, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612047; Roosevelt Institute, "Fact Sheet: Stock Buybacks Are a Key Example of Extractive Corporate Power," October 2019, p. 1, https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Stock-Buybacks-key-example-of-extractive-corporate-power-Fact-Sheet-201910.pdf.

[60] Paul Guest, "The Impact of Mergers and Acquisitions on Executive Pay in the United Kingdom," September 2007, https://www.jbs.cam.ac.uk/wp-content/uploads/2023/05/cbrwp354.pdf.

[61] Yaniv Grinstein and Paul Hribar, "CEO Compensation and Incentives - Evidence from M&A Bonuses," July 2003, http://www.law.harvard.edu/programs/corp_gov/papers/04.grinstein.ceo-compensation.pdf.

workers, degrading the consumer experience and working conditions for remaining workers. In other words, the rest of us lose.

Accordingly, judges and enforcers should reject merge-to-compete arguments and instead apply Section 7 of the Clayton Act in a manner that is faithful to congressional intent to favor and incentivize growth by internal expansion rather than through harmful anti-competitive mergers.