ANTITRUST LAW, POLICY, AND PROCEDURE:

CASES, MATERIALS, PROBLEMS (8th edition)

2022 Supplement

E. Thomas Sullivan
President Emeritus and Professor of Law and Political Science, The University of Vermont.

Herbert Hovenkamp
James G. Dinan University Professor, University of Pennsylvania Carey Law School and the Wharton School

Howard A. Shelanski
Professor of Law, Georgetown Law

Christopher R. Leslie
Chancellor's Professor of Law, UC Irvine School of Law

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

Chapter 1: Introduction to the Competition Model

Insert at page 17, II. Common Law Legacies:

In a recent speech before the New York City Bar Association, the current Assistant Attorney General for the Antitrust Division, Jonathan Kanter, spoke on the goal of antitrust as one to protect competition. He noted: "antitrust law protects competition and the competitive process in service of both prosperity and freedom." In this context, he challenged the current "consumer welfare" standard by characterizing it as a distraction.

Kanter noted that versions of this standard "assert the antitrust laws were never intended to protect our democracy from corporate power, or to promote choice and opportunity for individuals and small businesses." This view argues that the antitrust laws were meant "to promote wealth and output but do nothing for the liberty of our nation," he states. He observed that the Sherman and Clayton Acts show a "profound concern with economic liberty, not merely as an economic concept but as a concept connected to the freedom of our nation."

Kanter reasoned that "competitively healthy markets offer more economic opportunity and less risk of corporate power dominating our democratic and social wellbeing." He also lamented the current reduction of antitrust "to econometric qualifications of the price or output effects." In addition, he asserted that the "consumer welfare" standard is problematic because it ignores "workers, farmers, and many other intended benefits and beneficiaries of the competitive economy."

The overriding problem for him with the consumer welfare standard apparently is that "it does not reflect the law as passed by Congress and interpreted by the courts." The goals of antitrust, he articulated, start and end with the protection of competition and the competitive process. He quoted Professor Milton Handler from Columbia University Law School that "the combination of a policy of minimal antitrust enforcement and the glorification of efficiency have reduced antitrust to [a] parlous condition."

In his definition of competition, Kanter started with the concept of rivalry including competition over price, but he also included "anything that causes somebody to choose one firm over another." By the competitive process, he meant that "rivalry plays out in the market among multiple competitors. It is charging lower prices so customers buy a good instead of a rival's or paying higher salaries, so you attract talent away from a competitor." He noted "freedom to choose drives competition between firms."

Kanter believes that innovation drives competitive markets. "Focusing on competition is a much more administrable standard than one that attempts to quantify consumer welfare effects." For him, it is time to "get back to first principles[,] …. recognizing that antitrust laws are not narrowly focused. "The focus should be "on competition and the competitive process with a range of benefits to consumers, workers, resiliency, and our democracy."

As the head of the Antitrust Division, Kanter is sounding a clarion call for the rejection of the "consumer welfare" standard as envisioned in Professor Robert Bork's influential treatise, *The Antitrust Paradox*. It is not clear from his remarks, however, what the alternative analytical standard and the details for enforcement and implementation might be for such a standard. But it is clear that Kanter urges more non-economic values as part of the antitrust analysis, where he sees today "underenforcement." It will be important to watch the enforcement discretion and case selections in the Biden administration, including new merger guidelines and other guidelines that will show enforcement insights by the Antitrust Division.

While the debate continues on consumer welfare versus general welfare standards, and the administrability of each, other antitrust voices argue that antitrust enforcement has a role to play in reducing economic inequality, and fighting inflation, an argument that goes back to the past century of the Progressive Era in the early 1900s and later into the New Deal period in the 1940s.

The progressive voices of today urge the use of antitrust enforcement to regulate monopolies, concentrations of power, and monopoly rents, which they see as suppressing innovation and labor wages, each leading to inequality due to too much dominant economic power.

Chapter 3. Special Problems of Antitrust Enforcement

[A] Tripartite Approach

I. Enforcement

[2] Federal Trade Commission

Insert at page 69 right before [3] Private Suits

The FTC can enforce its mandate to protect unfair methods of competition and unfair or deceptive acts of practices, as we have seen, through its own administrative proceedings or through district court actions. During 2021, the United States Supreme Court held that the Commission lacks authority to award equitable monetary relief, including restitution and disgorgement, under Section 13(b), which permits courts to issue permanent injunctions.

In that case, *AMG Capital Management v. Federal Trade Commission,* 141 S.Ct. 1341 (2021), the FTC filed a complaint directly in federal district court, alleging deceptive payday lending practices. The district court agreed with the FTC and issued a permanent injunction to prevent defendant from engaging in future violations of the act. In addition, the court, ordered the defendant, under section 13(b), to pay $1.27 bllion in restitution and disgorgement.

The problem, however, was that section 13(b) authorized only "permanent injunctions" and did not explicitly authorize monetary awards. Traditionally, the Commission used its normal administrative proceedings of securing monetary relief. The Court, without dissent, held such an approach through section 13(b) was foreclosed by structure and the history of the Act. Under section 13(b), the only relief allowable when the FTC proceeded directly in the district court is prospective injunctive relief, not retrospective monetary damages, such as restoration or disgorgement. Therefore, Section 13(b) was not available for the FTC to seek court ordered equitable monetary relief without first utilizing its traditional administrative hearing process under Sections 5 and 19 of the Act. Under those two latter sections, Congress "gave district courts the authority to impose limited monetary penalties and to award monetary relief in cases where the Commission [first] has issued cease and desist orders, i.e., where the Commission has engaged in administrative proceedings."

In short, Section 13(b) is not a substitute for first invoking Sections 5 and 19.

[3] Private Suits

[e] The Direct Purchaser Requirement and the Problem of Passing On

Insert at page 113 just before [f] "Business or Property"

Apple, Inc. v. Pepper, 139 S. Ct. 1514 (2019)

Justice KAVANAUGH delivered the opinion of the Court.

In 2007, Apple started selling iPhones. The next year, Apple launched the retail App Store, an electronic store where iPhone owners can purchase iPhone applications from Apple. Those "apps" enable iPhone owners to send messages, take photos, watch videos, buy clothes, order food, arrange transportation, purchase concert tickets, donate to charities, and the list goes on. "There's an app for that" has become part of the 21st-century American lexicon.

In this case, however, several consumers contend that Apple charges too much for apps. The consumers argue, in particular, that Apple has monopolized the retail market for the sale of apps and has unlawfully used its monopolistic power to charge consumers higher-than-competitive prices.

A claim that a monopolistic retailer (here, Apple) has used its monopoly to overcharge consumers is a classic antitrust claim. But Apple asserts that the consumer-plaintiffs in this case may not sue Apple because they supposedly were not "direct purchasers" from Apple under our decision in Illinois Brick Co. v. Illinois, 431 U.S. 720, 745–746, 97 (1977). We disagree. The plaintiffs purchased apps directly from Apple and therefore are direct purchasers under Illinois Brick. At this early pleadings stage of the litigation, we do not assess the merits of the plaintiffs' antitrust claims against Apple, nor do we consider any other defenses Apple might have. We merely hold that the Illinois Brick direct-purchaser rule does not bar these plaintiffs from suing Apple under the antitrust laws. We affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

I

In 2007, Apple began selling iPhones. In July 2008, Apple started the App Store. The App Store now contains about 2 million apps that iPhone owners can download. By contract and through technological limitations, the App Store is the only place where iPhone owners may lawfully buy apps.

For the most part, Apple does not itself create apps. Rather, independent app developers create apps. Those independent app developers then contract with Apple to make the apps available to iPhone owners in the App Store.

Through the App Store, Apple sells the apps directly to iPhone owners. To sell an app in the App Store, app developers must pay Apple a $ 99 annual membership fee. Apple requires that the retail sales price end in $ 0.99, but otherwise allows the app developers to set the retail price. Apple keeps 30 percent of the sales price, no matter what the sales price might be. In other words, Apple pockets a 30 percent commission on every app sale.

In 2011, four iPhone owners sued Apple. They allege that Apple has unlawfully monopolized "the iPhone apps aftermarket." The plaintiffs allege that, via the App Store, Apple locks iPhone owners "into buying apps only from Apple and paying Apple's 30% fee, even if" the iPhone owners wish "to buy apps elsewhere or pay less." According to the complaint, that 30 percent commission is "pure profit" for Apple and, in a competitive environment with other retailers, "Apple would be under considerable pressure to substantially lower its 30% profit margin." The plaintiffs allege that in a competitive market, they would be able to "choose between Apple's high-priced App Store and less costly alternatives." And they allege that they have "paid more for their iPhone apps than they would have paid in a competitive market."

Apple moved to dismiss the complaint, arguing that the iPhone owners were not direct purchasers from Apple and therefore may not sue. In Illinois Brick, this Court held that direct purchasers may sue antitrust violators, but also ruled that indirect purchasers may not sue. The District Court agreed with Apple and dismissed the complaint. According to the District Court, the iPhone owners were not direct purchasers from Apple because the app developers, not Apple, set the consumers' purchase price.

The Ninth Circuit reversed. The Ninth Circuit concluded that the iPhone owners were direct purchasers under *Illinois Brick* because the iPhone owners purchased apps directly from Apple. According to the Ninth Circuit, Illinois Brick means that a consumer may not sue an alleged monopolist who is two or more steps removed from the consumer in a vertical distribution chain. See In re Apple iPhone Antitrust Litig., 846 F. 3d 313, 323 (2017). Here, however, the consumers purchased directly from Apple, the alleged monopolist. Therefore, the Ninth Circuit held that the iPhone owners could sue Apple for allegedly monopolizing the sale of iPhone apps and charging higher-than-competitive prices.

II

A

The plaintiffs' allegations boil down to one straightforward claim: that Apple exercises monopoly power in the retail market for the sale of apps and has unlawfully used its monopoly power to force iPhone owners to pay Apple higher-than-competitive prices for apps. According to the plaintiffs, when iPhone owners want to purchase an app, they have only two options: (1) buy the app from Apple's App Store at a higher-than-competitive price or (2) do not buy the app at all. Any iPhone owners who are dissatisfied with the selection of apps available in the App Store or with the price of the apps available in the App Store are out of luck, or so the plaintiffs allege.

The sole question presented at this early stage of the case is whether these consumers are proper plaintiffs for this kind of antitrust suit—in particular, our precedents ask, whether the consumers were "direct purchasers" from Apple. Illinois Brick. It is undisputed that the iPhone owners bought the apps directly from Apple. Therefore, under Illinois Brick, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization.

That straightforward conclusion follows from the text of the antitrust laws and from our precedents.

First is text: Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 26 Stat. 209, 15 U.S.C. § 2. Section 4 of the Clayton Act in turn provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... the defendant ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731, 15 U.S.C. § 15(a) (emphasis added). The broad text of § 4 "any person" who has been "injured" by an antitrust violator may sue—readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer.

Second is precedent: Applying § 4, we have consistently stated that "the immediate buyers from the alleged antitrust violators" may maintain a suit against the antitrust violators. Kansas v. UtiliCorp United Inc., 497 U.S. 199, 207, (1990); see also *Illinois Brick*, 431 U.S. at 745–746. At the same time, incorporating principles of proximate cause into § 4, we have ruled that indirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Our decision in *Illinois Brick* established a bright-line rule that authorizes suits by direct purchasers but bars suits by indirect purchasers.

The facts of *Illinois Brick* illustrate the rule. Illinois Brick Company manufactured and distributed concrete blocks. Illinois Brick sold the blocks primarily to masonry contractors, and those contractors in turn sold masonry structures to general contractors. Those general contractors in turn sold their services for larger construction projects to the State of Illinois, the ultimate consumer of the blocks.

The consumer State of Illinois sued the manufacturer Illinois Brick. The State alleged that Illinois Brick had engaged in a conspiracy to fix the price of concrete blocks. According to the complaint, the State paid more for the concrete blocks than it would have paid absent the price-fixing conspiracy. The monopoly overcharge allegedly flowed all the way down the distribution chain to the ultimate consumer, who was the State of Illinois.

This Court ruled that the State could not bring an antitrust action against Illinois Brick, the alleged violator, because the State had not purchased concrete blocks directly from Illinois Brick. The proper plaintiff to bring that claim against Illinois Brick, the Court stated, would be an entity that had purchased directly from Illinois Brick.

The bright-line rule of *Illinois Brick*, as articulated in that case and as we reiterated in *UtiliCorp*, means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. By contrast, direct purchasers—that is, those who are "the immediate buyers from the alleged antitrust violators"—may sue. *UtiliCorp*, 497 U.S. at 207.

For example, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule of *Illinois Brick*. See Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469, 481–482 (C.A.7 2002) (Wood, J.)

In this case, unlike in *Illinois Brick*, the iPhone owners are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. There is no intermediary in the distribution chain between Apple and the consumer. The iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator. The iPhone owners pay the alleged overcharge directly to Apple. The absence of an intermediary is dispositive. Under Illinois Brick, the iPhone owners are direct purchasers from Apple and are proper plaintiffs to maintain this antitrust suit.

B

All of that seems simple enough. But Apple argues strenuously against that seemingly simple conclusion, and we address its arguments carefully. For this kind of retailer case, Apple's theory is that Illinois Brick allows consumers to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party. Apple says that its theory accords with the economics of the transaction. Here, Apple argues that the app developers, not Apple, set the retail price charged to consumers, which according to Apple means that the consumers may not sue Apple.

We see three main problems with Apple's "who sets the price" theory.

First, Apple's theory contradicts statutory text and precedent. As we explained above, the text of § 4 broadly affords injured parties a right to sue under the antitrust laws. And our precedent in Illinois Brick established a bright-line rule where direct purchasers such as the consumers here may sue antitrust violators from whom they purchased a good or service. Illinois Brick, as we read the opinion, was not based on an economic theory about who set the price. Rather, Illinois Brick sought to ensure an effective and efficient litigation scheme in antitrust cases. To do so, the Court drew a bright line that allowed direct purchasers to sue but barred indirect purchasers from suing. When there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue. The Illinois Brick bright-line rule is grounded on the "belief that simplified administration improves antitrust enforcement." 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, Antitrust Law ¶346e, p. 194 (4th ed. 2014) (Areeda & Hovenkamp). Apple's theory would require us to rewrite the rationale of Illinois Brick and to gut the longstanding bright-line rule.

To the extent that *Illinois Brick* leaves any ambiguity about whether a direct purchaser may sue an antitrust violator, we should resolve that ambiguity in the direction of the statutory text. And under the text, direct purchasers from monopolistic retailers are proper plaintiffs to sue those retailers.

Second, in addition to deviating from statutory text and precedent, Apple's proposed rule is not persuasive economically or legally. Apple's effort to transform *Illinois Brick* from a direct-purchaser rule to a "who sets the price" rule would draw an arbitrary and unprincipled line among retailers based on retailers' financial arrangements with their manufacturers or suppliers.

In the retail context, the price charged by a retailer to a consumer is often a result (at least in part) of the price charged by the manufacturer or supplier to the retailer, or of negotiations between the manufacturer or supplier and the retailer. Those agreements between manufacturer or supplier and retailer may take myriad forms, including for example a markup pricing model or a commission pricing model. In a traditional markup pricing model, a hypothetical monopolistic retailer might pay $ 6 to the manufacturer and then sell the product for $ 10, keeping $ 4 for itself. In a commission pricing model, the retailer might pay nothing to the manufacturer; agree with the manufacturer that the retailer will sell the product for $ 10 and keep 40 percent of the sales price; and then sell the product for $ 10, send $ 6 back to the manufacturer, and keep $ 4. In those two different pricing scenarios, everything turns out to be economically the same for the manufacturer, retailer, and consumer.

Yet Apple's proposed rule would allow a consumer to sue the monopolistic retailer in the former situation but not the latter. In other words, under Apple's rule a consumer could sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service. But a consumer could not sue a monopolistic retailer when the manufacturer or supplier set the retail price and the retailer took a commission on each sale.

Apple's line-drawing does not make a lot of sense, other than as a way to gerrymander Apple out of this and similar lawsuits. In particular, we fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer and has paid a higher-than-competitive price because of the retailer's unlawful monopolistic conduct. As the Court of Appeals aptly stated, "the distinction between a markup and a commission is immaterial." 846 F. 3d at 324. A leading antitrust treatise likewise states: "Denying standing because 'title' never passes to a broker is an overly lawyered approach that ignores the reality that a distribution system that relies on brokerage is economically indistinguishable from one that relies on purchaser-resellers." 2A Areeda & Hovenkamp ¶345, at 183. If a retailer has engaged in unlawful monopolistic conduct that has caused consumers to pay higher-than-competitive prices, it does not matter how the retailer structured its relationship with an upstream manufacturer or supplier—whether, for example, the retailer employed a markup or kept a commission.

To be sure, if the monopolistic retailer's conduct has not caused the consumer to pay a higher-than-competitive price, then the plaintiff's damages will be zero. Here, for example, if the competitive commission rate were 10 percent rather than 30 percent but Apple could prove that app developers in a 10 percent commission system would always set a higher price such that consumers would pay the same retail price regardless of whether Apple's commission was 10 percent or 30 percent, then the consumers' damages would presumably be zero. But we cannot assume in all cases—as Apple would necessarily have us do—that a monopolistic retailer who keeps a commission does not ever cause the consumer to pay a higher-than-competitive price. We find no persuasive legal or economic basis for such a blanket assertion.

In short, we do not understand the relevance of the upstream market structure in deciding whether a downstream consumer may sue a monopolistic retailer. Apple's rule would elevate form (what is the precise arrangement between manufacturers or suppliers and retailers?) over substance (is the consumer paying a higher price because of the monopolistic retailer's actions?). If the retailer's unlawful monopolistic conduct caused a consumer to pay the retailer a higher-than-competitive price, the consumer is entitled to sue the retailer under the antitrust laws.

Third, if accepted, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement.

Consider a traditional supplier-retailer relationship, in which the retailer purchases a product from the supplier and sells the product with a markup to consumers. Under Apple's proposed rule, a retailer, instead of buying the product from the supplier, could arrange to sell the product for the supplier without purchasing it from the supplier. In other words, rather than paying the supplier a certain price for the product and then marking up the price to sell the product to consumers, the retailer could collect the price of the product from consumers and remit only a fraction of that price to the supplier.

That restructuring would allow a monopolistic retailer to insulate itself from antitrust suits by consumers, even in situations where a monopolistic retailer is using its monopoly to charge higher-than-competitive prices to consumers. We decline to green-light monopolistic retailers to exploit their market position in that way. We refuse to rubber-stamp such a blatant evasion of statutory text and judicial precedent.

In sum, Apple's theory would disregard statutory text and precedent, create an unprincipled and economically senseless distinction among monopolistic retailers, and furnish monopolistic retailers with a how-to guide for evasion of the antitrust laws.

C

In arguing that the Court should transform the direct-purchaser rule into a "who sets the price" rule, Apple insists that the three reasons that the Court identified in *Illinois Brick* for adopting the direct-purchaser rule apply to this case—even though the consumers here (unlike in *Illinois Brick*) were direct purchasers from the alleged monopolist. The Illinois Brick Court listed three reasons for barring indirect-purchaser suits: (1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants.

As we said in *UtiliCorp*, however, the bright-line rule of *Illinois Brick* means that there is no reason to ask whether the rationales of *Illinois Brick* "apply with equal force" in every individual case. 497 U.S. at 216. We should not engage in "an unwarranted and counterproductive exercise to litigate a series of exceptions."

But even if we engage with this argument, we conclude that the three Illinois Brick rationales —whether considered individually or together—cut strongly in the plaintiffs' favor here, not Apple's.

First, Apple argues that barring the iPhone owners from suing Apple will better promote effective enforcement of the antitrust laws. Apple posits that allowing only the upstream app developers—and not the downstream consumers—to sue Apple would mean more effective enforcement of the antitrust laws. We do not agree. Leaving consumers at the mercy of monopolistic retailers simply because upstream suppliers could also sue the retailers makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases.

Second, Apple warns that calculating the damages in successful consumer antitrust suits against monopolistic retailers might be complicated. It is true that it may be hard to determine what the retailer would have charged in a competitive market. Expert testimony will often be necessary. But that is hardly unusual in antitrust cases. Illinois Brick is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated. Illinois Brick surely did not wipe out consumer antitrust suits against monopolistic retailers from whom the consumers purchased goods or services at higher-than-competitive prices. Moreover, the damages calculation may be just as complicated in a retailer markup case as it is in a retailer commission case. Yet Apple apparently accepts consumers suing monopolistic retailers in a retailer markup case. If Apple accepts that kind of suit, then Apple should also accept consumers suing monopolistic retailers in a retailer commission case.

Third, Apple claims that allowing consumers to sue will result in "conflicting claims to a common fund—the amount of the alleged overcharge." *Illinois Brick*, 431 U.S. at 737. Apple is incorrect. This is not a case where multiple parties at different levels of a distribution chain are trying to all recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain; Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 483–484(1968). If the iPhone owners prevail, they will be entitled to the full amount of the unlawful overcharge that they paid to Apple. The overcharge has not been passed on by anyone to anyone. Unlike in Illinois Brick, there will be no need to "trace the effect of the overcharge through each step in the distribution chain." 431 U.S. at 741.

It is true that Apple's alleged anticompetitive conduct may leave Apple subject to multiple suits by different plaintiffs. But Illinois Brick did not purport to bar multiple liability that is unrelated to passing an overcharge down a chain of distribution. Basic antitrust law tells us that the "mere fact that an antitrust violation produces two different classes of victims hardly entails that their injuries are duplicative of one another." 2A Areeda & Hovenkamp ¶339d, at 136. Multiple suits are not atypical when the intermediary in a distribution chain is a bottleneck monopolist or monopsonist (or both) between the manufacturer on the one end and the consumer on the other end. A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers—when the retailer's unlawful conduct affects both the downstream and upstream markets.

Here, some downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a "common fund," as that term was used in Illinois Brick. The consumers seek damages based on the difference between the price they paid and the competitive price. The app developers would seek lost profits that they could have earned in a competitive retail market. Illinois Brick does not bar either category of suit.

In short, the three Illinois Brick rationales do not persuade us to remake Illinois Brick and to bar direct-purchaser suits against monopolistic retailers who employ commissions rather than markups. The plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. That is why we have antitrust law.

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Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, "protecting consumers from monopoly prices" has been "the central concern of antitrust." 2A Areeda & Hovenkamp ¶345, at 179. The consumers here purchased apps directly from Apple, and they allege that Apple used its monopoly power over the retail apps market to charge higher-than-competitive prices. Our decision in Illinois Brick does not bar the consumers from suing Apple for Apple's allegedly monopolistic conduct. We affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Justice GORSUCH, with whom THE CHIEF JUSTICE, Justice THOMAS, and Justice ALITO join, dissenting.

More than 40 years ago, in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), this Court held that an antitrust plaintiff can't sue a defendant for overcharging someone else who might (or might not) have passed on all (or some) of the overcharge to him. Illinois Brick held that these convoluted "pass on" theories of damages violate traditional principles of proximate causation and that the right plaintiff to bring suit is the one on whom the overcharge immediately and surely fell. Yet today the Court lets a pass-on case proceed. It does so by recasting Illinois Brick as a rule forbidding only suits where the plaintiff does not contract directly with the defendant. This replaces a rule of proximate cause and economic reality with an easily manipulated and formalistic rule of contractual privity. That's not how antitrust law is supposed to work, and it's an uncharitable way of treating a precedent which—whatever its flaws—is far more sensible than the rule the Court installs in its place.

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II

The lawsuit before us depends on just the sort of pass-on theory that *Illinois Brick* forbids. The plaintiffs bought apps from third-party app developers (or manufacturers) in Apple's retail Internet App Store, at prices set by the developers. The lawsuit alleges that Apple is a monopolist retailer and that the 30% commission it charges developers for the right to sell through its platform represents an anticompetitive price. The problem is that the 30% commission falls initially on the developers. So if the commission is in fact a monopolistic overcharge, the developers are the parties who are directly injured by it. Plaintiffs can be injured only if the developers are able and choose to pass on the overcharge to them in the form of higher app prices that the developers alone control. Plaintiffs admitted as much in the district court, where they described their theory of injury this way: "[I]f Apple tells the developer ... we're going to take this 30 percent commission ... what's the developer going to do? The developer is going to increase its price to cover Apple's ... demanded profit."

Because this is exactly the kind of "pass-on theory" *Illinois Brick* rejected, it should come as no surprise that the concerns animating that decision are also implicated. Like other pass-on theories, plaintiffs' theory will necessitate a complex inquiry into how Apple's conduct affected third-party pricing decisions. And it will raise difficult questions about apportionment of damages between app developers and their customers, along with the risk of duplicative damages awards. If anything, plaintiffs' claims present these difficulties even more starkly than did the claims at issue in *Illinois Brick*.

Consider first the question of causation. To determine if Apple's conduct damaged plaintiffs at all (and if so, the magnitude of their damages), a court will first have to explore whether and to what extent each individual app developer was able—and then opted—to pass on the 30% commission to its consumers in the form of higher app prices. Sorting this out, if it can be done at all, will entail wrestling with " 'complicated theories' " about "how the relevant market variables would have behaved had there been no overcharge." *Illinois Brick*, 431 U.S. at 741. Will the court hear testimony to determine the market power of each app developer, how each set its prices, and what it might have charged consumers for apps if Apple's commission had been lower? Will the court also consider expert testimony analyzing how market factors might have influenced developers' capacity and willingness to pass on Apple's alleged monopoly overcharge? And will the court then somehow extrapolate its findings to all of the tens of thousands of developers who sold apps through the App Store at different prices and times over the course of years?

This causation inquiry will be complicated further by Apple's requirement that all app prices end in $ 0.99. As plaintiffs acknowledge, this rule has caused prices for the "vast majority" of apps to "cluster" at exactly $ 0.99. And a developer charging $ 0.99 for its app can't raise its price by just enough to recover the 30-cent commission. Instead, if the developer wants to pass on the commission to consumers, it has to more than double its price to $ 1.99 (doubling the commission in the process), which could significantly affect its sales. In short, because Apple's 99-cent rule creates a strong disincentive for developers to raise their prices, it makes plaintiffs' pass-on theory of injury even harder to prove. Yet the court will have to consider all of this when determining what damages, if any, plaintiffs suffered as a result of Apple's allegedly excessive 30% commission.

Plaintiffs' claims will also necessitate "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," including both consumers and app developers. *Illinois Brick*, 431 U.S. at 737. If, as plaintiffs contend, Apple's 30% commission is a monopolistic overcharge, then the app developers have a claim against Apple to recover whatever portion of the commission they did not pass on to consumers. Before today, Hanover Shoe would have prevented Apple from reducing its liability to the developers by arguing that they had passed on the overcharge to consumers. But the Court's holding that Illinois Brick doesn't govern this situation surely must mean Hanover Shoe doesn't either. So courts will have to divvy up the commissions Apple collected between the developers and the consumers. To do that, they'll have to figure out which party bore what portion of the overcharge in every purchase. And if the developers bring suit separately from the consumers, Apple might be at risk of duplicative damages awards totaling more than the full amount it collected in commissions. To avoid that possibility, it may turn out that the developers are necessary parties who will have to be joined in the plaintiffs' lawsuit. See Fed. Rule Civ. Proc. 19(a)(1)(B); Illinois Brick, 431 U.S. at 739(explaining that "[t]hese absent potential claimants would seem to fit the classic definition of 'necessary parties,' for purposes of compulsory joinder").

III

The United States and its antitrust regulators agree with all of this, so how does the Court reach such a different conclusion? Seizing on *Illinois Brick*'s use of the shorthand phrase "direct purchasers" to describe the parties immediately injured by the monopoly overcharge in that case, the Court (re)characterizes *Illinois Brick* as a rule that anyone who purchases goods directly from an alleged antitrust violator can sue, while anyone who doesn't, can't. Under this revisionist version of *Illinois Brick*, the dispositive question becomes whether an "intermediary in the distribution chain" stands between the plaintiff and the defendant. And because the plaintiff app purchasers in this case happen to have purchased apps directly from Apple, the Court reasons, they may sue.

This exalts form over substance. Instead of focusing on the traditional proximate cause question where the alleged overcharge is first (and thus surely) felt, the Court's test turns on who happens to be in privity of contract with whom. But we've long recognized that antitrust law should look at "the economic reality of the relevant transactions" rather than "formal conceptions of contract law." United States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199, 208 (1968). And this case illustrates why. To evade the Court's test, all Apple must do is amend its contracts. Instead of collecting payments for apps sold in the App Store and remitting the balance (less its commission) to developers, Apple can simply specify that consumers' payments will flow the other way: directly to the developers, who will then remit commissions to Apple. No antitrust reason exists to treat these contractual arrangements differently, and doing so will only induce firms to abandon their preferred—and presumably more efficient—distribution arrangements in favor of less efficient ones, all so they might avoid an arbitrary legal rule. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 763, 772–774 (1984) (rejecting an " 'artificial distinction' " that "serves no valid antitrust goals but merely deprives consumers and producers of the benefits" of a particular business model).

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Notes and Questions

1. Does the Court in *Apple* clarify and simplify the "direct purchaser" rule of *Illinois Brick*? Compare Justice Kavanaugh's and the dissent's discussion and analysis on the test "who sets the price" versus "who are the immediate buyers from the antitrust violators". Is the dissent correct that the holding and reasoning in *Apple* is a formalistic rule of contract law privity over a proximate causation test? Is the dissent's preference for an "economic reality" standard subject to subjective interpretation rather than empirical evidence on the dynamics of the marketplace exchange?

2. The *Illinois Brick* decision itself and much of the case law and commentary since then has focused on the problem of passing on overcharge damages. Is the Court's approach in *Apple* radically different? In any event, is the overcharge even theoretically the correct measure of damages for a business that has absorbed part of the overcharge but passed on a part as well. In fact, many retailers use standard markup formulas that would end up passing on the entire higher price. Their real injury comes from loss of sales. See Herbert Hovenkamp, Apple vs. Pepper: Rationalizing Antitrust's Indirect Purchaser Rule, 120 Col. L. Rev. Forum 14 (2020).

3. Many amicus briefs were filed in support of the plaintiffs that asked the Court to overturn *Illinois Brick*. Would that have made future predications of *Illinois Brick*'s application easier?

4. After reading both *Illinois Brick* and now *Apple*, do you think they may not apply to injunctive relief claims, meaning that a claim for injunctive relief is an exception to *Illinois Brick*'s direct purchaser limitations?

[A] Tripartite Approach

[g] Antitrust Injury

Insert at page 135 (just before Section [h], Standing to Sue)

The Fourth Circuit held in 2021 that the plaintiff was able to show requisite antitrust injury in a Section 7 Clayton Act claim alleging a merger violation and a breach of contract. The plaintiff, Steves and Sons, a customer of JELD-WEN that manufactured "molded doors", alleged that the merger between JELD-WEN and a competitor, CMI, violated Section 7 because it allowed the resulting manufacturer "to charge higher prices, offer inferior products and customer service, and eventually to try to kill off [the plaintiff] Steves by refusing to sell it" [the product]. Plaintiff sought money damages for past and future losses as well as equitable divestiture of the companies that were merged. *Steves and Sons, Inc. v. JELD-WEN, Inc.,* 988 F3d 690 (4th Cir. 2021).

The Defendant's motion to dismiss asserted that, as a matter of law, Steves was unable to show antitrust injury. To recover on the antitrust claim, plaintiff Steves needed to prove that the merger may substantially lessen competition as a result of an antitrust effect due to the merger. Defendant JELD-WEN argued that plaintiff's injury was purely "contractual,"

The Fourth Circuit held that "antitrust injury" requirement was a decision for the jury to decide and found the jury's finding of "antitrust injury" was reasonable under the facts as was the "standing" of the plaintiffs to bring the suit. This was so, the court ruled, because the plaintiff's loss "reflected the anticompetitive effect" of JELD-WEN's conduct. The court cited *Brunswick and Cargill* for the rule that antitrust injury requires 1) "the 'causal connection' between the plaintiff's injury and an antitrust violation and whether the plaintiff's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws."

II. Additional Antitrust Defenses

[A] First Amendment Protections

Insert at page 166 before [B] In Pari Delicto

A recent case in 2020 from the Seventh Circuit has reaffirmed the importance of an immunity defense under the *Noerr-Pennington* doctrine. In *U.S. Futures Exchange v. Board of Trade of the City,* 953 F.3d 955 (2020), the court held that the immunity applies to businesses and other associations joining together to petition legislative bodies, regulatory agencies, and courts for action if the claims are not fraudulent or a sham lawsuit.

The context for the case involved commodities in futures markets utilizing traditional floor trading models and electronic-based futures trading platforms. Before trading operations could be changed, approval was necessary by the Commodities Future Trading Commission.

The Commission approved the requested change after much delay. Ultimately, trading on the new exchange flopped, and suit followed by the plaintiff, U.S. Futures Exchange, claiming that the opposition to the new trading platform filed "frivolous objections" in order to stall the regulatory approval. The district court ruled in favor of the defendant, the Chicago Board of Trade, under the *Noerr- Pennington* immunity doctrine. The doctrine, with its First Amendment origins in the Petition Clause, generally does not permit an antitrust claim when the defendant is exercising its rights to petition the government to reach a decision in its favor --even if the result would achieve a monopoly business. Exceptions to immunity apply, however, when petitioners present fraudulent misrepresentations or bring sham lawsuits.

In this case, the Seventh Circuit rejected the plaintiff's claim that an exception to the *Noerr-Pennington* doctrine was present. The court ruled that neither exception (fraudulent misrepresentation or sham litigation) applied. Drawing distinctions among legislative and political settings where immunity is most absolute with an adjudicative proceeding, the court noted that the Commodities Commission review in this case was decidedly legislative or political in nature and less agency adjudication; thus, the two exceptions to immunity did not apply. The sham, abusive process, or baseless claims exceptions did not apply in the decision process because the efforts were found to be more "outcome driven" and "reasonably aimed" at achieving a favorable outcome during the application process. Nor was there any "wide-ranging" patterns" of abuse, delay, or baseless claims that might constitute a sham. See also *Westlake Services v. Credit Acceptance Corporation, 800* Fed.Appx. *505 (9th Cir. 2020).*

[C] at page 189 after Note 6 and before [D] Contribution and Claim Reduction.

1. *Divestiture in a Private Merger Action*. In the Fourth Circuit's *Steves and Sons* case, discussed above, the court also ruled that divestiture was an appropriate remedy for a merger causing higher prices, even in a private party enforcement action. The court was applying Section 16 of the Clayton Act. The court noted that this case was the first to apply divestiture as an equitable remedy in a successful, plaintiff case, and the case served as a "poster child for divestiture". *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 988 F3d 690 (4th Cir. 2021).

Regarding the plaintiff's claim for future lost profits, the Circuit Court set aside the district court's award, since the claim was "meant to be a backup remedy in case divesture doesn't pan out." With the divestiture order upheld, the Court found that the claim for future damages was not "ripe" for determination. So was this simply a way of saying that divestiture and lost future problems were alternative remedies?

Chapter 4. Cartels and Other Joint Conduct by Competitors

I. Horizontal Restraints
[B] Price Fixing
[3] Data Dissemination and Information Exchanges

***Insert at page 235 before Problem 4.1*:**

5. In criminal antitrust cases, the role of intent evidence diminishes when the defendant's alleged crime is a per se violation. In *United States v. Aiyer*, 33 F.4th 97 (2d Cir. 2022), the defendant was criminally convicted of conspiring to restrain trade in the foreign currency exchange market by manipulating exchange rates with other currency traders (who had already pled guilty and served as cooperating witnesses against the defendant). Among his defenses on appeal, the defendant argued that the district court improperly denied the defendant's request to introduce evidence that his conduct did not have anticompetitive effects. The Second Circuit rejected the defendant's argument because the conspiracy at issue was per se illegal and "restraints on trade that are subject to the *per se* rule, such as price fixing and bid rigging, are *categorically unreasonable*, such that proof of reasonableness—which is to say, a lack of anticompetitive effects and/or the presence of procompetitive benefits—is not required." *Id*. at 123.
The defendant separately asserted that evidence regarding anticompetitive effects was admissible to show a lack of criminal intent. The Second Circuit reasoned that the presence of anticompetitive effects was relevant to the element of intent in Gypsum because the agreement to exchange price information in *Gypsum* was evaluated under the rule of reason. In contrast, when a criminal antitrust conspiracy is per se illegal, anticompetitive effects are immaterial "and, thus, as to intent, the government was required to prove nothing more than that [the defendant] intentionally engaged in a conspiracy to fix prices and/or rig bids." *Id*. at 125. In per se cases, the government need not prove that the "defendant in a criminal antitrust case was consciously aware that anticompetitive effects would most likely result from his alleged misconduct." *Id*. The court reasoned that a criminal defendant in a per se case "cannot use the element of intent as a backdoor" to introduce the issue of competitive effects to the jury. *Id*. at 126.

I. Horizontal Restraints
[B] Price Fixing
[4] The Meaning and Scope of the Rule of Reason

Insert at page 264 before NCAA case:

6. The Tenth Circuit has cited *Arizona v. Maricopa County* for the proposition that "[t]he per se rule is not a different cause of action than the rule of reason, but rather only an evidentiary shortcut through the rule of reason morass." *United States v. Kemp & Assocs., Inc*., 907 F.3d 1264, 1272 (10th Cir. 2018). The per se rule and the rule of reason are simply two different ways for a plaintiff to prove that the defendants' agreement constitutes an unreasonable restraint of trade. Even so, it is not uncommon for antitrust plaintiffs to plead a per se violation and a rule of reason violation based on the same underlying conspiracy. This is essentially a form of pleading in the alternative. A court would not allow a plaintiff to recover antitrust damages on both claims if they are based on the same underlying conspiracy.

***Insert at page 277 before O'Bannon case*:**

13. In *In re Processed Egg Products Antitrust Litigation*, 962 F.3d 719 (3d Cir. 2020), the plaintiffs claimed that egg producers violated Section One of the Sherman Act by conspiring to increase egg prices through three strategies: "(1) early slaughtering of hens and similar supply-reducing steps; (2) creation of an animal-welfare program that was actually designed to reduce the egg supply; and (3) coordinated exports of eggs." The plaintiffs argued that because the conspiracy entailed a horizontal agreement to reduce supply in order to increase price, the per se rule should apply. The district court disaggregated the three components of the conspiracy and held that because the animal-welfare program should be judged under the rule of reason, then so should the entire Section One claim. At trial, the jury found that the defendants participated in "a single overarching conspiracy" to reduce supply, but that the conspiracy did not impose "an unreasonable restraint on supply." On appeal, the plaintiffs argued that because "the defendants had engaged in a single, overarching conspiracy, all of the defendants' conduct must be evaluated under a single standard," which should be the per se rule because the defendants conspired to reduce supply and increase price. The Third Circuit rejected this argument, concluding that "[w]hen different stratagems are alleged to have furthered an antitrust conspiracy, the court is free to determine which analytical standard should apply to each." The appellate court reasoned that a contrary rule would impermissibly allow a plaintiff with rule of reason claims to "add[] a single allegation of behavior that is anticompetitive *per se*, [and] demand *per se* analysis of the whole." Do you agree?

***Insert at page 308 after Problem 4.6*:**

National Collegiate Athletic Association v. Alston,
141 S. Ct. 2141 (June 21, 2021)

Justice Gorsuch delivered the opinion of the Court.

In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces "yield the best allocation" of the Nation's resources. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 104, n. 27 (1984). The plaintiffs before us brought this lawsuit alleging that the National Collegiate Athletic Association (NCAA) and certain of its member institutions violated this policy by agreeing to restrict the compensation colleges and universities may offer the student-athletes who play for their teams. After amassing a vast record and conducting an exhaustive trial, the district court issued a 50-page opinion that cut both ways. The court refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court struck down NCAA rules limiting the education-related benefits schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships. Before us, the student-athletes do not challenge the district court's judgment. But the NCAA does. In essence, it seeks immunity from the normal operation of the antitrust laws and argues, in any event, that the district court should have approved all of its existing restraints. We took this case to consider those objections.

I

A

From the start, American colleges and universities have had a complicated relationship with sports and money. … Colleges offered all manner of compensation to talented athletes. Yale reportedly lured a tackle named James Hogan with free meals and tuition, a trip to Cuba, the exclusive right to sell scorecards from his games—and a job as a cigarette agent for the American Tobacco Company. [co] The absence of academic residency requirements gave rise to "'tramp athletes'" who "roamed the country making cameo athletic appearances, moving on whenever and wherever the money was better." [co] One famous example was a law student at West Virginia University—Fielding H. Yost—"who, in 1896, transferred to Lafayette as a freshman just in time to lead his new teammates to victory against its arch-rival, Penn." [co]...

By 1905, though, a crisis emerged. While college football was hugely popular, it was extremely violent. Plays like the flying wedge and the players' light protective gear led to 7 football fatalities in 1893, 12 deaths the next year, and 18 in 1905. [co] President Theodore Roosevelt responded by convening a meeting between Harvard, Princeton, and Yale to review the rules of the game, a gathering that ultimately led to the creation of what we now know as the NCAA. [co] Organized primarily as a standard-setting body, the association also expressed a view at its founding about compensating college athletes—admonishing that "[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession." Intercollegiate Athletic Association of the United States Constitution By-Laws, Art. VII, § 3 (1906); [co].

Reality did not always match aspiration. More than two decades later, the Carnegie Foundation produced a report on college athletics that found them still "sodden with the commercial and the material and the vested interests that these forces have created." H. Savage, The Carnegie Foundation for the Advancement of Teaching, American College Athletics Bull. 23, p. 310 (1929). Schools across the country sought to leverage sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. …

The commercialism extended to the market for student-athletes. … In 1948, the NCAA … adopted the "Sanity Code." [co] The code reiterated the NCAA's opposition to "promised pay in any form." [co] But for the first time the code also authorized colleges and universities to pay athletes' tuition. [co] And it created a new enforcement mechanism—providing for the "suspension or expulsion" of "proven offenders." [co] To some, these changes sought to substitute a consistent, above-board compensation system for the varying under-the-table schemes that had long proliferated. To others, the code marked "the beginning of the NCAA behaving as an effective cartel," by enabling its member schools to set and enforce "rules that limit the price they have to pay for their inputs (mainly the 'student-athletes')." Zimbalist 10.

The rules regarding student-athlete compensation have evolved ever since. In 1956, the NCAA expanded the scope of allowable payments to include room, board, books, fees, and "cash for incidental expenses such as laundry." [co] In 1974, the NCAA began permitting paid professionals in one sport to compete on an amateur basis in another. [co] In 2014, the NCAA "announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance." *O'Bannon* v. *National Collegiate Athletic Assn.*, 802 F. 3d 1049, 1054–1055 (CA9 2015). …

In recent years, changes have continued. The NCAA has created the "Student Assistance Fund" and the "Academic Enhancement Fund" to "assist student-athletes in meeting financial needs," "improve their welfare or academic support," or "recognize academic achievement." *Id.*, at 1072. These funds have supplied money to student-athletes for "postgraduate scholarships" and "school supplies," as well as "benefits that are not related to education," such as "loss-of-value insurance premiums," "travel expenses," "clothing," and "magazine subscriptions." *Id.*, at 1072, n. 15. In 2018, the NCAA made more than $84 million available through the Student Activities Fund and more than $48 million available through the Academic Enhancement Fund. *Id.*, at 1072. Assistance may be provided in cash or in kind, and there is no limit to the amount any particular student-athlete may receive. *Id.*, at 1073. Since 2015, disbursements to individual students have sometimes been tens of thousands of dollars above the full cost of attendance. *Ibid.*

The NCAA has also allowed payments "'incidental to athletics participation,'" including awards for "participation or achievement in athletics" (like "qualifying for a bowl game") and certain "payments from outside entities" (such as for "performance in the Olympics"). *Id.,* at 1064, 1071, 1074. The NCAA permits its member schools to award up to (but no more than) two annual "Senior Scholar Awards" of $10,000 for students to attend graduate school after their athletic eligibility expires. *Id.*, at 1074. Finally, the NCAA allows schools to fund travel for student-athletes' family members to attend "certain events." *Id.*, at 1069.

Over the decades, the NCAA has become a sprawling enterprise. Its membership comprises about 1,100 colleges and universities, organized into three divisions. *Id.*, at 1063. Division I teams are often the most popular and attract the most money and the most talented athletes. Currently, Division I includes roughly 350 schools divided across 32 conferences. See *ibid.* Within Division I, the most popular sports are basketball and football. The NCAA divides Division I football into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision, with the FBS generally featuring the best teams. *Ibid.* The 32 conferences in Division I function similarly to the NCAA itself, but on a smaller scale. They "can and do enact their own rules." *Id.,* at 1090.

At the center of this thicket of associations and rules sits a massive business. The NCAA's current broadcast contract for the March Madness basketball tournament is worth $1.1 billion annually. See *id.,* at 1077, n. 20. Its television deal for the FBS conference's College Football Playoff is worth approximately $470 million per year. See *id*., at 1063; [co]. Beyond these sums, the Division I conferences earn substantial revenue from regular-season games. … The president of the NCAA earns nearly $4 million per year. [co] Commissioners of the top conferences take home between $2 to $5 million. [co] College athletic directors average more than $1 million annually. [co] And annual salaries for top Division I college football coaches approach $11 million, with some of their assistants making more than $2.5 million. [co]

B

The plaintiffs are current and former student-athletes in men's Division I FBS football and men's and women's Division I basketball. They filed a class action against the NCAA and 11 Division I conferences (for simplicity's sake, we refer to the defendants collectively as the NCAA). The student-athletes challenged the "current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services." D. Ct. Op., at 1062, 1065, n. 5. Specifically, they alleged that the NCAA's rules violate § 1 of the Sherman Act, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce." 15 U. S. C. § 1.

After pretrial proceedings stretching years, the district court conducted a 10-day bench trial. It heard experts and lay witnesses from both sides, and received volumes of evidence and briefing, all before issuing an exhaustive decision. In the end, the court found the evidence undisputed on certain points. The NCAA did not "contest evidence showing" that it and its members have agreed to compensation limits on student-athletes; the NCAA and its conferences enforce these limits by punishing violations; and these limits "affect interstate commerce." D. Ct. Op., at 1066.

Based on these premises, the district court proceeded to assess the lawfulness of the NCAA's challenged restraints. This Court has "long recognized that in view of the common law and the law in this country when the Sherman Act was passed, the phrase 'restraint of trade' is best read to mean 'undue restraint.'" *Ohio* v. *American Express Co.*, 585 U. S. ___, ___ (2018) (slip op., at 8) (brackets and some internal quotation marks omitted). Determining whether a restraint is undue for purposes of the Sherman Act "presumptively" calls for what we have described as a "rule of reason analysis." *Texaco Inc.* v. *Dagher*, 547 U. S. 1, 5 (2006); *Standard Oil Co. of N. J.* v. *United States*, 221 U. S. 1, 60–62 (1911). That manner of analysis generally requires a court to "conduct a fact-specific assessment of market power and market structure" to assess a challenged restraint's "actual effect on competition." *American Express*, 585 U. S., at ___–___ (slip op., at 8–9) (internal quotation marks omitted). Always, "[t]he goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Ibid.* (brackets and internal quotation marks omitted).

The district court next considered the NCAA's procompetitive justifications for its restraints. The NCAA suggested that its restrictions help increase output in college sports and maintain a competitive balance among teams. But the district court rejected those justifications, D. Ct. Op., at 1070, n. 12, and the NCAA does not pursue them here. The NCAA's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports. … [T]he court observed that the NCAA's conception of amateurism has changed steadily over the years. [co] The court noted that the NCAA "nowhere define[s] the nature of the amateurism they claim consumers insist upon." D. Ct. Op., at 1070. And, given all this, the court struggled to ascertain for itself "any coherent definition" of the term…

Nor did the district court find much evidence to support the NCAA's contention that its compensation restrictions play a role in consumer demand. …

The court next required the student-athletes to show that "substantially less restrictive alternative rules" existed that "would achieve the same procompetitive effect as the challenged set of rules." *Id.*, at 1104. The district court emphasized that the NCAA must have "ample latitude" to run its enterprise and that courts "may not use antitrust laws to make marginal adjustments to broadly reasonable market restraints." *Ibid.* (internal quotation marks omitted). In light of these standards, the court found the student-athletes had met their burden in some respects but not others. The court rejected the student-athletes' challenge to NCAA rules that limit athletic scholarships to the full cost of attendance and that restrict compensation and benefits unrelated to education. These may be price-fixing agreements, but the court found them to be reasonable in light of the possibility that "professional-level cash payments ... could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand." *Ibid*.

The court reached a different conclusion for caps on education-related benefits—such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships. *Id.*, at 1088. On no account, the court found, could such education-related benefits be "confused with a professional athlete's salary." *Id.*, at 1083. If anything, they "emphasize that the recipients are students." *Ibid.* Enjoining the NCAA's restrictions on these forms of compensation alone, the court concluded, would be substantially less restrictive than the NCAA's current rules and yet fully capable of preserving consumer demand for college sports. *Id.*, at 1088.

The court then entered an injunction reflecting its findings and conclusions. Nothing in the order precluded the NCAA from continuing to fix compensation and benefits unrelated to education; limits on athletic scholarships, for example, remained untouched. The court enjoined the NCAA only from limiting education-related compensation or benefits that conferences and schools may provide to student-athletes playing Division I football and basketball. App. to Pet. for Cert. in No. 20–512, p. 167a, ¶1. The court's injunction further specified that the NCAA could continue to limit cash awards for academic achievement—but only so long as those limits are no lower than the cash awards allowed for athletic achievement (currently $5,980 annually). [co] The court added that the NCAA and its members were free to propose a definition of compensation or benefits "'related to education.'" App. to Pet. for Cert. in No. 20–512, at 168a, ¶4. And the court explained that the NCAA was free to regulate how conferences and schools provide education-related compensation and benefits. *Ibid.* The court further emphasized that its injunction applied only to the NCAA and multi-conference agreements—thus allowing individual conferences (and the schools that constitute them) to impose tighter restrictions if they wish. *Id.*, at 169a, ¶6. The district court's injunction issued in March 2019, and took effect in August 2020.

Both sides appealed. The student-athletes said the district court did not go far enough; it should have enjoined all of the NCAA's challenged compensation limits, including those "untethered to education," like its restrictions on the size of athletic scholarships and cash awards. *In re National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F. 3d 1239, 1263 (CA9 2020). The NCAA, meanwhile, argued that the district court went too far by weakening its restraints on education-related compensation and benefits. In the end, the court of appeals affirmed in full, explaining its view that "the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports." *Ibid.*

C

Unsatisfied with this result, the NCAA asks us to reverse to the extent the lower courts sided with the student athletes. For their part, the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined.

Before us, as through much of the litigation below, some of the issues most frequently debated in antitrust litigation are uncontested. The parties do not challenge the district court's definition of the relevant market [which it defined as the market for "athletic services in men's and women's Division I basketball and FBS football, wherein each class member participates in his or her sport-specific market."]. They do not contest that the NCAA enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market—such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor. Nor does the NCAA dispute that its member schools compete fiercely for student-athletes but remain subject to NCAA-issued-and-enforced limits on what compensation they can offer. Put simply, this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control.

Other significant matters are taken as given here too. No one disputes that the NCAA's restrictions *in fact* decrease the compensation that student-athletes receive compared to what a competitive market would yield. No one questions either that decreases in compensation also depress participation by student-athletes in the relevant labor market—so that price and quantity are both suppressed. See 12 P. Areeda & H. Hovenkamp, Antitrust Law ¶2011b, p. 134 (4th ed. 2019) (Areeda & Hovenkamp). Nor does the NCAA suggest that, to prevail, the plaintiff student-athletes must show that its restraints harm competition in the seller-side (or consumer facing) market as well as in its buyer-side (or labor) market. [co]

Meanwhile, the student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market. …

II

A

With all these matters taken as given, we express no views on them. Instead, we focus only on the objections the NCAA *does* raise. Principally, it suggests that the lower courts erred by subjecting its compensation restrictions to a rule of reason analysis. In the NCAA's view, the courts should have given its restrictions at most an "abbreviated deferential review," Brief for Petitioner in No. 20–512, p. 14, or a "'quick look,'" Brief for Petitioners in No. 20–520, p. 18, before approving them.

The NCAA offers a few reasons why. Perhaps dominantly, it argues that it is a joint venture and that collaboration among its members is necessary if they are to offer consumers the benefit of intercollegiate athletic competition. We doubt little of this. There's no question, for example, that many "joint ventures are calculated to enable firms to do something more cheaply or better than they did it before." 13 Areeda & Hovenkamp ¶2100c, at 7. And the fact that joint ventures can have such procompetitive benefits surely stands as a caution against condemning their arrangements too reflexively. See *Dagher*, 547 U. S., at 7; *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 22–23 (1979).

But even assuming (without deciding) that the NCAA is a joint venture, that does not guarantee the foreshortened review it seeks. Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which (again) we have described as “a fact-specific assessment of market power and market structure” aimed at assessing the challenged restraint’s “actual effect on competition”—especially its capacity to reduce output and increase price. *American Express*, 585 U. S., at ___–___ (slip op., at 8–9) (internal quotation marks omitted).

Admittedly, the amount of work needed to conduct a fair assessment of these questions can vary. As the NCAA observes, this Court has suggested that sometimes we can determine the competitive effects of a challenged restraint in the “‘twinkling of an eye.’” *Board of Regents*, 468 U. S., at 110, n. 39 (quoting P. Areeda, The “Rule of Reason” in Antitrust Analysis: General Issues 37–38 (Federal Judicial Center, June 1981)); *American Needle, Inc.* v. *National Football League*, 560 U. S. 183, 203 (2010). That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation.

At one end of the spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny. In *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F. 2d 210 (CADC 1986), for example, Judge Bork explained that the analysis could begin and end with the observation that the joint venture under review “command[ed] between 5.1 and 6% of the relevant market.” *Id.*, at 217. Usually, joint ventures enjoying such small market share are incapable of impairing competition. …

At the other end, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look. See *Dagher*, 547 U. S., at 7, n. 3; *California Dental Assn.* v. *FTC*, 526 U. S. 756, 770 (1999). Recognizing the inherent limits on a court’s ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—we take special care not to deploy these condemnatory tools until we have amassed “considerable experience with the type of restraint at issue” and “can predict with confidence that it would be invalidated in all or almost all instances.” *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 886–887 (2007); [co].

None of this helps the NCAA. The NCAA *accepts* that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact do) harm competition. See D. Ct. Op., at 1067. Unlike customers who would look elsewhere when a small van company raises its prices above market levels, the district court found (and the NCAA does not here contest) that student-athletes have nowhere else to sell their labor. Even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions.

Nor does the NCAA's status as a particular type of venture categorically exempt its restraints from ordinary rule of reason review. We do not doubt that some degree of coordination between competitors within sports leagues can be procompetitive. Without some agreement among rivals—on things like how many players may be on the field or the time allotted for play—the very competitions that consumers value would not be possible. See *Board of Regents*, 468 U. S., at 101 (quoting R. Bork, The Antitrust Paradox 278 (1978)). Accordingly, even a sports league with market power might see some agreements among its members win antitrust approval in the "'twinkling of an eye.'" *American Needle*, 560 U. S., at 203.

But this insight does not always apply. That *some* restraints are necessary to create or maintain a league sport does not mean *all* "aspects of elaborate interleague cooperation are." *Id.*, at 199, n. 7. While a quick look will often be enough to approve the restraints "necessary to produce a game," *ibid.*, a fuller review may be appropriate for others. [co]

The NCAA's rules fixing wages for student-athletes fall on the far side of this line. Nobody questions that Division I basketball and FBS football can proceed (and have proceeded) without the education-related compensation restrictions the district court enjoined; the games go on. Instead, the parties dispute whether and to what extent those restrictions in the NCAA's labor market yield benefits in its consumer market that can be attained using substantially less restrictive means. That dispute presents complex questions requiring more than a blink to answer.

B

Even if background antitrust principles counsel in favor of the rule of reason, the NCAA replies that a particular precedent ties our hands. The NCAA directs our attention to *Board of Regents*, where this Court considered the league's rules restricting the ability of its member schools to televise football games. 468 U. S., at 94. On the NCAA's reading, that decision expressly approved its limits on student-athlete compensation—and this approval forecloses any meaningful review of those limits today. … [W]e cannot agree. *Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions. …

Our confidence on this score is fortified by still another factor. Whether an antitrust violation exists necessarily depends on a careful analysis of market realities. See, *e.g., American Express Co.*, 585 U. S., at ___–___ (slip op., at 10–12); 2B Areeda & Hovenkamp ¶500, p. 107 (2014). If those market realities change, so may the legal analysis.

When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984. Since then, the NCAA has dramatically increased the amounts and kinds of benefits schools may provide to student-athletes. For example, it has allowed the conferences flexibility to set new and higher limits on athletic scholarships. … From 1982 to 1984, CBS paid $16 million per year to televise the March Madness Division I men's basketball tournament. [co] In 2016, those annual television rights brought in closer to $1.1 billion. D. Ct. Op., at 1077, n. 20.

Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in *Board of Regents* as more than that. …

III

A

While the NCAA devotes most of its energy to resisting the rule of reason in its usual form, the league lodges some objections to the district court's application of it as well.

When describing the rule of reason, this Court has sometimes spoken of "a three-step, burden-shifting framework" as a means for "'distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.'" *American Express Co.*, 585 U. S., at ___ (slip op., at 9). As we have described it, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect." *Ibid.* Should the plaintiff carry that burden, the burden then "shifts to the defendant to show a procompetitive rationale for the restraint." *Ibid.* If the defendant can make that showing, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.,* at ___–___ (slip op., at 9–10).

These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. As we have seen, what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances. See *supra*, at __. The whole point of the rule of reason is to furnish "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint" to ensure that it unduly harms competition before a court declares it unlawful. *California Dental*, 526 U. S., at 781; [co].

In the proceedings below, the district court followed circuit precedent to apply a multistep framework closely akin to *American Express*'s. As its first step, the district court required the student-athletes to show that "the challenged restraints produce significant anticompetitive effects in the relevant market." D. Ct. Op., at 1067. This was no slight burden. According to one *amicus*, courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect. Brief for 65 Professors of Law, Business, Economics, and Sports Management as *Amici Curiae* 21, n. 9 ("Since 1977, courts decided 90% (809 of 897) on this ground"). This suit proved different. As we have seen, based on a voluminous record, the district court held that the student-athletes had shown the NCAA enjoys the power to set wages in the market for student-athletes' labor—and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects. See D. Ct. Op., at 1067. Perhaps even more notably, the NCAA "did not meaningfully dispute" this conclusion. *Ibid.*

Unlike so many cases, then, the district court proceeded to the second step, asking whether the NCAA could muster a procompetitive rationale for its restraints. *Id.*, at 1070. This is where the NCAA claims error first crept in. On its account, the district court examined the challenged rules at different levels of generality. At the first step of its inquiry, the court asked whether the NCAA's entire package of compensation restrictions has substantial anticompetitive effects *collectively*. Yet, at the second step, the NCAA says the district court required it to show that each of its distinct rules limiting student-athlete compensation has procompetitive benefits *individually*. The NCAA says this mismatch had the result of effectively—and erroneously—requiring it to prove that each rule is the least restrictive means of achieving the procompetitive purpose of differentiating college sports and preserving demand for them.

We agree with the NCAA's premise that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess "degrees of reasonable necessity" so that "the lawfulness of conduct turn[s] upon judgments of degrees of efficiency." *Rothery Storage*, 792 F. 2d, at 227; *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 58, n. 29 (1977). That would be a recipe for disaster, for a "skilled lawyer" will "have little difficulty imagining possible less restrictive alternatives to most joint arrangements." 11 Areeda & Hovenkamp ¶1913b, p. 398 (2018). And judicial acceptance of such imaginings would risk interfering "with the legitimate objectives at issue" without "adding that much to competition." 7 *id.*, ¶1505b, at 435–436.

Even worse, "[r]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F. 2d 227, 234 (CA1 1983) (BREYER, J.). After all, even "[u]nder the best of circumstances," applying the antitrust laws "'can be difficult'"—and mistaken condemnations of legitimate business arrangements "'are especially costly, because they chill the very'" procompetitive conduct "'the antitrust laws are designed to protect.'" *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398, 414 (2004). Indeed, static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition. *Ibid.* To know that the Sherman Act prohibits only *unreasonable* restraints of trade is thus to know that attempts to "'[m]ete[r]' small deviations is not an appropriate antitrust function." Hovenkamp, Antitrust Balancing, 12 N. Y. U. J. L. & Bus. 369, 377 (2016).

While we agree with the NCAA's legal premise, we cannot say the same for its factual one. Yes, at the first step of its inquiry, the district court held that the student-athletes had met their burden of showing the NCAA's restraints collectively bear an anticompetitive effect. And, given that, yes, at step two the NCAA had to show only that those same rules collectively yield a procompetitive benefit. The trouble for the NCAA, though, is not the level of generality. It is the fact that the district court found unpersuasive much of its proffered evidence. See D. Ct. Op., at

1070–1076, 1080–1083. Recall that the court found the NCAA failed "to establish that the challenged compensation rules ... have any direct connection to consumer demand." *Id.,* at 1070.

To be sure, there is a wrinkle here. While finding the NCAA had failed to establish that its rules collectively sustain consumer demand, the court did find that "some" of those rules "may" have procompetitive effects "to the extent" they prohibit compensation "unrelated to education, akin to salaries seen in professional sports leagues." *Id.,* at 1082–1083. The court then proceeded to what corresponds to the third step of the *American Express* framework, where it required the student-athletes "to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules." D. Ct. Op., at 1104. And there, of course, the district court held that the student-athletes partially succeeded—they were able to show that the NCAA could achieve the procompetitive benefits it had established with substantially less restrictive restraints on education-related benefits.

Even acknowledging this wrinkle, we see nothing about the district court's analysis that offends the legal principles the NCAA invokes. The court's judgment ultimately turned on the key question at the third step: whether the student-athletes could prove that "substantially less restrictive alternative rules" existed to achieve the same procompetitive benefits the NCAA had proven at the second step. *Ibid.* Of course, deficiencies in the NCAA's proof of procompetitive benefits at the second step influenced the analysis at the third. But that is only because, however framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits. See, *e.g.,* 7 Areeda & Hovenkamp ¶1505, p. 428 ("To be sure, these two questions can be collapsed into one," since a "legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative").

Simply put, the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the *least* restrictive means of preserving consumer demand. Rather, it was only after finding the NCAA's restraints "'patently and inexplicably stricter than is necessary'" to achieve the procompetitive benefits the league had demonstrated that the district court proceeded to declare a violation of the Sherman Act. D. Ct. Op., at 1104. That demanding standard hardly presages a future filled with judicial micromanagement of legitimate business decisions. …

C

Finally, the NCAA attacks as "indefensible" the lower courts' holding that substantially less restrictive alternatives exist capable of delivering the same procompetitive benefits as its current rules. Brief for Petitioner in No. 20–512, at 46. The NCAA claims, too, that the district court's injunction threatens to "micromanage" its business. *Id.*, at 50.

Once more, we broadly agree with the legal principles the NCAA invokes. As we have discussed, antitrust courts must give wide berth to business judgments before finding liability. See *supra*, at

__. Similar considerations apply when it comes to the remedy. Judges must be sensitive to the possibility that the "continuing supervision of a highly detailed decree" could wind up impairing rather than enhancing competition. *Trinko*, 540 U. S., at 415. Costs associated with ensuring compliance with judicial decrees may exceed efficiencies gained; the decrees themselves may unintentionally suppress procompetitive innovation and even facilitate collusion. See *supra*, at __. Judges must be wary, too, of the temptation to specify "the proper price, quantity, and other terms of dealing"—cognizant that they are neither economic nor industry experts. *Trinko*, 540 U. S., at 408. Judges must be open to reconsideration and modification of decrees in light of changing market realities, for "what we see may vary over time." *California Dental*, 526 U. S., at 781. And throughout courts must have a healthy respect for the practical limits of judicial administration: "An antitrust court is unlikely to be an effective day-to-day enforcer" of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket. *Trinko*, 540 U. S., at 415. Nor should any court "'impose a duty ... that it cannot explain or adequately and reasonably supervise.'" *Ibid.* In short, judges make for poor "central planners" and should never aspire to the role. *Id.*, at 408.

Once again, though, we think the district court honored these principles. The court enjoined only restraints on education-related benefits—such as those limiting scholarships for graduate school, payments for tutoring, and the like. The court did so, moreover, only after finding that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand—and only after finding that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules. D. Ct. Op., at 1104–1105.

Even with respect to education-related benefits, the district court extended the NCAA considerable leeway. As we have seen, the court provided that the NCAA could develop its own definition of benefits that relate to education and seek modification of the court's injunction to reflect that definition. App. to Pet. for Cert. in No. 20–512, at 168a, ¶4. The court explained that the NCAA and its members could agree on rules regulating how conferences and schools go about providing these education-related benefits. *Ibid.* The court said that the NCAA and its members could continue fixing education-related cash awards, too—so long as those "limits are never lower than the limit" on awards for athletic performance. D. Ct. Op., at 1104; App. to Pet. for Cert. in No. 20–512, at 168a–169a, ¶5. And the court emphasized that its injunction applies only to the NCAA and multiconference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still. *Id.,* at 169a–170a, ¶¶6–7. …

When it comes to fashioning an antitrust remedy, we acknowledge that caution is key. Judges must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. And judges must be open to clarifying and reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to "set sail on a sea of doubt." *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 284 (CA6 1898) (Taft, J.). But we do not believe the district court fell prey to that temptation. Its judgment does not float on a sea of doubt but stands on firm ground—an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility.

*

Some will think the district court did not go far enough. By permitting colleges and universities to offer enhanced education-related benefits, its decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools. Still, some will see this as a poor substitute for fuller relief. At the same time, others will think the district court went too far by undervaluing the social benefits associated with amateur athletics. For our part, though, we can only agree with the Ninth Circuit: "'The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law.'" 958 F. 3d, at 1265. That review persuades us the district court acted within the law's bounds. The judgment is Affirmed.

Notes and Questions

1. The Supreme Court noted that the district "court emphasized that its injunction applies only to the NCAA and multiconference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still." Why wouldn't such restrictions similarly constitute an unreasonable restraint of trade and violate Section One?

2. In his concurrence, Justice Kavanaugh noted that the majority's opinion only addressed the NCAA's "rules restricting the *education-related* benefits that student athletes may receive, such as post-eligibility scholarships at graduate or vocational schools." He predicted trouble for the NCAA's remaining compensation rules, such as restrictions on student athletes from receiving compensation for playing college sports or from endorsement deals. After noting that these restrictions should be analyzed under "ordinary rule of reason scrutiny," he seemed to cast doubt on the NCAA's amateurism defense:

In my view, that argument is circular and unpersuasive. The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality:
The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood. Price-fixing labor is price-fixing labor. And price-fixing labor is

ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.

Is Justice Kavanaugh's position persuasive?

I. Horizontal Restraints
[C] Proof of Agreement
[4] Surviving a Motion for Summary Judgment

***Insert at page 380 before Williamson case*:**

2. The Seventh Circuit in *In re High Fructose Corn Syrup Antitrust Litigation* assigned probative value to the plaintiffs' evidence that the defendants sold HFCS to each other. Writing for the court, Judge Richard Posner reasoned that "[a] seller who experiences a surge in demand, but meets the surge by buying what it needs from another seller rather than by expanding its own production, protects the other firm's market share and so preserves peace among the cartelists." In contrast, the Third Circuit in *Valspar Corp. v. E.I. Du Pont De Nemours & Co.,* 873 F.3d 185 (3d Cir. 2017), implied that no precedent existed for treating inter-competitor sales as a plus factor. In *Valspar*, the plaintiff argued that titanium dioxide manufacturers' sales to each other – sometimes at below-market prices – were evidence that the defendants' 31 parallel price increases occurred pursuant to an underlying price-fixing conspiracy. The Third Circuit, however, deprived the inter-competitor sales of probative value. Which circuit's approach is more persuasive? Should inter-competitor sales be considered a plus factor? Why or why not? See Christopher R. Leslie, *Balancing the Conspiracy's Books: Inter-Competitor Sales and Price-Fixing Cartels*, 96 WASH. U.L. REV. 1 (2018).

I. Horizontal Restraints
[E] Boycotts and Other Concerted Refusals to Deal
[3] The Modern "Per Se Rule" Against Group Boycotts

***Insert at page 463 before [3] Naked and Ancillary Concerted Refusals to Deal*:**

6. Most real estate agents pay monthly fees to access multiple listing services (MLSs), which are databases of homes for sale in local geographic areas. Most MLSs are owned and controlled by members of the National Association of Realtors (NAR), a trade association that most residential real estate agents belong to. MLSs require sellers to share significant amounts of information. While most home sellers list their property on NAR-affiliated MLSs to reach the widest possible range of buyers, sellers who desire more privacy use "pocket listings," which are not shared on a NAR-affiliated MLS.

A group of real estate agents created PLS, which was a database similar to an MLS, but that allowed sellers to choose how much information to share. Any agent could join PLS, which charged less than MLSs. Perceiving PLS as a competitive threat, the NAR adopted its Clear Cooperation Policy, which required members who listed properties on PLS to also list those properties on an NAR-affiliated MLS. Penalties for non-compliance included significant fines and temporary or permanent denial of access to MLSs. This policy had the purpose and effect of reducing agent participation in PLS.

PLS challenged the NAR's policy as an illegal group boycott. The district court dismissed the complaint for failure to properly allege antitrust injury. In *PLS.Com, LLC v. National Association of Realtors*, 32 F.4th 824 (9th Cir. 2022), the Ninth Circuit reversed, explaining why PLS had properly pled a per se claim.

Defendants argue that the Policy is not a *per se* group boycott because (1) it "does not cut off access to anything, and brokers remain free to use PLS or any other listing service," (2) "on its face" it does not prevent real estate agents from posting listings on competing networks or from "making a choice about the listing network platforms in which they choose to participate," and (3) it is procompetitive. These arguments are not persuasive.

First, a group of competitors coercing a competitor's suppliers to sell to that competitor only on "unfavorable terms" constitutes a group boycott even if the competitors do not completely cut off the competitor's access to inputs it needs. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209 (1959). That is because businesses that can obtain those inputs only on unfavorable terms are unlikely to be able to compete. *See Nw. Wholesale Stationers*, 472 U.S. at 295 n.6 (noting that "a concerted refusal to deal ... *on substantially equal terms* ... might justify *per se* invalidation if it place[s] a competing firm at a severe competitive disadvantage" (emphasis added)); *see also Ind. Fed'n of Dentists*, 476 U.S. at 458 (characterizing a group boycott as "a concerted refusal to deal *on particular terms*" (emphasis added)).

Here, the Clear Cooperation Policy impaired PLS's ability to compete against the MLSs in the market for sellers' listings on almost any dimension because it requires the vast majority of PLS's suppliers (sellers' agents that are members of a NAR-affiliated MLS) to supply to PLS's dominant competitors (NAR-affiliated MLSs) even if PLS's product is better on the merits. Regardless of what PLS does—whether it charges less to list properties, provides a nationwide network, or develops a better interface—agents who belong to a NAR-affiliated MLS may not list on PLS without also listing on an MLS. Thus, the Clear Cooperation Policy essentially *eliminates* competition for most sellers' agents' listings between NAR-affiliated MLSs and rival services.

Defendants' second argument—that the Clear Cooperation Policy is not coercive because sellers' agents who wish to place some listings exclusively on competing services may do so if they give up their access to the MLSs— is even less persuasive. That is precisely the dilemma the Sherman Act is designed to prevent. In *every* group boycott, the dominant firms force their suppliers or customers to choose between assisting the dominant firms in injuring their competitors or working exclusively with those competitors, knowing that because of the dominant firms' market power very few suppliers or customers will be able to rely exclusively on the competitors. That the customers or suppliers technically have a choice does not mean the group boycott is not coercive.

Finally, Defendants argue that the Clear Cooperation Policy is procompetitive because it "reduc[es] search and transaction costs." Although this contention is dressed up in the language of economics, at its core it is just an argument that the Clear Cooperation Policy benefits buyers' agents because it allows them to see more listings on the MLSs and to avoid the need to consult competing services. This is not a procompetitive justification because it does not explain how the Clear Cooperation Policy enhances *competition.* At bottom, Defendants argue that the Clear Cooperation Policy results in a higher quality product: a listing service with all of the publicly available listings in one place. But justifying a restraint on competition based on an assumption it will improve a product's quality "is nothing less than a frontal assault on the basic policy of the Sherman Act." *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 695 (1978). The antitrust laws assume that "competition will produce not only lower prices, but also better goods and services." *Id.* If Defendants are correct that buyers' agents prefer listing networks that offer more listings in one place, the MLSs should be in a good position to compete with upstarts like PLS. But the fact that PLS was growing rapidly despite the MLSs' larger inventory of listings might suggest that PLS offered features that at least some buyers' agents found attractive, despite the lower concentration of listings. In the end, sparing consumers the need to patronize competing firms is not a procompetitive justification for a group boycott. …

Although we hold that PLS has adequately alleged a *per se* group boycott, we leave to the district court to determine in the first instance whether it should apply *per se* analysis or rule of reason analysis at later stages in this litigation.

If you representing PLS, would you bring the group boycott lawsuit as a per se claim or a rule-of-reason claim?

I. Horizontal Restraints
[F] Agreements Involving Intellectual Property

***Insert at page 485 before Notes and Questions*:**

Impax Laboratories, Inc. v. Federal Trade Commission
994 F.3d 484 (5th Cir. 2021)

Gregg Costa, Circuit Judge:

Normally, when lawsuits settle the defendant pays the plaintiff. That makes sense as the defendant is the party accused of wrongdoing.

But when a generic drug is poised to enter the market and threaten the monopoly enjoyed by a brand-name pharmaceutical, federal law can incentivize a different type of settlement. The Hatch-Waxman Act delays the entry of the generic drug if the brand-drug manufacturer files a patent infringement suit against the generic. Those patent suits are sometimes settled with the brand-drug plaintiff paying the allegedly-infringing generic. In return for the payment, the generic agrees to delay its market entry beyond the date when the FDA would allow it to compete. The result is an extension of the brand drug's monopoly.

Given the counterintuitive flow of money in this scenario—to, rather than from, the alleged wrongdoer—such deals are called "reverse payment settlements." The Supreme Court has held that these settlements that extend the brand drug's monopoly can have anticompetitive effects that violate the antitrust laws. *FTC v. Actavis*, 570 U.S. 136, 158 (2013). Reverse payment settlements, however, are not automatically invalid; they are subject to the rule of reason. *Id.* at 159.

In its first post-*Actavis* reverse payment case, the Federal Trade Commission charged Impax Laboratories with antitrust violations for accepting payments ultimately worth more than $100 million to delay the entry of its generic drug for more than two years. The resulting administrative hearing included testimony from 37 witnesses and over 1,200 exhibits. Based on that record, the Commission conducted a rule-of-reason analysis and unanimously concluded that Impax violated antitrust law.

On appeal, we face a narrower task: determining whether the Commission committed any legal errors and whether substantial evidence supported its factual findings. Concluding that the Commission's ruling passes muster on both fronts, we DENY the petition for review.

I.
A.

Anyone who buys pharmaceuticals knows that generic drugs are cheaper than their brand counterparts. The first generic to enter the market typically costs 10 to 25 percent less than the branded drug; those discounts grow to between 50 and 80 percent once other generics enter.

To bring competition to the drug market, the Hatch-Waxman Act promotes entry for these generics. *Actavis*, 570 U.S. at 142. Rather than undergoing the lengthy and costly approval process that a new drug faces, generics can file an Abbreviated New Drug Application with the Food and Drug Administration. *Id.* at 142; 21 U.S.C. § 355(j). If the generic drug is biologically equivalent to a brand drug the FDA has already approved, then the generic can essentially "piggy-back on the pioneer's approval efforts." *Actavis*, 570 U.S. at 142; 21 U.S.C. § 355(j)(2)(A)(i)–(iv). The Act offers an additional carrot to the first generic applicant: it can market its generic drug for 180 days without competition from any other generic manufacturer. *Actavis*, 570 U.S. at 143–44; 21 U.S.C. § 355(j)(5)(B)(iv). During this period of exclusivity, the newly approved generic only faces competition from the brand drug or a generic sold by the brand manufacturer. *Actavis*, 570 U.S. at 143–44. In effect, the statute allows a duopoly during those 180 days. A first-to-file generic often realizes most of its profits, potentially "several hundred million dollars," during this initial six-month period. *Id*. at 143 (quoting C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553, 1579 (2006)).

Generic entry is not so easy when there is a patent for the brand drug. The Hatch-Waxman Act also addresses this common situation. If the brand manufacturer asserts a patent in its initial drug application, then the generic manufacturer must certify in its application that the patent is invalid or that its drug will not infringe the patent. 21 U.S.C. § 355(j)(2)(A)(vii)(IV). If the brand manufacturer disagrees (it likely will), it may file a patent infringement suit. 35 U.S.C. § 271(e)(2)(A). And if it does so within 45 days, the FDA is stayed from approving the generic application until either 30 months have passed or the patent litigation concludes. 21 U.S.C. § 355(j)(5)(B)(iii); *see also Actavis*, 570 U.S. at 143 (describing these procedures). This delay for the first generic's entry also postpones the potential entry of other generics. They must wait for the same 30-month stay and then for the expiration of the first generic's 6-month exclusivity period before entering the market.

What happens if the patent suit against the first generic settles? The brand manufacturer no longer faces an immediate threat of competition from new generic entrants. The 30-month statutory stay restarts if the brand maker brings a patent suit against another generic that wishes to enter the market. *Actavis*, 570 U.S. at 155 (citing 21 U.S.C. § 355(j)(5)(B)(iii)). Plus, any subsequent generic is not entitled to the exclusivity period. *Id.* That greatly reduces the potential benefit of challenging the brand maker's patent. *Id*. (noting that subsequent generics "stand to win significantly less than the first if they bring a successful" challenge to the patent).
These features of the Hatch-Waxman Act—the period of exclusivity for the first generic; the 30-month stay of the generic's FDA application when the brand maker sues for infringement; and the reduced incentive a subsequent generic has to challenge the brand maker's patent—can lead the brand maker to pay large sums for delaying entry of the first generic maker. [citation omitted]

B.

The facts of this case show those incentives in action. The drug at issue is a type of oxymorphone, which is an opioid. Endo, the brand-name drug maker in this case, started selling an extended-release formulation of oxymorphone called Opana ER in 2006. An extended-release pain reliever provides medication to the bloodstream over several hours, as opposed to immediate-release opioids which are short-acting. When it entered the market, Opana ER was the only extended-release version of oxymorphone.

In late 2007, Impax filed the first application to market generic extended-release oxymorphone. The application did not result in prompt approval of the generic, however, because Endo held patents for Opana ER that would not expire until 2013. Endo sued Impax for patent infringement in January 2008, delaying any FDA approval of the generic for 30 months—until June 2010—unless the litigation concluded earlier.

Early settlement talks failed, with Endo rejecting Impax's proposed entry dates of January 2011, July 2011, December 2011, or January 2012.

The June 2010 expiration of the Hatch-Waxman stay loomed. Delaying Impax's entry beyond the stay period would save Endo millions. Endo had projected that generic entry would cut Opana ER sales by 85 percent within three months and cost it $100 million in revenue within six months.

But extending the period in which it could sell Opana ER without competition was just one of Endo's priorities. The drug maker had something else in the works: It planned to move consumers to a new brand-name drug that would not face competition for years. Endo would remove the original Opana ER from the market, replace it with a crush-resistant version of the drug, and obtain new patents to protect the reformulated drug. While Impax's generic would still eventually reach the market, it would not be therapeutically equivalent to Endo's new branded drug and thus pharmacists would not be able to automatically substitute the generic when filling prescriptions. This automatic substitution of brand drug prescriptions, promoted by state laws, is the primary driver of generic sales. So, if Endo succeeded in switching consumers to its reformulated drug, which would be just different enough from the original formulation to preclude substitution, the market for Impax's generic would shrink dramatically, preserving Endo's monopoly profits.

The success of this "product hop" depended on the reformulated Opana ER reaching the market sufficiently in advance of Impax's generic entry to allow patients to move away from the original drug before pharmacists started substituting the generic version. This transition period to the reformulated drug would take roughly six to nine months. A successful transition to the reformulated Opana ER before generic entry would mean millions to Endo. The company projected that the reformulated Opana ER would generate about $200 million in annual sales by

2016 if the market transitioned to the new drug before the generic entered. But if the generic launched first, then 2016 sales of the new formulation would fall to $10 million.
The date when Impax could start selling its generic was thus critical. The FDA tentatively approved Impax's application in May 2010. The Hatch-Waxman stay would expire the next month. There were signs that Impax was planning to launch its generic soon thereafter.
With the possible launch date for generic entry imminent, Endo restarted settlement negotiations just three days after the FDA's tentative approval of the generic. The parties settled the patent litigation in June 2010, just a few days after the patent trial began and less than a week before the FDA fully approved Impax's application.

C.

Under the settlement, Impax agreed to delay launching its generic until January 1, 2013—two and a half years after Impax otherwise could have entered "at-risk." In turn, Endo agreed to not market its own generic version of extended-release oxymorphone until Impax's 180-day Hatch-Waxman exclusivity period concluded in July 2013. Additionally, Endo agreed to pay Impax a credit if sales revenues for the original formulation of Opana ER fell by more than 50 percent between the dates of settlement and Impax's entry. This credit served as an insurance policy for Impax, preserving the value of the settlement in case Endo undermined the generic oxymorphone market by transitioning consumers to the reformulated Opana ER. Endo also provided Impax with a broad license to Endo's existing and future patents covering extended-release oxymorphone. Finally, Endo and Impax agreed to collaboratively develop a new Parkinson's disease treatment, with Endo paying Impax $10 million immediately and up to $30 million in additional payments contingent on achieving sufficient development and marketing progress.

Impax's delayed entry allowed Endo to execute the product hop. In March 2012, Endo introduced its reformulated drug and withdrew the original drug. It publicly stated that the original drug was unsafe, though the FDA later disagreed that safety concerns motivated the withdrawal. Predictably, the market for the original Opana ER shriveled. So Endo had to pay Impax $102 million in credits. Endo subsequently succeeded in securing additional patents, and in 2015 and 2016 secured injunctions that prevented all manufacturers, including Impax, from marketing generic versions of the reformulated drug. But in 2017, the FDA asked Endo to voluntarily withdraw the reformulated Opana ER from the market due to safety concerns, and it did.

For its part, Impax began marketing original formulation generic oxymorphone in January 2013, despite the damaged market Endo left behind. Because of the injunctions Endo secured against other generics and because Endo eventually withdrew the reformulated Opana ER from the market, Impax's generic is the only extended-release oxymorphone available to consumers today.

D.

The FTC brought separate actions against Endo and Impax alleging that the settlement was an unfair method of competition under the FTC Act and an unreasonable restraint on trade under the Sherman Act. Endo settled. Impax fought the charge and successfully argued that the case should proceed in an administrative proceeding rather than in federal district court where the Commission had first filed.

An administrative law judge determined that the agreement restricted competition but was nevertheless lawful because its procompetitive benefits outweighed the anticompetitive effects. Reviewing both the facts and law *de novo*, 16 C.F.R. § 3.54(a), the Commission reached a different conclusion. It found that Impax had failed to show that the settlement had any procompetitive benefits. Moreover, it determined that the purported benefits Impax identified could have been achieved through a less restrictive agreement. The Commission did not impose any monetary sanctions. It did not even invalidate Impax's agreements with Endo or other drug makers. Instead, it issued a cease-and-desist order enjoining Impax from entering into similar reverse payment settlements going forward.

Impax now petitions for review of the FTC's order. …

III.

A reverse payment settlement is a settlement of patent litigation in which the patentholder gives the alleged infringer cash or other valuable services or property and the alleged infringer agrees not to market its allegedly infringing product until some later date. *See Actavis*, 570 U.S. at 140. These horizontal agreements unlawfully restrain trade, *see* 15 U.S.C. § 1, if they cause anticompetitive effects that outweigh any procompetitive benefits. *See Actavis*, 570 U.S. at 156–59.

This rule-of-reason inquiry uses a burden-shifting framework. *See Ohio v. Am. Express*, ––– U.S. ––––, 138 S. Ct. 2274, 2284 (2018). The initial burden is on the FTC to show anticompetitive effects. *Id*. If the FTC succeeds in doing so, the burden shifts to Impax to demonstrate that the restraint produced procompetitive benefits. *Id*. If Impax successfully proves procompetitive benefits, then the FTC can demonstrate that any procompetitive effects could be achieved through less anticompetitive means. *Id.* Finally, if the FTC fails to demonstrate a less restrictive alternative way to achieve the procompetitive benefits, the court must balance the anticompetitive and procompetitive effects of the restraint. *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 627 (5th Cir. 2002). If the anticompetitive harms outweigh the procompetitive benefits, then the agreement is illegal. *Id.*

A.

The first question is whether the agreement caused anticompetitive effects or "created the potential for anticompetitive effects." [citation omitted] Such effects may be proved "indirectly," with "proof of market power plus some evidence that the challenged restraint harms competition." *Am. Express Co.*, 138 S. Ct. at 2284.

Anticompetitive effects are those that harm consumers. Think increased prices, decreased output, or lower quality goods. *Id.* Eliminating potential competition is, by definition, anticompetitive. [citation omitted] Indeed, paying a potential competitor not to compete is so detrimental to competition that normally it is a *per se* violation of the antitrust laws. *See Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 48–49 (1990); [citation omitted]

Actavis concluded that, in contrast to the typical horizontal agreement to divvy up markets, reverse payment settlements might produce both anti-and procompetitive effects. On the one hand, a brand maker's paying a generic to delay entry "in effect amounts to a purchase by the patentee of the exclusive right to sell its product, a right it already claims but would lose if the patent litigation were to continue and the patent were held invalid or not infringed by the generic product." 570 U.S. at 153–54. In fact, reverse payment settlements may restrict competition even more than typical market allocation agreements because delaying entry of the first generic does not just eliminate one competitor—it prolongs the "bottleneck" that delays entry of other generic competitors. *In re Nexium (Esomeprazole) Antitrust Lit.*, 842 F.3d 34, 41 (1st Cir. 2016). But the existence of patent—a lawful monopoly if valid—points in the other direction. If the patent is valid, then unlike traditional market allocation agreements, a settlement that allows generic entry after the FDA's approval of the drug but still earlier than the patent expiration date may result in more competition than would have existed absent the settlement. *Actavis*, 570 U.S. at 154. Given the potentially countervailing impacts of reverse payment settlements, the Supreme Court applied the rule of reason rather than automatic invalidity. *Id*. at 159.

At this first step of the rule-of-reason analysis, we are just focused on the anticompetitive side of the equation. *Actavis* held that a "large and unjustified" reverse payment creates a likelihood of "significant anticompetitive effects." *Id*. at 158. "[T]he likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." *Id.* at 159. In many reverse payment cases, the central dispute is whether there was in fact a reverse payment. Herbert Hovenkamp et al. IP & Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law § 16.01 (2018 Supp.); *see, e.g., In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538, 550–51 (1st Cir. 2016) (citing numerous post-*Actavis* case addressing whether nonmonetary benefits to a generic are reverse payments). The settling party will often contend that any settlement payments are for services rather than for delayed entry. *Id*. That is not the case here. Impax has not challenged the ALJ's original determination "that a large reverse payment helped induce settlement or that the payment was linked to the January 2013 entry date."

That concession makes sense in light of the valuable consideration Impax received in exchange for delaying entry. We will note two significant items. First, Endo committed to not market an authorized generic, which increased Impax's projected profits by $24.5 million. *See King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp.*, 791 F.3d 388, 394 (3d Cir. 2015) (holding that brand manufacturer commitments to not market a generic drug during the 180-day exclusivity period are "payments" under *Actavis*); *see also Loestrin 24 Fe Antitrust Litig.*, 814 F.3d at 549–53 (explaining that *Actavis* recognized that a reverse payment could include more than just an exchange of money). Second, Endo would pay Impax credits for the shrunken market the latter would inherit if, as expected, Endo timely executed the product hop to the reformulated Opana ER. The $102 million Endo ultimately paid is likely a good approximation of the parties' expected value for these credits. The size of these payments is comparable to other cases where courts have inferred anticompetitive effect. *See In re Wellbutrin XL Antitrust Lit. Indirect Purchaser Class*, 868 F.3d 132, 162 (3d Cir. 2017) (holding that $233 million paid to three generic manufacturers is large under *Actavis*); *Nexium*, 842 F.3d at 50, 54 (acknowledging jury finding that a $300–$690 million payment was large); *accord Actavis*, 570 U.S. at 145 (brand manufacturer agreed to pay three generic manufacturers $12 million, $60 million, and an estimated $171–270 million over nine years).

The Commission rejected the argument that just showing a large payment was enough to establish anticompetitive harm. It reasoned that "[e]stablishing that the payment is not otherwise justified is necessary for demonstrating that the payment is purchasing an exclusive right and preventing the risk of competition." [citation omitted]

But the Commission correctly found no such justification. A large reverse payment might be justified if it represents "avoided litigation costs or fair value for services." *Id.* at 156. That is not the case here. The FTC estimated the settlement saved Endo only $3 million in litigation expenses, an amount in the ballpark of the typical cost for litigating pharmaceutical patents. [citation omitted] Nor did the agreement involve any services that the generic would provide to Endo that could otherwise justify the large payment. Only the services associated with the Parkinson's collaboration could plausibly provide an appropriate basis for the payments. But even assuming that the collaboration is relevant and that the $10 million Parkinson's research agreement constituted payment for services, over $100 million of Endo's payment remains unjustified.

This large and unjustified payment generated anticompetitive effects. The Commission explained that there "was a real threat of competition from Impax" snuffed out by Endo's agreement to make the reverse payments. The FDA had just approved Impax's generic, allowing it to sell the drug. Impax had taken steps to do so, even though its market entry would be "at risk" of infringement liability. Endo's known product-hop plans increased Impax's incentive to quickly enter the market. The Commission thus had substantial evidence to conclude that the reverse payments replaced the "possibility of competition with the certainty of none."

Impax argues that the Commission needed to do more at this first stage of the rule of reason. Its principal attack on the finding of anticompetitive effect is that the Commission needed to evaluate "the patent's strength, which is the expected likelihood of the brand manufacturer winning the litigation." Impax reasons that if it was highly likely that Endo would win the patent suit, then the reverse payment was not anticompetitive because it allowed the generic to enter the market before the patent expired.

We disagree that *Actavis* requires the Commission to assess the likely outcome of the patent case in order to find anticompetitive effects. The fact that generic competition was possible, and that Endo was willing to pay a large amount to prevent that risk, is enough to infer anticompetitive effect. *Actavis*, 570 U.S. at 157. In fact, *Actavis* squarely rejected Impax's argument: "[T]he size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself." *Id*. at 158; [citation omitted]

Consider this settlement. If the parties thought Endo was highly likely to win the infringement suit, then Impax would have been happy with a deal giving it nothing more than entry months in advance of the likely-valid patent's expiration. [citation omitted] Reverse payments potentially worth nine figures would have been a windfall. The need to add that substantial enticement indicates that at least some portion of that payment is "for exclusion beyond the point that would have resulted, on average, from simply litigating the case to its conclusion." [*In re Cipro Cases I & II*, 348 P.3d 845, 867 (Cal. 2015)] …

Impax also argues that the settlement does not look anticompetitive in hindsight. After all, since the settlement Endo has obtained more patents for Opana ER and proven their validity in court. On top of that, the product hop ended up failing once Endo had to take reformulated Opana ER off the market due to safety concerns. So Impax's generic is now the only version of Opana ER on the market.

But it is a basic antitrust principle that the impact of an agreement on competition is assessed as of "the time it was adopted." *See Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985) (Easterbrook, J.); [citation omitted] So the focus is on the following facts as they existed when the parties adopted the settlement. Endo agreed to make large payments to the company that was allegedly infringing its patents. In exchange, Impax agreed to delay entry of its generic drug until two-and-a-half years after the FDA approved the drug. Neither the saved costs of forgoing a trial nor any services Endo received justified these payments. Substantial evidence supports the Commissions' finding that the reverse payment settlement threatened competition.

B.

The next rule-of-reason question is whether Impax can show procompetitive benefits. *Am. Express*, 138 S.Ct. at 2284. The Commission concluded it could not. Although the ALJ had recognized that the settlement's license and covenant-not-to-sue provisions benefited competition, the Commission concluded that these procompetitive effects did not flow from the challenged restraint—the reverse payments themselves. …

We need not resolve this question because of an alternative ruling the Commission made. Although the Commission found the reverse payments generated no procompetitive benefits, it went on to assume *arguendo* that Impax could connect the settlement's purported procompetitive effects to the challenged restraint. Even if that was so, the Commission determined that "Impax could have obtained the proffered benefits by settling without a reverse payment for delayed entry—which is a practical, less restrictive alternative." If we conclude that substantial evidence supported this finding of a less restrictive alternative, we can also assume that Impax has proven procompetitive benefits. So we will turn to our review of the "less restrictive alternative" finding.

C.

A restraint is unreasonable when any procompetitive benefits it produces "could be reasonably achieved through less anticompetitive means." *Am. Express*, 138 S. Ct. at 2284; *see generally* 11 Areeda & Hovenkamp, *supra*, ¶ 1913, at 395–402; C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 937–42 (2016). The concept traces back to then-Circuit Judge Taft's opinion in *United States v. Addyston Pipe & Steel Co*. Hemphill, *Less Restrictive*, *supra*, at 938 & n.53 (citing 85 F. 271, 282 (6th Cir. 1898) (holding that a restraint of trade is unenforceable unless it is "ancillary to the main purpose of a lawful contract[ ] and *necessary* to protect the covenantee['s] ... enjoyment of the legitimate fruits of the contract" (emphasis added))). … The idea is that it is unreasonable to justify a restraint of trade based on a purported benefit to competition if that same benefit could be achieved with less damage to competition. Focusing on the existence of less restrictive alternatives may allow courts to avoid difficult balancing of anticompetitive and procompetitive effects and to "smoke out" anticompetitive effects or pretextual justifications for the restraint. *Hemphill*, *Less Restrictive*, *supra*, at 947–63. …

Actavis recognizes the possibility of less restrictive alternatives to reverse payment settlements. The Court noted that parties to pharmaceutical patent litigation "may, as in other industries, settle in other ways, for example, by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without ... paying the challenger to stay out prior to that point." 570 U.S. at 158; *see also* 12 Areeda & Hovenkamp, *supra*, ¶ 2046c2, at 381–82 (observing that *Actavis* recognizes "that there are better, less anticompetitive ways to settle these disputes").

The Commission found that Impax could have achieved just as much and likely more good (an entry date even earlier than 2013) without the bad (Endo's agreement not to sell a competing generic during the exclusivity period and to pay credits to Impax for the decline of the Opana ER market while Endo executed the product hop). The Commission explained that "[h]olding everything else equal, Impax's acceptance of payment would normally be expected to result in a later entry date than what Impax would have accepted based on the strength of the patents alone." To support its view that Impax could have entered into a settlement without reverse payments that would have resulted in greater generic competition, the Commission relied on industry practice, economic analysis, expert testimony, and adverse credibility findings discounting the testimony of Impax's lead settlement negotiator.

"[T]he existence of a viable less restrictive alternative is ordinarily a question of fact." 11 Areeda & Hovenkamp, *supra*, ¶ 1913b, at 398; *accord O'Bannon v. NCAA*, 802 F.3d 1049, 1074 (9th Cir. 2015) (applying clear-error review to district court's finding of less restrictive alternative). So the substantial deference we owe the Commission's factfinding kicks in, in particular on its determination that a no-payment settlement was feasible.

…In recent years, reverse payment settlements may have become even rarer; over 80 percent of brand-generic settlements reached within the year following *Actavis* did not include a reverse payment.

Impax suggests this evidence of industry practice is not probative of whether it had the opportunity to enter in a no-payment settlement. But leading scholars have recognized that other parties' "actual experience in analogous situations" can help establish the feasibility or practicality of a less restrictive alternative. 11 Areeda & Hovenkamp, *supra*, ¶ 1913b, at 398; [citation omitted] Showing that the alternative is "rooted in real commercial experience" may be especially compelling as the defendant often will not want to acknowledge its willingness to enter into an arrangement that would not have included "the illicit profits arising from an anticompetitive effect." [citation omitted]

And the Commission did not rely on industry practice alone. It acknowledged but refused to credit the trial testimony of Impax's chief negotiator, who said that Endo was "adamant about preventing pre-2013 entry." The Commission noted that this resolute trial testimony was inconsistent with the witness's prior statements that he could not remember discussing pre-2013 entry dates with Endo. …

Finally, economics support the Commission's finding that Endo would have entered into a settlement with an earlier entry date if it could have could have kept the more than $100 million it ended up paying Impax. [citation omitted] If everything has a price, then those large payments were the price for Impax's delayed entry. [citation omitted] Such "fairly obvious" observations can show the feasibility of a less restrictive alternative. [citation omitted]

Three evidentiary legs—industry practice, credibility determinations about settlement negotiations, and economic analysis—thus supported the Commission's conclusion that Endo would have agreed to a less restrictive settlement. [citation omitted] …

Our question is not whether the Commission could have reached a different result on the less-restrictive-alternative question. It is whether there was evidence that would allow a reasonable factfinder to conclude that a no-payment settlement was feasible. [citation omitted] Because there was more than enough evidence to support that unanimous view of the Commissioners, we must uphold their view that a less restrictive alternative was viable. And that means the reverse payment settlement was an agreement to preserve and split monopoly profits that was not necessary to allow generic competition before the expiration of Endo's patent. As a result, Impax agreed to an unreasonable restraint of trade.

* * *

The petition for review is DENIED.

***Insert at page 490 before Antitrust Guidelines for the Licensing of Intellectual Property*:**

1-800 Contacts, Inc. v. Federal Trade Commission, 1 F.4th 102 (2d Cir. 2021)

Per Curiam:

Between 2004 and 2013, Petitioner 1-800 Contacts, Inc. ("1-800") entered into thirteen trademark settlement agreements and one sourcing and services agreement with competitors (the "Challenged Agreements"). As explained below, the Challenged Agreements contained provisions restricting specific terms on which the parties could "bid" when participating in auctions held by companies that operate search engines. By restricting bidding on terms in these auctions, the competitors agreed not to advertise their products when consumers used the search engines' platforms to search the specific terms at issue. In August 2016, the Federal Trade Commission ("FTC" or the "Commission") issued an administrative complaint against Petitioner, alleging that the Challenged Agreements and Petitioner's enforcement of the agreements unreasonably restrain truthful, non-misleading advertising as well as price competition in search advertising auctions in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. The claim was tried before an Administrative Law Judge (ALJ), who in 2017 issued an Initial Decision and Order finding that the agreements violate Section 5. Petitioner then appealed to the full Commission, which affirmed the ALJ's conclusion in a three to one decision, with one Commissioner not participating. This timely petition for review followed the issuance of the Commission's Final Order.

Although we hold that trademark settlement agreements are not automatically immune from antitrust scrutiny, the Commission's analysis of the alleged restraints under the "inherently suspect" framework was improper. …

BACKGROUND

Contact lenses, prescription eyewear designed to improve the user's vision, can be sold only pursuant to a prescription. Such prescriptions specify both the characteristics of the lens, such as its strength, and the manufacturer brand. Thus, when consumers purchase contact lenses, they may not substitute one brand for another, but must purchase the brand listed on the prescription. Contact lenses are sold by four different types of retailers: independent eye care professionals; optical retail chains; mass merchants and club stores; and purely internet-based retailers, such as Petitioner. Internet-based retailers accounted for 17 percent of all contact lens sales in 2015, the year before these proceedings began. 1-800 accounts for a majority of all online sales of contact lenses. The price of contact lenses varies significantly based on retail channel; independent eye care professionals typically charge the most, followed by retail chains, mass merchants, and then online retailers. Petitioner, however, admits that it charges more than its rival online retailers. It prices its lenses somewhere below independent professionals and retail chains but above mass merchants and other club stores.

Petitioner and its competitors pay to advertise their sales of contact lenses on the internet. One way they do this is via "search advertising." When an online shopper uses a search engine such as Google or Bing, the search engine's program returns two types of results to the shopper: "sponsored" and "organic," both of which provide links to web pages. Sponsored results are ads; they appear because the owner of the featured web page has paid for its page to appear in that space. Sponsored links are typically designated by a label like "Ad" or "Sponsored," and by colored or shaded boxes around the link. Organic results, on the other hand, appear based exclusively on which results a search engine's algorithm deems to be most relevant to the shopper's search. Organic results are listed separately from the sponsored results.

Search engines determine which advertisements to display on a search results page based in part on the relevance or relation of the consumer's search to various words or phrases called "keywords." Advertisers bid on these keywords during auctions hosted by the search engines. The highest bidders' ads are typically displayed most prominently on a page, though search engines consider other factors when determining where to place an ad on a results page, such as an ad's quality and relevance to a consumer's search. Search engines generally do not limit the keywords available to advertisers at auction. As a result, competitors often bid on each other's brand names so that their ad runs when a consumer searches for a competitor. Brand name terms are often trademarked.

Via bidding on "negative keywords," an advertiser may also prevent its ad from being displayed when a consumer searches for a particular keyword. These negative keywords preclude ads from being displayed even when the search engine independently determined that the ad would be relevant to the consumer. The Commission suggests that this is useful when, for example, a retailer selling eyeglasses has bid on the advertising keyword "glasses" but wants to prevent its ad from appearing in response to the term "wine glasses."

Many online retailers of contact lenses devote the majority of their advertising budgets to search advertising. The Commission found that these ads are presented to consumers "at a time when [they are] more likely looking to buy." Unlike its online retail competitors, Petitioner also uses other methods of advertising, including printed materials, radio, and television. Online search advertising, however, still represents a large portion of Petitioner's advertising budget. Because Petitioner charges more than other online retailers, when its competitors' ads appear in response to a search for 1-800's trademark terms, Petitioner's sales tend to decrease.

In 2002, Petitioner began filing complaints and sending cease-and-desist letters to its competitors alleging trademark infringement related to its competitors' online advertisements. Between 2004 and 2013, Petitioner entered into thirteen settlement agreements to resolve most of these disputes. Each of these agreements includes language that prohibits the parties from using each other's trademarks, URLs, and variations of trademarks as search advertising keywords. The agreements also require the parties to employ negative keywords so that a search including one party's trademarks will not trigger a display of the other party's ads. The agreements do not prohibit parties from bidding on generic keywords such as “contacts” or “contact lenses.” Petitioner enforced the agreements when it perceived them to be breached.

Apart from the settlement agreements, in 2013 Petitioner entered into a “sourcing and services agreement” with Luxottica, a company that sells and distributes contacts through its affiliates. That agreement also contains reciprocal online search advertising restrictions prohibiting the use of trademark keywords and requiring both parties to employ negative keywords.

The FTC issued an administrative complaint against Petitioner in August 2016 alleging that the thirteen settlement agreements and the Luxottica agreement (the “Challenged Agreements”), along with subsequent actions to enforce them, unreasonably restrain truthful, non-misleading advertising as well as price competition in search advertising auctions, all of which constitute a violation of Section 5 of the FTC Act, 15 U.S.C. § 45.3 The complaint alleges that the Challenged Agreements prevented Petitioner’s competitors from disseminating ads that would have informed consumers that the same contact lenses were available at a cheaper price from other online retailers, thereby reducing competition and making it more difficult for consumers to compare online retail prices. The case was tried before an ALJ, who concluded that a violation had occurred.

As an initial matter, the ALJ rejected Petitioner’s assertion that trademark settlement agreements are not subject to antitrust scrutiny in light of *FTC v. Actavis*, 570 U.S. 136 (2013). Applying the “rule of reason” and principles of Section 1 of the Sherman Act, 15 U.S.C. § 1, the ALJ determined that “[o]nline sales of contact lenses constitute a relevant product market.” He found that the agreements constituted a “contract, combination, or conspiracy” as required by the Sherman Act and held that the advertising restrictions in the agreements harmed consumers by reducing the availability of information, in turn making it costlier for consumers to find and compare contact lens prices.

Having found actual anticompetitive effects, as required under the rule of reason analysis, the ALJ rejected the procompetitive justifications for the agreements offered by Petitioner. He found that while trademark protection is procompetitive, it did not justify the advertising restrictions in the agreements and also that Petitioner failed to show that reduced litigation costs would benefit consumers. The ALJ issued an order that barred Petitioner from entering into an agreement with any marketer or seller of contact lenses to limit participation in search advertising auctions or to prohibit or limit search advertising.

1-800 appealed the ALJ’s order to the Commission. In a split decision, a majority of the Commission agreed with the ALJ that the agreements violated Section 5 of the FTC Act. The majority, however, analyzed the settlement agreements differently from the ALJ. The majority classified the agreements as “inherently suspect” and alternatively found “direct evidence” of anticompetitive effects on consumers and search engines. The majority then analyzed the procompetitive justifications Petitioner offered for the agreements and rejected arguments that the benefits of protecting trademarks and reducing litigation costs outweighed any potential harm to consumers. Finally, the majority identified what it believed to be less anticompetitive alternatives to the advertising restrictions in the agreements. One Commissioner dissented, reasoning both that the majority should not have applied the "inherently suspect" framework and that it failed to give appropriate consideration to Petitioner's proffered procompetitive justifications. This timely appeal followed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal under 15 U.S.C. § 45(c). The majority opinion of the Commission "adopt[ed] the ALJ's findings of fact to the extent that they [were] not inconsistent" with its opinion. Factual findings of the Commission are binding "if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." FTC v. Ind. Fed'n of Dentists (IFD), 476 U.S. 447, 454 (1986) (internal quotation marks and citation omitted). The Commission's legal conclusions are "for the courts to resolve, although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair.'" *Id*.

DISCUSSION

I. *Actavis* Considerations

Petitioner argues, as it did below, that trademark litigation settlements are generally immune from antitrust review. It contends that in *Actavis*, the Supreme Court "cabin[ed] its extension of antitrust scrutiny" to the "unusual" intellectual property settlements at issue there and did not intend to implicate "commonplace" settlements. Neither the ALJ nor any participating member of the Commission found this argument persuasive. Nor do we.

In *Actavis*, the Supreme Court analyzed what are known as "reverse payment" patent settlements. 570 U.S. at 141. In short, manufacturers of brand name drugs paid manufacturers of generic drugs to keep the generic manufacturers from litigating the validity of the brand name manufacturers' patents. *See id*. at 145. This effectively allowed the brand name manufacturers to maintain exclusive sales of certain drugs for longer than they would have if the applicable patent, through litigation, was found to be invalid. *Id*. at 153-54. In *Actavis*, the Court rejected the idea that the conduct at issue was immune from antitrust scrutiny just because it occurred within the context of a patent litigation settlement. *Id*. at 146-48. The Court explained that "it would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well." *Id*. at 148.

Petitioner argues that *Actavis* represents an exception to the general rule against subjecting intellectual property (IP) settlement agreements to antitrust scrutiny because patents, unlike trademarks, for example, are inherently exclusionary and because the reverse payment scheme at issue in *Actavis* was "unusual." To be sure, in *Actavis* the Court detailed how certain commonplace forms of settlement agreements did not, by the nature of their existence alone, create antitrust liability. 570 U.S. at 151-52. Contrary to Petitioner's claim, however, the Court went on to say that the possibility that agreements may not always bring about anticompetitive consequences "does not justify dismissing the FTC's complaint. An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present[.]" *Actavis*, 570 U.S. at 156.

As in *Actavis*, Petitioner's trademark, "if valid and infringed, might have permitted it to" preclude competitors from bidding on its trademarked terms in search advertising auctions or running advertisements on those terms. *Id*. at 147. We "take this fact as evidence that the agreement's anticompetitive effects fall within the scope of" the trademark protections. *Id*. But the mere fact that an agreement implicates intellectual property rights does not "immunize [an] agreement from antitrust attack." *Id*.; see also In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1325 (Fed. Cir. 2000) ("Intellectual property rights do not confer a privilege to violate the antitrust laws."); United States v. Microsoft Corp., 253 F.3d 34, 63 (D.C. Cir. 2001) (same). We have not shied away from considering antitrust claims that implicate trademark rights in the past, see, e.g., Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 55-56 (2d Cir. 1997), and we decline to do so now. As in any antitrust case, we must "determine whether the restraints in the agreement[s] are reasonable in light of their actual effects on the market and their pro-competitive justifications." *Id*. at 56.

II. Sherman Act Framework

Because "[t]he FTC Act's prohibition of unfair competition and deceptive acts or practices ... overlaps the scope of § 1 of the Sherman Act ... aimed at prohibiting restraint of trade," California Dental Ass'n v. FTC (Cal. Dental), 526 U.S. 756, 762 n. 3 (1999), it was appropriate that the ALJ and the Commission consulted Sherman Act jurisprudence to determine whether the Challenged Agreements violated Section 5 of the FTC Act. [co]

To prove a Sherman Act violation – and by extension, a Section 5 violation – the FTC must establish (1) a contract, combination, or conspiracy exists that (2) unreasonably restrains trade. [co] In this case, the Challenged Agreements are undeniably contracts between Petitioner and its competitors. We "presumptively appl[y]" what is known as the "rule of reason" analysis to the Challenged Agreements to determine whether they restrain trade. Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006). Under that analysis an antitrust plaintiff "must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." *Id*. As Justice Brandeis famously articulated:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). A plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. North Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc., 883 F.3d 32, 42 (2d Cir. 2018). After a prima facie case of anticompetitive conduct has been established, the burden shifts to the defendant to proffer procompetitive justifications for the agreement. *Id*. "Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means." Geneva Pharm. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 507 (2d Cir. 2004).

In some cases, however, "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958). Such agreements are deemed per se illegal. See *MLB*, 542 F.3d at 315. This designation is saved for certain types of restraints, e.g., geographic division of markets or horizontal price fixing, that have been established over time to "lack ... any redeeming virtue." *Id*.

The Supreme Court, however, has rejected fixed categories of analysis when considering the anticompetitive nature of a restraint. See Cal. Dental, 526 U.S. at 779. Some restraints, therefore, fall between the type of conduct typically labeled per se anticompetitive and that which is analyzed under a "full-blown" rule of reason analysis. *MLB*, 542 F.3d at 317. When "the great likelihood of anticompetitive effects can easily be ascertained[,]" courts apply an abbreviated rule of reason analysis sometimes known as the "quick-look" approach. Cal. Dental, 526 U.S. at 770. The Commission calls the standard it applies in these situations the "inherently suspect" framework.

Under the Commission's "inherently suspect" framework, neither direct evidence of harm nor proof of market power is needed to show the anticompetitive effect of the restraint because the "likely tendency to suppress competition" posed by the challenged conduct makes it "inherently suspect." Polygram Holding, Inc., 136 F.T.C. 310, 344-45 (2003), aff'd, 416 F.3d 29 (D.C. Cir. 2005). An "elaborate market analysis" is unnecessary, Polygram, 416 F.3d at 35, and once the government has identified a "suspect" agreement, the burden shifts directly to the defendant to show any procompetitive justifications it might have for the restraint. See United States v. Apple, 791 F.3d 290, 330 (2d Cir. 2015).

This approach is only permissible when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." Cal. Dental, 526 U.S. at 770; see also Dagher, 547 U.S. at 7 n.3 (rejecting a quick-look analysis because it applies only "to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability"); Polygram, 416 F.3d at 37 (explaining that the inherently suspect framework is only applicable when "close family resemblance [exists] between the suspect practice and another practice that already stands convicted in the court of consumer welfare").

Further, "[i]f an arrangement 'might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition,' more than a 'quick look' is required." *MLB*, 542 F.3d at 318 (quoting Cal. Dental, 526 U.S. at 771). In *California Dental*, the Supreme Court considered the California Dental Association's rule prohibiting price advertising, specifically discounted fees, and advertising relating to the quality of dental services. 526 U.S. at 761. There, the Court rejected the use of an abbreviated rule of reason analysis, holding that the existence of a plausible procompetitive justification – in that case, the prohibition of deceptive advertising in an asymmetrical information marketplace – effectively foreclosed the ability of courts to utilize the quick look approach. *See id*. at 771.

Here, the Commission viewed the advertising restrictions in the Challenged Agreements as inherently suspect; it also found that the agreements were a form of "bid rigging" that harmed search engines – i.e., an independent basis upon which it could apply the inherently suspect analytical framework. Petitioner and amici argue that the application of the inherently suspect framework was improper and that the Challenged Agreements should only be considered under a rule of reason analysis. We agree with Petitioner that the Challenged Agreements cannot be classified as inherently suspect.

Citing expert reports and economic theory, the government argues that the Commission was correct to employ the inherently suspect framework because restrictions on advertising are likely to cause consumers to pay more for contact lenses. But even if restraints on truthful advertising have a tendency to raise prices, "[t]he fact that a practice may have a tangential relationship to the price of the commodity in question does not mean that a court should dispense with a full rule-of-reason analysis." *MLB*, 542 F.3d at 317.

Crucially, the restraints at issue here could plausibly be thought to have a net procompetitive effect because they are derived from trademark settlement agreements. In *Clorox*, applying the rule of reason, we considered whether a trademark settlement agreement illegally restrained trade under the Sherman Act and we explained that "[t]rademarks are by their nature non-exclusionary." 117 F.3d at 55-56. Agreements to protect trademarks, then, should not immediately be assumed to be anticompetitive – in fact, *Clorox* tells us instead to presume they are procompetitive. *Id*. at 60. As the Challenged Agreements restrict the parties from running advertisements on Petitioner's trademarked terms, they directly implicate trademark policy.

The Commission acknowledged as much, finding Petitioner's proffered procompetitive justifications to be "cognizable and, at least, facially plausible[.]" Rather than take that fact as an indication that it should not apply an abbreviated rule of reason analysis, as the Supreme Court instructed in *California Dental*, the Commission instead set out to show (i) that there was a theoretical basis for the alleged anticompetitive effect and that the restraints were likely, in this particular context, to harm competition and (ii) that Petitioner could have minimized the anticompetitive effects and accomplished its procompetitive justifications through less restrictive means. While this may be analytically acceptable in some situations, see *Cal. Dental*, 526 U.S. at 779 (noting to require a "more extended examination" does not always translate to a call for "plenary market examination"), it was not appropriate here.

Courts do not have sufficient experience with this type of conduct to permit the abbreviated analysis of the Challenged Agreements undertaken by the Commission. … When, as here, not only are there cognizable procompetitive justifications but also the type of restraint has not been widely condemned in our "judicial experience," see *Polygram*, 416 F.3d at 37, more is required. Cf. Bogan v. Hodgkins, 166 F.3d 509, 514 n.6 (2d Cir. 1999) (noting pre-*California Dental* that "[u]nder quick look, once the defendant has shown a procompetitive justification for the conduct, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis" (internal quotation marks and citation omitted)). The Challenged Agreements, therefore, are not so obviously anticompetitive to consumers that someone with only a basic understanding of economics would immediately recognize them to be so. See *Cal. Dental*, 526 U.S. at 770. We are bound, then, to apply the rule of reason.

III. Application of the Rule of Reason

Under the rule of reason, the Commission bears the burden of establishing a prima facie case of anticompetitive effect. Direct evidence of anticompetitive effects establishes a prima facie case of a Sherman Act Section 1 violation and obviates the need for a detailed market analysis or showing of market power. *See IFD*, 476 U.S. at 460. The Commission contends that it satisfied its burden by adducing evidence of increased contact lens prices and a reduction in the quantity of advertisements.

A. Anticompetitive Effects

Anticompetitive effects in a relevant market may be shown through direct evidence of output reductions, increased prices, or reduced quality in the relevant market. Ohio v. Am. Express Co. (Am. Express), ––– U.S. ––––, 138 S. Ct. 2274, 2284 (2018); *see also* North Am. Soccer League, 883 F.3d at 42. The Commission has also defined sufficient evidence of anticompetitive harm to include evidence of "retarded innovation, or other manifestations of harm to consumer welfare." In re Realcomp II Ltd., No. 9320, 2007 WL 6936319 (F.T.C. Oct. 30, 2009), aff'd 635 F.3d 815. We reject the Commission's argument that it has established direct evidence of anticompetitive effect in the form of increased prices. When an antitrust plaintiff advances an antitrust claim based on direct evidence in the form of increased prices, the question is whether it can show an actual anticompetitive change in prices after the restraint was implemented. See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 236-37 (1993); MacDermid, 833 F.3d at 184. The government could not make that showing because it did not conduct an empirical analysis of the Challenged Agreements' effect on the price of contact lenses in the online market for contacts. The evidence offered by the government is theoretical and anecdotal; it is not "direct." Consequently, the Commission's conclusion that differences between 1-800 Contacts' prices and those of its competitors constitute direct evidence of the Challenged Agreements' anticompetitive effects is not supported by substantial evidence.

The government also argues that "disrupted information flow" is an anticompetitive effect and that a reduction in the quantity of advertisements is direct evidence of that effect. While, to our knowledge, no Court of Appeals has held that a reduction of truthful information is necessarily a manifestation of anticompetitive harm, our sister circuits have occasionally considered advertising restraints in different contexts and have found the conduct in question to have anticompetitive effects. See, e.g., California Dental Ass'n v. FTC (Cal. Dental II), 224 F.3d 942, 949 (9th Cir. 2000) (considering professional advertising restraints in an asymmetrical information marketplace); Polygram, 416 F.3d at 37 (holding that the FTC appropriately concluded an agreement to restrain price cutting and advertising violated the FTC Act); Realcomp II, 635 F.3d at 831-32, 832 n.9 (denying petition for review when petitioner's policy limited access to internet marketing); Blackburn v. Sweeney, 53 F.3d 825, 827-29 (7th Cir. 1995) (identifying an agreement not to advertise in certain geographic areas as a per se illegal attempt to allocate markets). We need not decide whether the Commission's theory of harm is viable, however, because we conclude that Petitioner has shown a procompetitive justification and the Commission fails to carry its burden at the third step.

B. Procompetitive Justifications

Petitioner asserts that the Challenged Agreements are justified by two procompetitive effects: reduced litigation costs and protecting Petitioner's trademark rights. … The protection of Petitioner's trademark interests constitutes a valid procompetitive justification for the Challenged Agreements.

The Commission determined that, since "the [Challenged Agreements] restrict a type of competitive advertising that has never been found to violate the trademark laws, and the weight of authority overwhelmingly points to non-infringement[,]" trademark protection was not a valid procompetitive benefit that justified the Challenged Agreements. This was incorrect. Trademarks are by their nature non-exclusionary, and agreements to protect trademark interests are "common, and favored, under the law." *Clorox*, 117 F.3d at 55. As a result, "it is difficult to show that an unfavorable trademark agreement creates antitrust concerns." *Id*. at 57. This is true even though trademark agreements inherently prevent competitors "from competing as effectively as [they] otherwise might[.]" *Id*. at 59.

In *Clorox*, we found that the plaintiff had failed to show adverse effects on the market as a whole because the restrictions at issue did not restrict competitors' ability to enter into the relevant market. *Id*. at 59. Although we held that the plaintiff in that case failed to present a prima facie case of anticompetitive harm, we also went on to detail how the procompetitive justifications of the agreement weighed against finding an antitrust violation. *Id*. at 60. We stated that "trademark agreements are favored in the law as a means by which parties agree to market products in a way that reduces the likelihood of consumer confusion and avoids time-consuming litigation." *Id*. And again, *Clorox* counsels that we should "presume" that trademark settlement agreements are procompetitive. *Id*.

The Commission, however, decided that the trademark claims that led to the Challenged Agreements were likely meritless. While it claimed not to be determining the validity of Petitioner's trademark claims, it did just that by weighing the potential validity of the trademark claims in order to show that Petitioner's procompetitive justification was invalid. Even if the Commission's analysis of the underlying trademark claims were correct, trademark agreements that "only marginally advance[ ] trademark policies" can be procompetitive. *See id*. at 57. Under *Clorox*, "[e]fforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies." *Id*. at 61.

That does not mean that every trademark agreement has a legitimate procompetitive justification. If the "provisions relating to trademark protection are auxiliary to an underlying illegal agreement between competitors," or if there were other exceptional circumstances, we would think twice before concluding the challenged conduct has a procompetitive justification. *See id*. at 60. As in *Clorox*, however, there is a lack of evidence here that the Challenged Agreements are the "product of anything other than hard-nosed trademark negotiations." *Id*. Consequently, we find Petitioner met its burden at step two.

C. Less Restrictive Alternatives

Because Petitioner has carried its burden of identifying a procompetitive justification, the government must show that a less restrictive alternative exists that achieves the same legitimate competitive benefits. *Am. Express*, 138 S. Ct. at 2284; North Am. Soccer League, 883 F.3d at 42. That is, the restraint "only survives a rule of reason analysis if it is reasonably necessary to achieve the legitimate objectives proffered by the defendant." United States v. Brown Univ., 5 F.3d 658, 678-79 (3d Cir. 1993). "Less restrictive alternatives are those that would be less prejudicial to competition as a whole." North Am. Soccer League, 883 F.3d at 45 (internal quotation marks omitted). The Commission found that the government had shown a viable less restrictive alternative, namely that the parties to the Challenged Agreements could have agreed to require clear disclosure in each search advertisement of the identity of the rival seller rather than prohibit all advertising on trademarked terms. According to the government, therefore, the Challenged Agreements are overbroad.

In *Clorox*, however, we noted that "it is usually unwise for courts to second-guess" trademark agreements between competitors. 117 F.3d at 60. In this context, what is "reasonably necessary," *Brown Univ*., 5 F.3d at 679, is likely to be determined by competitors during settlement negotiations, *Clorox*, 117 F.3d at 60. And, as articulated above, absent something that would negate the typically procompetitive nature of these agreements, "the parties' determination of the scope of needed trademark protections is entitled to substantial weight." *Clorox*, 117 F.3d at 60.

The government attempts to differentiate *Clorox* by arguing that the FTC is different than a private plaintiff, and when it brings an antitrust claim we should not give the settling parties as much latitude to negotiate a trademark agreement as a court would in a private antitrust suit. Even if we were to accept the Commission's argument that its presence in a case warrants less solicitude for trademark interests, the government still needs to show more than the mere possibility there could be crafted an alternative form of the trademark agreement. The alternative must be "substantially less restrictive." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1502 (3rd & 4th eds., 2019 Cum. Supp. 2010-2018). The alternative must also achieve the same legitimate competitive benefits outlined by the Petitioner. *North Am. Soccer League*, 883 F.3d at 42. And at the end of the day, our job is to "weigh[ ] the competing evidence to determine if the effects of the challenged restraint tend to promote or destroy competition." *Apple*, 791 F.3d at 329 (internal quotation marks omitted).

The Commission majority thought that a disclosure requirement was enforceable because, *inter alia*, it has ordered similar requirements in the past. But the majority failed to consider the practical reasons for the parties entering into the Challenged Agreements. Under *Clorox*, this was insufficient. 117 F.3d at 60-61. The Commission did not consider, for example, how the parties might enforce such a requirement moving forward or give any weight to how onerous such enforcement efforts would be for private parties. When the restraint at issue in an antitrust action implicates IP rights, *Actavis* directs us to consider the policy goals of the relevant IP law. *See* 570 U.S. at 149. Here, those considerations must include the practical implications of the government's proffered alternatives on the parties' ability to protect and enforce their trademarks.

While trademark agreements limit competitors from competing as effectively as they otherwise might, we owe significant deference to arm's length use agreements negotiated by parties to those agreements. *Clorox*, 117 F.3d at 59-60. Doing so may give rise to collateral harm in a relevant market. But forcing companies to be less aggressive in enforcing their trademarks is antithetical to the procompetitive goals of trademark policy. And without considering the downstream effects of requiring less aggressive enforcement, the government has failed to show that the proffered alternatives achieve the same legitimate procompetitive benefits as those advanced by the Petitioner.

CONCLUSION

In this case, where the restrictions that arise are born of typical trademark settlement agreements, we cannot overlook the Challenged Agreements' procompetitive goal of promoting trademark policy. In light of the strong procompetitive justification of protecting Petitioner's trademarks, we conclude the Challenged Agreements "merely regulate[ ] and perhaps thereby promote[ ] competition." *Chicago Bd. of Trade*, 246 U.S. at 238. They do not constitute a violation of the Sherman Act, and therefore an asserted violation of the FTC Act fails of necessity.

The petition for review is GRANTED, the Final Order of the Federal Trade Commission is VACATED, and the case is REMANDED with instructions to DISMISS the administrative complaint.

Chapter 5. Vertical Restrictions

II. Interbrand Vertical Foreclosure -- Mainly, Exclusive Dealing and Tying

[B] Tying Arrangements

[3] Modern Doctrine: Tying Product Power and Anticompetitive Effects

p. 638, insert after Note 5:

6. *In Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 468 (7th Cir. 2020), cert. denied (June 30, 2021) the Seventh Circuit held that the defendant cable provider's interconnect services and its advertising representation services were separate products. Prior to implementation of its tying requirement, the plaintiff had sold advertising representation services to Comcast customers, but Comcast later required customers to purchase this service from itself. A dissenter objected that this was simply a refusal to deal claim disguised as a tying claim and that the record did not show true conditioning because a monopolist has a right to decide with whom it will do business. Who is correct? Suppose a firm selling durable equipment initially sells it without service, and customers can purchase service where they want; later the firm prices three years of service into the product price. Tying? Cf. Eastman Kodak Co. v. Image Tech. Services, 504 U.S. 451 (1992).

NOTE: DEFAULTS AND THE LAW OF TYING

A "default" is a variation of either a contractual or technological tie except that the attachment or inclusion of the second product is presumptive rather than mandatory.[2] For example, at this writing a new cellular phone with either an Android or Apple operating system and sold in the United States virtually always comes with Google Search preinstalled as the "default" search engine. Pending litigation against Google may change this. The default means that if the user does nothing and simply searches, she will be using Google Search. However, the user may add additional search engines, quickly and at no cost, and use any one among several. Alternatively, a new computer running Windows 10 from Microsoft comes with Edge as the default internet browser and Bing as the default search engine. If the user does nothing, internet browsing and searching will occur on these products. However, once again, the user can readily switch to another browser, such as Google Chrome, or another search engine, such as Duck-Duck-Go or Google Search.

One significant difference between these two situations is the rate of substitution. Although cell phone users can freely switch away from Google Search, most do not. By contrast, many of the buyers of a Windows 10 laptop or desktop do switch away from the Microsoft products, mainly to go to Google Chrome as a browser or Google Search as a search engine. One explanation, of course, is that switching the default is more intimidating or less likely to occur on a small device such as a handheld. Another explanation is that most customers prefer the Google search engine. Because Google Search is the default on handhelds, they stay with it. Because it is

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[2]For further exploration, see Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 Yale L.J. 1952 (2021).

not the default on desktops and laptops that run Windows, most purchasers switch to it. Another issue with defaults is that the person making the choice is typically not the person who is harmed. For example, the collective effect of individual users' low-impact decisions to accept a particular default search engine might be the costly exclusion of rivals.

Are defaults equivalent to tying arrangement? Simply offering two products together without actually forcing the buyer to take both is not a tie. See, e.g., *It's My Party, Inc. v. Live Nation, Inc*., 811 F.3d 676, 685 (4th Cir. 2016) (concert promoter did not tie its venue to its promotion services; artists were not forced to use the venue, and only 14 percent of those who used the defendant's promotion services also rented its venue). The Supreme Court has described ties with terms such as "forcing" or "coercion." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) ("forcing"); *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 605 (1953) ("coerce"). A default with the unrestricted right to abandon the secondary product in favor of a different choice seems not to fit that definition. One factor that might be legally relevant is that in most devices a default is really an absolute tie in the sense that the user cannot actually remove the tied product; she can only add substitutes. For example, Bing search is effectively "tied" to Windows 10 absolutely, because the code is incorporated into the program and an ordinary user is not able to remove it. She can, however, add one or more alternative search engines and ignore the presence of Bing on the device. In that case, is Bing being tied?

The statutory language is not entirely clear about defaults, although it appears to permit Sherman Act challenges more readily than those under §3 of the Clayton Act, 15 U.S.C. §14. The latter provision requires a "condition, agreement, or understanding" that the buyer not deal with a rival. Because the default mechanism readily permits a user to install a rival product, that requirement appears not to be met. By contrast, the language of §1 of the Sherman Act reaches conduct that "restrain[s] . . . trade," which refers to reduced output and higher prices. Section 2 prohibits those who "monopolize," which requires unreasonable exclusion. Whether a default satisfies either of the Sherman Act requirements is mainly a question of fact. In any event, there is a solid tradition of being less strict about tying or exclusive-dealing law's categorical requirements when raised as part of a §2 case against a monopolist. The ultimate question is not whether there is literal coercion, but whether the practice serves to exclude competition unreasonably.

NOTE: TERMINATION OF THE PARAMOUNT CONSENT DECREE

In 2020 the Antitrust Division sought to terminate the 70-year-old *Paramount* consent decree that has governed a variety of mainly vertical practices in the motion picture industry, including block-booking, resale price maintenance, and various other vertical practices. The Division noted:

> The Paramount decrees, like other legacy antitrust judgments, have no sunset provisions or termination dates. They continue to govern how the film industry conducts its business, despite significant changes to the

> industry, including technological innovations, new movie platforms, new competitors and business models, and shifting consumer demand. Unlike 70 years ago, the first-run movie palaces of the 1930s and '40s that had one screen and showed one movie at a time have been replaced by multiplex theatres that have multiple screens showing movies from many different distributors at the same time. New technology has created many different movie platforms that did not exist when the decrees were entered into, including cable and broadcast television, DVDs, and the Internet through movie streaming and download services.[17]

A district court granted the request, finding that termination was in the public interest, given that many of the factual aspects of motion picture distribution had changed, as well as the law. On factual changes, the court noted:

> In the seventy years since the Decrees were entered, the motion picture industry has seen significant changes. First, the Decrees forced the Major Defendants to separate their distribution and theater operations; today, none of them own an appreciable percentage of the nation's movie theaters. In fact, no movie distributor owns a major theater. Second, although the Decrees concerned first-run motion picture theater markets, films today are broadly released in single theatrical runs. In the 1930s and 40s, the only way that the public could view a motion picture was in a single-screen movie theater. Multiplexes, broadcast and cable television, DVDs, and the internet did not exist. The single-screen, theater-only distribution market provided Defendants with the incentive and ability to limit the first-run distribution of their films to a select group of owned or controlled theaters in order to maximize their profits, and to relegate independent theaters to subsequent less profitable runs.
>
> Today, subsequent theatrical runs, as well as subsequent-run theaters, no longer exist in any meaningful way. Rather, major films are released broadly to thousands of multiscreen theaters at the same time in a single theatrical run. This material change in motion picture distribution was apparent in 1989, when the Second Circuit noted that, among other changes to this industry, the development of national television advertising … changed the business realities of the industry so that movie producers and distributors have every incentive to disseminate their products as quickly, and as widely, as possible. Many more exhibitors exhibit on many more screens than was the case when the consent judgments were entered into.

United States v. Paramount Pictures, Inc., 2020 WL 4573069, at *4–5 (S.D.N.Y. Aug. 7, 2020), quoting *United States v. Loew's Inc.*, 882 F.2d 29, 33 (2d Cir. 1989). On the

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[17] https://www.justice.gov/opa/pr/department-justice-files-motion-terminate-paramount-consent-decrees.

law, the court also found significant changes in the law of vertical restraints, many of which were illegal per se in 1948, and also in the law of mergers. Finally, it noted that the Antitrust Division today routinely places time limits on consent decrees, typically for ten years. Consent decrees in perpetuity such as the *Paramount* decree were disfavored.

Chapter 6. Monopoly Structure, Power, and Conduct

III. The Modern Monopolization Offense: Conduct

[A] Innovation and Exclusion

Add at p. 786 before [B] Monopolization and the Intellectual Property Laws:

NOTE: ONGOING ANTITRUST LITIGATION AGAINST TECH GIANTS

Facebook

In late 2020, the FTC brought suit against Facebook for violating Section 2 of the Sherman Act. The FTC accused Facebook of illegally monopolizing the relevant market of "provision of personal social networking services" in the United States, a monopoly protected by barriers to entry such as network effects and high switching costs. The FTC alleged that Facebook engaged in anticompetitive conduct by "acquiring Instagram, acquiring WhatsApp, and the anticompetitive conditioning of access to its platform to suppress competition."

Regarding the acquisitions, the FTC argued that Instagram and WhatsApp were uniquely positioned to overcome the network-effects barrier to entry that protected Facebook's monopoly. While these services were not yet direct competitors to Facebook, the monopolist worried that they would enter the personal social networking market. The FTC highlighted the contents of emails from Facebook CEO Mark Zuckerberg saying that "it is better to buy than compete." With regard to WhatsApp, Mr. Zuckerberg worried about, in his words, "messaging apps . . . using messages as a springboard to build more general mobile social networks." Facebook neutralized the threat posed by WhatsApp by acquiring it. Facebook was not only worried that Instagram or WhatsApp would independently evolve into competitive threats; it worried that another major tech company could acquire these services and compete against Facebook in providing personal social networking services.

The FTC also alleged that Facebook would allow third-party software applications access to Facebook's application programming interfaces ("APIs") "only on the condition that they refrain from providing the same core functions that Facebook offers." This policy harmed competition, according to the FTC, by deterring third-party application developers from including features and functionalities that might compete with Facebook and by "hinder[ing] and prevent[ing] promising apps from evolving into competitors that could threaten Facebook's personal social networking monopoly."

The FTC sought to enjoin Facebook from ever imposing such anticompetitive conditions. (Although Facebook had voluntarily suspended its conditions on app developers in light of antitrust scrutiny, the FTC sought to make that suspension permanent and mandatory.) In addition to seeking injunctions against Facebook's anticompetitive conduct, the FTC requested the divestiture of certain assets, including, but not limited to, Instagram and/or WhatsApp.

In the summer of 2021, a federal judge dismissed the FTC's complaint without prejudice. *FTC v. Facebook, Inc*., 560 F.Supp.3d 1 (D.D.C. 2021). The judge held that the FTC failed to plead sufficient facts that Facebook possessed "monopoly power in the market for Personal Social Networking (PSN) Services." Although an antitrust complaint's allegation of a dominant market share may be sufficient in Section 2 cases where "market share was measured by revenue, units sold, or some other typical metric," – the judge reasoned – such allegations are insufficient when the case involves an unusual market such as PSN services that are free to use.

The court further opined that even if the FTC had sufficiently pled that Facebook possessed monopoly power, "its challenge to Facebook's policy of refusing interoperability permissions with competing apps fails to state a claim for injunctive relief." In addition to finding these policies lawful, the court questioned the timing issue given that Facebook's actions "occurred in 2013, seven years before this suit was filed, and the FTC lacks statutory authority to seek an injunction 'based on [such] long-past conduct.'" In contrast, regarding Facebook's acquisitions of WhatsApp and Instagram, the court held that "an injunction under Section 13(b) is a theoretically available remedy in a Section 2 challenge to long-ago mergers so long as the defendant still holds the purchased assets or stock, as is the case here."

The FTC filed an amended complaint against Facebook, again alleging that the company had illegally monopolized the market for U.S. personal social networking (PSN). This time, however, the federal judge rejected Facebook's motion to dismiss, reasoning that the FTC had sufficiently pled that Facebook possessed monopoly power in the market for PSN services and that Facebook willfully maintained that power through anticompetitive conduct, namely, the acquisitions of Instagram and WhatsApp. The court did, however, express doubt as to the FTC's claim based on Facebook's interoperability policies because Facebook had abandoned those policies in 2018 and had ceased enforcement of those policies even earlier. The court, thus, barred discovery on this claim. *FTC v. Facebook, Inc*., __ F.Supp. 3d __, 2022 WL 103308 (D.D.C. Jan. 11, 2022).

Google

In October 2020, the DOJ and eleven state attorneys general sued Google for "unlawfully maintaining monopolies in the markets for general search services, search advertising, and general search text advertising in the United States through anticompetitive and exclusionary practices." The complaint alleged that "Google in recent years has accounted for nearly 90 percent of all general-search-engine queries in the United States, and almost 95 percent of queries on mobile devices." As a result, Google possessed monopoly power in a relevant market.

As for monopoly conduct, the complaint alleged that Google maintained exclusionary contracts with cellphone and other device manufacturers, wireless carriers, and browser developers that make Google the default search engine or otherwise prohibited these firms from doing business with Google's competitors. The complaint also explained how Google uses consumer search queries and consumer data to make its platform more attractive to advertisers.

These two factors operated in tandem through a series of revenue sharing agreements, which Google promised Android distributors "a substantial portion of Google's search advertising revenues" in exchange for making Google the preset default general search engine, as well as typically including an exclusivity provision that prohibited the preinstallation of a competing general search service. Through its exclusionary conduct, Google has achieved scale economies that operate as a barrier to entry to smaller rivals.

The complaint alleged that Google's anticompetitive conduct blocked entry by rivals and "harmed consumers by reducing the quality of general search services (including dimensions such as privacy, data protection, and use of consumer data), lessening choice in general search services, and impeding innovation." The conduct also harmed advertisers, whom Google could charge supra-competitive prices. By way of remedy, the complaint asked for undefined "structural relief." What sort of structural relief would be an appropriate remedy for the type of anticompetitive conduct alleged in the complaint?

In late 2020, two different sets of state attorneys general filed separate antitrust complaints against Google. In one action, over 30 state AGs accused the tech giant of violating Section 2 of the Sherman Act by using its power as "the gateway to the internet" to "systematically degrade[] the ability of other companies to access consumers." These State AGs began their complaint with an extensive reference to the *Microsoft* case, writing that "just as *Microsoft* improperly maintained its monopoly through conduct directed at Netscape, Google has improperly maintained and extended its search-related monopolies through exclusionary conduct that has harmed consumers, advertisers, and the competitive process itself." In addition to challenging Google's deals to make it the default option on various devices, this complaint alleged that Google manipulated search results to give its own products and services prominence over those of rivals. (Several state AGs stated that they would seek to consolidate their lawsuit with the Justice Department's earlier complaint. Is this a good litigation strategy? Why or why not?

For more on the role of antitrust in protecting nascent competitors in technology markets, see Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L. J. 1952 (2021); Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. REV. 1, 1 (2021); C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2020); and Kevin A. Bryan & Erik Hovenkamp, *Startup Acquisitions, Error Costs, and Antitrust Policy*, 87 U. CHI. L. REV. 331 (2020).

III. The Modern Monopolization Offense: Conduct
[B] Monopolization and the Intellectual Property Laws
[2] Patent "Hold up"

Add at p. 791 before Problem 6.6:

Federal Trade Commission v. Qualcomm Inc.,
969 F.3d 974 (9th Cir. 2020)

CALLAHAN, Circuit Judge:

This case asks us to draw the line between *anti*competitive behavior, which is illegal under federal antitrust law, and *hyper*competitive behavior, which is not. The Federal Trade Commission ("FTC") contends that Qualcomm Incorporated ("Qualcomm") violated the Sherman Act, 15 U.S.C. §§ 1, 2, by unreasonably restraining trade in, and unlawfully monopolizing, the code division multiple access ("CDMA") and premium long-term evolution ("LTE") cellular modem chip markets. After a ten-day bench trial, the district court agreed and ordered a permanent, worldwide injunction prohibiting several of Qualcomm's core business practices. … We now hold that the district court went beyond the scope of the Sherman Act, and we reverse.

I

A

Founded in 1985, Qualcomm dubs itself "the world's leading cellular technology company." Over the past several decades, the company has made significant contributions to the technological innovations underlying modern cellular systems, including third-generation ("3G") CDMA and fourth-generation ("4G") LTE cellular standards—the standards practiced in most modern cellphones and "smartphones." Qualcomm protects and profits from its technological innovations through its patents, which it licenses to original equipment manufacturers ("OEMs") whose products (usually cellphones, but also smart cars and other products with cellular applications) practice one or more of Qualcomm's patented technologies.

Qualcomm's patents include cellular standard essential patents ("SEPs"), non-cellular SEPs, and non-SEPs. Cellular SEPs are patents on technologies that international standard-setting organizations ("SSOs") choose to include in technical standards practiced by each new generation of cellular technology. SSOs—also referred to as standards development organizations ("SDOs")—are global collaborations of industry participants that "establish technical specifications to ensure that products from different manufacturers are compatible with each other." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 875 (9th Cir. 2012) ("*Microsoft II*"). Cellular SEPs are necessary to practice a particular cellular standard. Because SEP holders could prevent industry participants from implementing a standard by selectively refusing to license, SSOs require patent holders to commit to license their SEPs on fair, reasonable, and nondiscriminatory ("FRAND") terms before their patents are incorporated into standards.

Some of Qualcomm's SEPs and other patents relate to CDMA and premium LTE technologies—that is, the way cellular devices communicate with the 3G and 4G cellular networks—while others relate to other cellular and non-cellular applications and technologies, such as multimedia, cameras, location detecting, user interfaces, and more. Rather than license its patents individually, Qualcomm generally offers its customers various "patent portfolio" options, whereby the customer/licensee pays for and receives the right to practice all three types of Qualcomm patents (SEPs, non-cellular SEPs, and non-SEPs).

Qualcomm's patent licensing business is very profitable, representing around two-thirds of the company's value. But Qualcomm is no one-trick pony. The company also manufactures and sells cellular modem chips, the hardware that enables cellular devices to practice CDMA and premium LTE technologies and thereby communicate with each other across cellular networks. This makes Qualcomm somewhat unique in the broader cellular services industry. Companies such as Nokia, Ericsson, and Interdigital have comparable SEP portfolios but do not compete with Qualcomm in the modem chip markets. On the other hand, Qualcomm's main competitors in the modem chip markets—companies such as MediaTek, HiSilicon, Samsung LSI, ST-Ericsson, and VIA Telecom (purchased by Intel in 2015)—do not hold or have not held comparable SEP portfolios.

Like its licensing business, Qualcomm's modem chip business has been very successful. From 2006 to 2016, Qualcomm possessed monopoly power in the CDMA modem chip market, including over 90% of market share. From 2011 to 2016, Qualcomm possessed monopoly power in the premium LTE modem chip market, including at least 70% of market share. During these timeframes, Qualcomm leveraged its monopoly power to "charge monopoly prices on [its] modem chips." *Qualcomm*, 411 F. Supp. 3d at 800. Around 2015, however, Qualcomm's dominant position in the modem chip markets began to recede, as competitors like Intel and MediaTek found ways to successfully compete. Based on projections from 2017 to 2018, Qualcomm maintains approximately a 79% share of the CDMA modem chip market and a 64% share of the premium LTE modem chip market.

B

Qualcomm licenses its patent portfolios exclusively at the OEM level, setting the royalty rates on its CDMA and LTE patent portfolios as a percentage of the end-product sales price. This practice is not unique to Qualcomm. As the district court found, "[f]ollowing Qualcomm's lead, other SEP licensors like Nokia and Ericsson have concluded that licensing only OEMs is more lucrative, and structured their practices accordingly." *Id.* at 754–55. OEM-level licensing allows these companies to obtain the maximum value for their patented technologies while avoiding the problem of patent exhaustion, whereby "the initial authorized [or licensed] sale of a patented item terminates all patent rights to that item." *Quanta Comput., Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 625 (2008) [co]. Due to patent exhaustion, if Qualcomm licensed its SEPs further "upstream" in the manufacturing process to competing chip suppliers, then its patent rights would be exhausted when these rivals sold their products to OEMs. OEMs would then have little incentive to pay Qualcomm for patent licenses, as they could instead become "downstream" recipients of the already exhausted patents embodied in these rivals' products.

Because rival chip manufacturers practice many of Qualcomm's SEPs by necessity, Qualcomm offers these companies what it terms "CDMA ASIC Agreements," wherein Qualcomm promises not to assert its patents in exchange for the company promising not to sell its chips to unlicensed OEMs. These agreements, which essentially function as patent-infringement indemnifications, include reporting requirements that allow Qualcomm to know the details of its rivals' chip supply agreements with various OEMs. But they also allow Qualcomm's competitors to practice Qualcomm's SEPs royalty-free.

Qualcomm reinforces these practices with its so-called "no license, no chips" policy, under which Qualcomm refuses to sell modem chips to OEMs that do not take licenses to practice Qualcomm's SEPs. Otherwise, because of patent exhaustion, OEMs could decline to take licenses, arguing instead that their purchase of chips from Qualcomm extinguished Qualcomm's patent rights with respect to any CDMA or premium LTE technologies embodied in the chips. This would not only prevent Qualcomm from obtaining the maximum value for its patents, it would result in OEMs having to pay more money (in licensing royalties) to purchase and use a competitor's chips, which are unlicensed. Instead, Qualcomm's practices, taken together, are "chip supplier neutral"—that is, OEMs are required to pay a per-unit licensing royalty to Qualcomm for its patent portfolios regardless of which company they choose to source their chips from.

Although Qualcomm's licensing and modem chip businesses have made it a major player in the broader cellular technology market, the company is not an OEM. That is, Qualcomm does not manufacture and sell cellphones and other end-use products (like smart cars) that consumers purchase and use. Thus, it does not "compete"—in the antitrust sense—against OEMs like Apple and Samsung in these product markets. Instead, these OEMs are Qualcomm's *customers*.

C

… Qualcomm's competitors in the modem chip markets contend that Qualcomm's business practices, in particular its refusal to license them, have hampered or slowed their ability to develop and retain OEM customer bases, limited their growth, delayed or prevented their entry into the market, and in some cases forced them out of the market entirely. These competitors contend that this result is not just anticompetitive, but a violation of Qualcomm's contractual commitments to two cellular SSOs—the Telecommunications Industry Association ("TIA") and Alliance for Telecommunications Industry Solutions ("ATIS")—to license its SEPs "to all applicants" on FRAND terms. Qualcomm argues that it has no antitrust duty to deal with its rivals, and in any case OEM-level licensing is consistent with Qualcomm's SSO commitments because only OEM products (*i.e.*, cellphones, tablets, etc.) "practice" or "implement" the standards embodied in Qualcomm's SEPs. Furthermore, Qualcomm argues that it substantially complies with the TIA and ATIS requirements by not asserting its patents against rival chipmakers.

In 2011 and 2013, Qualcomm signed agreements with Apple under which Qualcomm offered Apple billions of dollars in incentive payments contingent on Apple sourcing its iPhone modem chips exclusively from Qualcomm and committing to purchase certain quantities of chips each year. Again, rivals such as Intel—as well as Apple itself, which was interested in using Intel as an alternative chip supplier—complained that Qualcomm was engaging in anticompetitive business practices designed to maintain its monopolies in the CDMA and premium LTE modem chip markets while making it impossible for rivals to compete. In 2014, Apple decided to terminate these agreements and source its modem chips from Intel for its 2016 model iPhone.

D

In January 2017, the FTC sued Qualcomm for equitable relief, alleging that Qualcomm's interrelated policies and practices excluded competitors and harmed competition in the modem chip markets, in violation § 5(a) of the FTC Act, 15 U.S.C. § 45(a), and §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. After a ten-day bench trial, the district court concluded that "Qualcomm's licensing practices are an unreasonable restraint of trade under § 1 of the Sherman Act and exclusionary conduct under § 2 of the Sherman Act." *Qualcomm*, 411 F. Supp. 3d at 812 (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 58–59 (D.C. Cir. 2001)). The district court ordered a permanent, worldwide injunction prohibiting Qualcomm's core business practices. *Id.* at 820–24.

The district court's decision consists of essentially five mixed findings of fact and law: (1) Qualcomm's "no license, no chips" policy amounts to "anticompetitive conduct against OEMs" and an "anticompetitive practice[ ] in patent license negotiations"; (2) Qualcomm's refusal to license rival chipmakers violates both its FRAND commitments and an antitrust duty to deal under § 2 of the Sherman Act; (3) Qualcomm's "exclusive deals" with Apple "foreclosed a 'substantial share' of the modem chip market" in violation of both Sherman Act provisions; (4) Qualcomm's royalty rates are "unreasonably high" because they are improperly based on its market share and handset price instead of the value of its patents; and (5) Qualcomm's royalties, in conjunction with its "no license, no chips" policy, "impose an artificial and anticompetitive surcharge" on its rivals' sales, "increas[ing] the effective price of rivals' modem chips" and resulting in anticompetitive exclusivity. *Qualcomm*, 411 F. Supp. 3d at 697–98, 751–62, 766, 771–92 (citations omitted). "Collectively," the district court found, these policies and practices "create insurmountable and artificial barriers for Qualcomm's rivals, and thus do not further competition on the merits." *Id.* at 797. …

II

… Regardless of whether the alleged antitrust violation involves concerted anticompetitive conduct under § 1 or independent anticompetitive conduct under § 2, the three-part burden-shifting test under the rule of reason is essentially the same. *See Standard Oil Co. of N.J.*, 221 U.S. at 61–62; *Microsoft*, 253 F.3d at 58–59. Under § 1, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Am. Express*, 138 S. Ct. at 2284 (citing 1 Kalinowski § 12.02[1]; P. Areeda & H. Hovenkamp, Fundamentals of Antitrust Law § 15.02[B] (4th ed. 2017) (Areeda & Hovenkamp); *Capital Imaging Assoc., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2nd Cir. 1993)). "If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint." *Id*. (citing 1 Kalinowski § 12.02[1]; Areeda & Hovenkamp § 15.02[B]; *Capital Imaging Assoc.*, 996 F.2d at 543). "If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.* (citing 1 Kalinowski § 12.02[1]; *Capital Imaging Assoc.*, 996 F.2d at 543).

Likewise, "if a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct." *Microsoft*, 253 F.3d at 59 (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 483 (1992)). "If the monopolist asserts a procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim." *Id.* If the plaintiff cannot rebut the monopolist's procompetitive justification, "then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.*

The similarity of the burden-shifting tests under §§ 1 and 2 means that courts often review claims under each section simultaneously. If, in reviewing an alleged Sherman Act violation, a court finds that the conduct in question is *not* anticompetitive under § 1, the court need not separately analyze the conduct under § 2. *Williams v. I.B. Fischer Nev.*, 999 F.2d 445, 448 (9th Cir. 1993). However, although the tests are largely similar, a plaintiff may not use *indirect* evidence to prove unlawful monopoly maintenance via anticompetitive conduct under § 2. *See Broadcom Corp. v. Qualcomm Inc*., 501 F.3d 297, 307–08 (3d Cir. 2007) (distinguishing between proving the existence of monopoly power through indirect evidence and proving anticompetitive conduct itself, the second element of a § 2 claim). In this respect, proving an antitrust violation under § 2 of the Sherman Act is more exacting than proving a § 1 violation, although courts have also held that the third element of a § 2 claim, the causation element, may be inferred. *See Microsoft*, 253 F.3d at 79.

B

…[T]he district court correctly defined the relevant markets as "the market for CDMA modem chips and the market for premium LTE modem chips." *Qualcomm*, 411 F. Supp. 3d at 683. Nevertheless, its analysis of Qualcomm's business practices and their anticompetitive impact looked beyond these markets to the much larger market of cellular services generally. Thus, a substantial portion of the district court's ruling considered alleged economic harms to OEMs—who are Qualcomm's *customers*, not its competitors—resulting in higher prices to consumers. These harms, even if real, are not "anticompetitive" in the antitrust sense—at least not *directly*—because they do not involve restraints on trade or exclusionary conduct in "the area of effective competition." *Am. Express*, 138 S. Ct. at 2285. …

III

Accordingly, we reframe the issues to focus on the impact, if any, of Qualcomm's practices in the area of effective competition: the markets for CDMA and premium LTE modem chips. Thus, we begin by examining the district court's conclusion that Qualcomm has an antitrust duty to license its SEPs to its direct competitors in the modem chip markets. …

A

"As the Supreme Court has repeatedly emphasized, there is 'no duty to deal under the terms and conditions preferred by [a competitor's] rivals[.']" *Aerotec Int'l*, 836 F.3d at 1184 (quoting *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 457 (2009) ("*Linkline*")). Likewise, "the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Trinko*, 540 U.S. at 408 (alteration in original) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)); *see Linkline*, 555 U.S. at 448 ("As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." (citing *Colgate*, 250 U.S. at 307)). This is because the antitrust laws, including the Sherman Act, "were enacted for 'the protection of *competition,* not *competitors*.'" *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis added) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Or, as we recently put it, in a bit more colorful terms: "Competitors are not required to engage in a lovefest." *Aerotec Int'l*, 836 F.3d at 1184.

The one, limited exception to this general rule that there is no antitrust duty to deal comes under the Supreme Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

There, the Court held that a company engages in prohibited, anticompetitive conduct when (1) it "unilateral[ly] terminat[es] ... a voluntary and profitable course of dealing," *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9th Cir. 2004); (2) "the only conceivable rationale or purpose is 'to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition,'" *Aerotec Int'l*, 836 F.3d at 1184 (quoting *MetroNet Servs.*, 383 F.3d at 1132); and (3) the refusal to deal involves products that the defendant already sells in the existing market to other similarly situated customers, *see MetroNet Servs.*, 383 F.3d at 1132–33. The Supreme Court later characterized the *Aspen Skiing* exception as "at or near the outer boundary of § 2 liability." *Trinko*, 540 U.S. at 409.

The district court's conclusion that Qualcomm's refusal to provide exhaustive SEP licenses to rival chip suppliers meets the *Aspen Skiing* exception ignores critical differences between Qualcomm's business practices and the conduct at issue in *Aspen Skiing*, and it ignores

the Supreme Court's subsequent warning in *Trinko* that the *Aspen Skiing* exception should be applied only in rare circumstances. As a result, the FTC concedes error here. We agree.
First, the district court was incorrect that "Qualcomm terminated a 'voluntary and profitable course of dealing'" with respect to its previous practice of licensing at the chip-manufacturer level. *Qualcomm*, 411 F. Supp. 3d at 759–60 (quoting *MetroNet Servs.*, 383 F.3d at 1131). In support of this finding, the district court cited a single piece of record evidence: an email from a Qualcomm lawyer regarding 3%-royalty-bearing licenses for modem chip suppliers. But this email was sent in 1999, seven years before Qualcomm gained monopoly power in the CDMA modem chip market. Furthermore, Qualcomm claims that it never granted exhaustive licenses to rival chip suppliers. Instead, as the 1999 email suggests, it entered into "non-exhaustive, royalty-bearing agreements with chipmakers that explicitly did not grant rights to the chipmaker's customers." Appellant's Opening Br. at 45.

According to Qualcomm, it ceased this practice in response to developments in patent law's exhaustion doctrine, *see, e.g.*, *Quanta Comput.*, 553 U.S. at 625 (noting that "the initial authorized sale of a patented item terminates all patent rights to that item"), which made it harder for Qualcomm to argue that it could provide "non-exhaustive" licenses in the form of royalty agreements. Nothing in the record or in the district court's factual findings rebuts these claims. The FTC offered no evidence that, from the time Qualcomm first gained monopoly power in the modem chip market in 2006 until now, it ever had a practice of providing exhaustive licenses at the modem chip level rather than the OEM level.

Second, Qualcomm's rationale for "switching" to OEM-level licensing was not "to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition," the second element of the *Aspen Skiing* exception. *Aerotec Int'l*, 836 F.3d at 1184 (internal quotation marks and citation omitted). Instead, Qualcomm responded to the change in patent-exhaustion law by choosing the path that was "far more lucrative," both in the short term *and* the long term, regardless of any impacts on competition. *Qualcomm*, 411 F. Supp. 3d at 753. The district court itself acknowledged that this was Qualcomm's purpose, observing: "Following Qualcomm's lead, other SEP licensors like Nokia and Ericsson have concluded that licensing only OEMs is more lucrative, and structured their practices accordingly." *Id.* at 754–55. Because Qualcomm's purpose was greater profits in both the short and long terms, the second required element of the *Aspen Skiing* exception is not present in this case.

Finally, unlike in *Aspen Skiing*, the district court found no evidence that Qualcomm singles out any specific chip supplier for anticompetitive treatment in its SEP-licensing. In *Aspen Skiing*, the defendant refused to sell its lift tickets to a smaller, rival ski resort even as it sold the same lift tickets to any other willing buyer (including any *other* ski resort); moreover, this refusal was designed specifically to put the smaller, nearby rival out of business. 472 U.S. at 593–94. Qualcomm applies its OEM-level licensing policy equally with respect to all competitors in the modem chip markets and declines to enforce its patents against these rivals even though they practice Qualcomm's patents (royalty-free). Instead, Qualcomm provides these rivals indemnifications through the use of "CDMA ASIC Agreements"—the *Aspen Skiing* equivalent of refusing to sell a skier a lift ticket but letting them ride the chairlift anyway. Thus, while Qualcomm's policy toward OEMs is "no license, no chips," its policy toward rival chipmakers could be characterized as "no license, no problem." Because Qualcomm applies the latter policy neutrally with respect to *all* competing modem chip manufacturers, the third *Aspen Skiing* requirement does not apply.

As none of the required elements for the *Aspen Skiing* exception are present, let alone all of them, the district court erred in holding that Qualcomm is under an antitrust duty to license rival chip manufacturers. We hold that Qualcomm's OEM-level licensing policy, however novel, is not an anticompetitive violation of the Sherman Act.

B

Conceding error in the district court's conclusion that Qualcomm is subject to an antitrust duty to deal under *Aspen Skiing*, the FTC contends that this court may nevertheless hold that Qualcomm engaged in anticompetitive conduct in violation of § 2. This is so, the FTC urges, because (1) "Qualcomm entered into a voluntary contractual commitment to deal with its rivals as part of the SSO process, which is itself a derogation from normal market competition," and (2) Qualcomm's breach of this contractual commitment "satisfies traditional Section 2 standards [in that] it 'tends to impair the opportunities of rivals and ... does not further competition on the merits.'" Appellee's Br. at 69, 77 (quoting *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008)). We disagree.

Even if the district court is correct that Qualcomm is contractually obligated via its SSO commitments to license rival chip suppliers—a conclusion we need not and do not reach—the FTC still does not satisfactorily explain how Qualcomm's alleged breach of this contractual commitment *itself* impairs the opportunities of rivals. It argues the breach "facilitat[es] Qualcomm's collection of a surcharge from rivals' customers." Appellee's Br. at 77. But this refers to a distinct business practice, licensing royalties, and alleged harm to OEMs, not rival chipmakers. In any case, Qualcomm's royalties are "chip-supplier neutral" because Qualcomm collects them from *all* OEMs that license its patents, not just "rivals' customers." The FTC argues that Qualcomm's breach directly impacts rivals by "otherwise deterring [their] entry and investment." *Id.* But this ignores that Qualcomm's "CDMA ASIC Agreements" functionally act as de facto licenses ("no license, no problem") by allowing competitors to practice Qualcomm's SEPs (royalty-free) before selling their chips to downstream OEMs. Furthermore, in order to make out a § 2 violation, the anticompetitive harm identified must be to *competition itself*, not merely to competitors. *Microsoft*, 253 F.3d at 58. The FTC identifies no such harm to competition. …

The FTC points to one case, *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3rd Cir. 2007), as support for its argument that a company's breach of its SSO commitments may rise to the level of an antitrust violation. But in that earlier antitrust action against Qualcomm, the alleged anticompetitive conduct was not Qualcomm's practice of licensing at the OEM level while not enforcing its patents against rival chip suppliers; instead, Broadcom asserted that

Qualcomm intentionally deceived SSOs by inducing them to standardize one of its patented technologies, which it then licensed at "discriminatorily higher" royalty rates to competitors and customers using non-Qualcomm chipsets. *Id.* at 304. The *Broadcom* court held that Qualcomm's "intentionally false promise to license [its SEP] on FRAND terms ... coupled with an SDO's reliance on that promise" and Qualcomm's subsequent discriminatory pricing sufficiently alleged "actionable anticompetitive conduct" under § 2 to overcome Qualcomm's motion to dismiss. *Id.* at 314.

Here, the district court found neither intentional deception of SSOs on the part of Qualcomm nor that Qualcomm charged discriminatorily higher royalty rates to competitors and OEM customers using non-Qualcomm chips. Instead, it is undisputed that Qualcomm's current royalty rates—which the district court found "unreasonably high"… —are based on the patent portfolio chosen by the OEM customer regardless of where the OEM sources its chips. Furthermore, competing chip suppliers are permitted to practice Qualcomm's SEPs freely without paying any royalties at all. Thus, the Third Circuit's "intentional deception" exception to the general rule that breaches of SSO commitments do not give rise to antitrust liability does not apply to this case. …

In short, we are not persuaded by the FTC's argument that we should adopt an additional exception, beyond the *Aspen Skiing* exception that the FTC concedes does not apply here, to the general rule that "businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Linkline*, 555 U.S. at 448 (citing *Colgate*, 250 U.S. at 307). We therefore decline to hold that Qualcomm's alleged breach of its SSO commitments to license its SEPs on FRAND terms, even assuming there was a breach, amounted to anticompetitive conduct in violation of § 2. …

We therefore **REVERSE** the district court's judgment and **VACATE** its injunction as well as its partial grant of summary judgment.

NOTES AND QUESTIONS

1. The Ninth Circuit criticized the FTC for "not satisfactorily explain[ing] how Qualcomm's alleged breach of this contractual commitment *itself* impairs the opportunities of rivals." If you were an attorney for the FTC, what arguments would you make? In other words, how does Qualcomm's breach of its FRAND obligations harm "competition itself"?

2. In another part of its opinion, the Ninth Circuit argued that the issue of FRAND violations should be addressed by contract law and patent law, not antitrust law. What are the strengths and weaknesses of using these other branches of law instead of antitrust?

Chapter 7. Mergers and Acquisitions

I. Vertical Integration Through Merger

Insert at p. 956:

NOTE: THE 2020 VERTICAL MERGER GUIDELINES

On June 30, 2020, the U.S. Department of Justice and Federal Trade Commission released new Vertical Merger Guidelines for the first time since 1984. They are available at **https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf**.

As compared to the essentially dormant 1984 Guidelines, the new version marked a step—even if smaller than some advocates wanted—toward more vigorous vertical merger enforcement in the U.S. In that regard, we note that the two Democratic FTC Commissioners, Rohit Chopra and Rebecca Kelly Slaughter, dissented from the new Guidelines. Commissioner Chopra argued that the new Guidelines relied too heavily on economic theory and did not adequately address effects of vertical mergers on entry. Commissioner Slaughter found the Guidelines insufficiently demanding with respect to evidence of benefits from vertical mergers, despite stronger on that point than the 1984 Guidelines were.

The principal changes of the 2020 Vertical Merger Guidelines are the following:

Increased Demands Regarding Procompetitive Effects: The 2020 Guidelines make clear that elimination of double marginalization ("EDM") is the most likely procompetitive effect of vertical mergers. The draft Guidelines noted that the agencies rely on parties to show how EDM occurs. The new Guidelines make it clear that while "it is incumbent upon the merging firms to provide substantiation for claims that they will benefit from [EDM]," the agencies may independently evaluate EDM-related evidence, including the evidence they develop to assess the potential for foreclosure or raising rivals' costs. The Guidelines note that the agencies may consider whether EDM-related cost savings are "merger-specific," or could have been achieved independent of the merger through contracting between independent firms.

Flexibility but no "Safe Harbor" for Low Market Shares: When the 2020 Guidelines initially appeared in draft form, they stated that the DOJ and FTC were unlikely to challenge a vertical merger in which the merging parties have less than a 20%

share of the upstream and downstream markets. The final Guidelines eliminate this language, although the final Guidelines suggest that in practice the agencies may exercise greater flexibility in enforcement than they otherwise would.

Comparison of Vertical and Horizontal Mergers: The 2020 Guidelines eliminate the 1984 Guidelines' explicit statement that vertical mergers are less likely than horizontal mergers to raise competition concerns. Instead, the revised Guidelines state: "the agencies more often encounter problematic horizontal mergers than problematic vertical mergers," in the context of noting that "vertical mergers are not invariably innocuous." This language, while less strong than that of the 1984 Guidelines, nonetheless signals that the agencies continue to expect horizontal mergers to receive more scrutiny than vertical mergers going forward.

Theories of Anticompetitive Harm: The 2020 Guidelines expand upon the theories of anticompetitive harm covered in the previous version, recognizing such unilateral effects on competition as foreclosure, raising rivals' costs, and increased access to competitively sensitive information. The new Guidelines explain that in considering foreclosure effects, the agencies will look to whether a merged firm has the ability to cause a rival to lose sales or compete less aggressively for business, and whether the merged firm would have an incentive to do so. The 2020 Guidelines go into detail on the types of costs that can be imposed on rivals, including raising costs of distribution, raising input costs, and forcing potential rivals to enter both upstream and downstream segments of a market (known as two-level entry). The 2020 Guidelines also recognize unilateral effects where firms producing two non-competing upstream inputs to a single downstream product merge (known as a merger of complements), and diagonal mergers, where a merger across different levels in different product chains prevents two products from competing with each other. The Guidelines also recognize that vertical mergers can enable tacit coordination among competitors.

The 2020 Vertical Merger Guidelines ultimately bring a potentially more enforcement-minded approach to reviewing vertical transactions, with an updated understanding of the applicable theories of harms and, while still focusing on EDM efficiencies, taking a less reflexively benign view of the effects of such deals. Nonetheless, the new Guidelines remain flexible enough to afford the agencies considerable enforcement discretion—perhaps more so than in the Horizontal Merger Guidelines—and it remains to be seen to what extent the FTC and DOJ will heed Commissioner Slaughter's call in her dissent for the agencies to "aggressively investigate and apply" the Guidelines' theories of harm.

II. Mergers of Competitors

Insert at p. 1043, end of the page:

NOTE: MARKET DEFINITION AND MERGERS IN TWO-SIDED MARKETS

In an important dictum in its *AmEx* decision (printed at p. 571 of your casebook) the Supreme Court stated as a matter of law that "Only other two-sided platforms can compete with a two-sided platform for transactions." Ohio v. American Express Co., 138 S. Ct. 2274, 2287 (2018), The statement was pure dicta, unnecessary to the decision at hand, which involved only two-sided platforms competing with one another. Further, market definition is always intensely factual, so why this conclusion as a matter of law? Finally, the Court was incorrect. As a matter of fact, two sided platforms compete with each other all the time. Credit card networks compete with cash or checks. Uber competes with traditional taxicabs.[1] Amazon online grocery sales through its Whole Foods division compete with traditional grocers.

For purposes of antitrust market definition, we say that two firms compete if one is able to force the other's prices down to a level close to its cost. For example, a traditional taxicab company would be regarded as a competitor with Uber if competition from the cab company was sufficiently robust to prevent Uber from charging a price significantly higher than its costs. That is, in the process of setting its price Uber must consider not only demand as between its own drivers and riders, it must also consider competition with Lyft, another two-sided platform, as well as conventional taxicab companies. Further, customers can switch among Uber, Lyft, and taxicabs, taking whichever is most favorable at the moment. Some drivers do the same thing. This makes the competition question intensely factual, and with the likelihood of different outcomes for different situations.

Finally, it is no answer that in a long run equilibrium only the platform will dominate. It may or may not be the case that eventually Uber and Lyft will drive traditional taxis out of the market. More likely, taxicab companies will adopt technologies that make them more competitive with multi-homing customers. But antitrust policy necessarily looks at shorter or middle runs, so what counts is the substitution now and in the near term. In all cases, however, the question whether a particular two-sided platform competes with a more traditional market is one of fact, not of law.

The *AmEx* dicta has already caused mischief in the lower courts, and in a merger case. See United States v. Sabre Corp., ___ F.Supp.3d __, 2020 WL 1855433 (D.Del. Apr. 7, 2020), which relied on this statement to conclude that a merger between two computerized airline reservation systems could not be a merger of competitors because one of the systems was a two-sided digital platform, while the other was a more traditional reservation service. See Herbert

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[1] *See, e.g.*, Phila. Taxi Ass'n, Inc. v. Uber Tech., Inc., 886 F.3d 332 (3rd Cir. 2018), cert. denied, 139 S. Ct. 211 (2018), reprinted in the casebook at p. 904.

Hovenkamp, *Antitrust and Platform Monopoly*, 130 Yale L.J. (2021) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3639142.

[A] The Development of Horizontal Merger Law Under the Sherman Act

Add at p. 963 after note 3 and before section [B]

Note: A Revived use of Section 2 to Challenge Mergers?

We are about to turn to Section 7 of the Clayton Act and its emergence as the principal statute under which the federal agencies and other plaintiffs challenge mergers and acquisitions. However, it is worth noting that despite its disuse in recent decades, Section 2 remains available to plaintiffs to block, unwind, or indirectly (by including mergers in a course of allegedly monopolistic conduct) impose liability for illegal transactions. In a 2020 speech, then-FTC Chair Joseph Simons specifically identified Section 2 as a viable framework for challenging acquisitions of "nascent" competitors as a form of illegal monopolization.[2] In December 2020, the FTC took a step toward challenging mergers under Section 2 in a complaint against Facebook.[3] In that complaint, the FTC challenged as illegal two prior acquisitions by Facebook: the company's 2012 purchase of Instagram and its 2014 purchase of WhatsApp. Importantly, the FTC did not challenge either of those transactions on a standalone basis. The FTC's complaint did not challenge either acquisition as a violation of Section 2 or as in itself a violation of Section 2. Instead, the FTC alleged that each transaction formed part of a course of conduct (including some aspects of Facebook's management of access to its platform) that, taken together, constituted illegal monopolization of an alleged "personal social networking" market under Section 2. The remedy the FTC asked for in its complaint (as of this writing dismissed mostly without prejudice by a federal district court[4]) was a structural divestiture by Facebook of both of those prior acquisitions. Whether or not the FTC's recent statements and actions herald a new era of using Section 2 to go after certain mergers remains to be seen and depends on some theories of causation not yet tested in court. But, as we now turn to the development of modern merger

[2] https://www.ftc.gov/system/files/documents/public_statements/1583022/simons_-_remarks_at_antitrust_law_fall_forum_2020.pdf.

[3] https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf

[4] (https://storage.courtlistener.com/recap/gov.uscourts.dcd.224921/gov.uscourts.dcd.224921.73.0.pdf)

law under Section 7, we should keep in mind that Section 2 remains a tool in the merger enforcement toolbox for agencies and private plaintiffs.

II. Mergers of Competitors

[B] Horizontal Mergers Under Section 7 of the Clayton Act and its 1950 Amendments

[2] Judicial Responses to the Merger Guidelines

Add at p. 1072 before *Note: Government Guidelines on Merger Remedies*:

State of NY, et al. v. Deustche Telekom AG, et al.

S.D.N.Y (February 10, 2020)

[The excerpt that follows is included for three notable aspects of the decision: (1) its treatment of economic evidence compared to testimonial evidence and judicial determinations of credibility; (2) its treatment of efficiencies under the 2010 Guidelines; and (3) its discussion of entry under the 2010 Guidelines. -Eds]

Decision and Order by Marrero, J. Plaintiffs, the States of New York, California, Connecticut, Hawaii, Illinois, Maryland, Michigan, Minnesota, Oregon, and Wisconsin, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, and the District of Columbia (collectively, "Plaintiff States"), acting by and through the respective Offices of their Attorneys General, brought this action against Deutsche Telekom AG ("DT"), T-Mobile US, Inc. ("T-Mobile"), Softbank Group Corp. ("Softbank"), and Sprint Corporation ("Sprint," and collectively with DT, T-Mobile, and Softbank, "Defendants") seeking to enjoin the proposed acquisition of Sprint by T-Mobile (the "Proposed Merger"). Plaintiff States claim that the effect of the Proposed Merger would be to substantially lessen competition in the market for retail mobile wireless telecommunications services (the "RMWTS Market" or "RMWTS Markets"), in violation of Section 7 of the Clayton Act, codified at 15 U.S.C. Section 18 ("Section 7"). Defendants counter that the Proposed Merger would in fact increase competition in the RMWTS Market and that Plaintiff States have thus failed to state a claim for relief.

INTRODUCTION

Adjudication of antitrust disputes virtually turns the judge into a fortuneteller. Deciding such cases typically calls for a judicial reading of the future. In particular, it asks the court to predict whether the business arrangement or conduct at issue may substantially lessen competition in a given geographical and product market, thus likely to cause price increases and harm consumers. To aid the courts perform that murky function demands a massive enterprise. In most cases, the litigation consumes years at costs running into millions of dollars. In furtherance of their enterprise, the parties to the dispute retain battalions of the most skilled and highest-paid attorneys in the nation. In turn, the lawyers enlist the services of other professionals — engineers, economists, business executives, academics — all brought into the dispute to render expert opinions regarding the potential procompetitive or anticompetitive effects of the transaction.

The qualifications of litigants' specialists, impressive by the titles they have held and the tomes their CVs fill, can be humbling and intimidating. And those witnesses' authoritative views stated on the stand under oath in open court can leave the lay person wondering whether word so expertly crafted and credentialed can admit room for error or even doubt. Together, counsel and experts amass documentary and testimonial records for trial that can occupy entire storage rooms to capacity.

Multiplying the complexity of antitrust proceedings, while also adding to the outlay of time and resources they demand, is the role of the federal government. In many cases, as occurred in the action at hand, the United States of America steps into the fray. Acting through the United States Department of Justice ("DOJ") or regulatory agencies, or both, the government intervenes to express its interest for or against the underlying transaction, filing objections or support, or imposing conditions that could affect its viability.

Perhaps most remarkable about antitrust litigation is the blurry product that not infrequently emerges from the parties' huge expenditures and correspondingly exhaustive efforts. Each side, bolstered by the mega records of fact discovery and expert reports it generates, as supplemented by the product of any governmental investigation and resulting action, offers the court evidence the party declares should guide the judge in reaching a compelling and irrefutable decision in the declarant's favor. In fact, however, quite often what the litigants propound sheds little light on a clear path to resolving the dispute. In the final analysis, at the point of sharpest focus and highest clarity and reliability, the adversaries' toil and trouble reduces to imprecise and somewhat suspect aids: competing crystal balls.

The case now before the Court follows the pattern. Plaintiff States contend that T-Mobile's merger with Sprint will likely stifle competition in the RMWTS Market, even in the short term, forcing consumers to pay higher prices for use of their cell phones. In support, they cite the results of their experts' spectral efficiency studies, engineering modeling, and computer-run data analytics. Defendants, similarly reinforced by their stellar cast of authorities, proclaim with equal conviction and no less intensity that after the merger, under a market newly energized by New T-Mobile's more vigorous competition, the prices consumers will pay for wireless services likely will not only not increase, but actually will decline. Accordingly, the parties' costly and conflicting engineering, economic, and scholarly business models, along with the incompatible visions of the competitive future their experts' shades-of- gray forecasts portray, essentially cancel each other out as helpful evidence the Court could comfortably endorse as decidedly affirming one side rather than the other.

The resulting stalemate leaves the Court lacking sufficiently impartial and objective ground on which to rely in basing a sound forecast of the likely competitive effects of a merger. But the expert witnesses' reports and testimony, however, do not constitute the only or even the primary source of support for the Court's assessment of that question. There is another evidentiary foundation more compelling in this Court's assessment than the abstract or hypothetical versions of the relevant market's competitive future that the adversaries and their experts advocate. Conceptually, that underpinning supports a projection of what will happen to competition post-merger that emerges from the evidence in the trial record that the Court heard, admitted through the testimony of fact witnesses, and evaluated with respect to its credibility and the weight it deserves.

How the future manifests itself and brings to pass what it holds is a multifaceted phenomenon that is not necessarily guided by theoretical forces or mathematical models. Instead, causal agents that engender knowing and purposeful human behavior, individual and collective, fundamentally shape that narrative. Confronted by such challenges, courts acting as fact-finders ordinarily turn to traditional judicial methods and guidance more aptly fitted for the task. Specifically, they resort to their own tried and tested version of peering into a crystal ball. Reading what the major players involved in the dispute have credibly said or not said and done or not done, and what they commit to do or not do concerning the merger, the courts are then equipped to interpret whatever formative conduct and decisive events they can reasonably foresee as likely to occur.

For this purpose, however, the courts rely less on the equipoise of mathematical computations, technical data, analytical modeling, and adversarial scientific assumptions that the litigants proffer. Rather, they apply the judge's own skills and frontline experience in weighing, predicting, and judging complex and often conflicting accounts of human conduct, those actions and inactions drawn from the factual evidence. In performing that function, courts employ various behavioral measures that even the most exhaustive and authoritative technical expert study could not adequately capture or gauge as a reliable prognosticator of likely events set in motion fundamentally by business decisions made by various live sources: relevant market competitors, other market participants, public agencies, and even consumers.

Evaluation of the likely competitive effects of a prospective business merger implicates these observations. The task provides the Court occasion to engage in such a prophetic role. To this end, the Court weighs what actions taken by the parties to the merger and other proponents could substantially influence consumer choices and thus affect competition and product pricing in the relevant markets.

During the two-week trial of this action the Court had ample occasion to observe the witnesses and assess their credibility and demeanor on the witness stand, and to consider the weight their testimony warranted in the light of the pointers referred to here and articulated below. As elaborated, in crafting the framework for its decision, and applying the evidence and governing legal principles, the Court took those considerations into account. The Court adopted this course because it regards as a guiding principle the proposition that behavioral drives and motivational forces such as those suggested serve to actuate as well as to restrain personal and business practices. Hence, they can function as a forecasting device, providing the Court substantial guidance about how the corporate officers and companies involved in the case are likely to conduct themselves under particular market conditions prevailing after a merger.

The approach detailed above assists the Court's adjudication by shedding light on a basic question presented here that was intensely debated by the parties, and that is central to a resolution of their dispute: whether a deeply embedded pattern of commercial conduct closely and publicly associated with a company or executive is likely to be abandoned or substantially altered after a merger so as to openly embrace a materially conflicting course, especially in the short term.

More significant for the purposes of deciding the issues before the Court is another salient point. The considerations the Court references here as supplying persuasive guidance also figure as judicial stock-in-trade, encompassing things courts commonly weigh in rendering predictive rulings such as, for instance, the judgment calls they routinely make in determining whether a rational person would or would not behave in a particular way, or whether to grant or deny bail, or to impose a custodial sentence, where in each case the likelihood of the defendant's reoffending if released comes into question.

Weighing the evidence in the trial record, and mindful of the considerations described here, the Court rejects Plaintiff States' objections on three essential points. First, the Court is not persuaded that Plaintiff States' prediction of the future after the merger of T-Mobile and Sprint is sufficiently compelling insofar as it holds that New T-Mobile would pursue anticompetitive behavior that, soon after the merger, directly or indirectly, will yield higher prices or lower quality for wireless telecommunications services, thus likely to substantially lessen competition in a nationwide market. Second, the Court also disagrees with the projection Plaintiff States present contending that Sprint, absent the merger, would continue operating as a strong competitor in the nationwide market for wireless services. Similarly, the Court does not credit Plaintiff States' evidence in arguing that DISH would not enter the wireless services market as a viable competitor nor live up to its commitments to build a national wireless network, so as to provide services that would fill the competitive gap left by Sprint's demise. Accordingly, the Court concludes that judgment should be entered in favor of Defendants and Plaintiff States' request to enjoin the Proposed Merger should be denied.

I. FINDINGS OF FACT

This is a case about competition in the retail market for mobile wireless telecommunications services. The significance of these services, as described in greater detail in Section II.D. below, has increased greatly since their inception roughly four decades ago, transforming from solely a method of voice communication to a critical means for consumers to manage countless facets of their daily lives. Among the variety of consumer uses enabled by these services are transportation applications such as Uber and Lyft, applications enabling mobile banking and transactions with various retail outlets, and personal entertainment uses such as streaming audio, video, and high-speed gaming. As mobile wireless telecommunications services now also enable consumers to communicate with each other through voice, video, and text in various ways, the importance of such services is hard to overstate.

Consumers choose retail mobile wireless telecommunications services ("RMWTS") providers, or "carriers," based on several considerations. These include the nominal price of the services, whether those services are bundled with consumer services in other retail markets, and the terms on which those services can be extended to consumers' families. Of equal or potentially greater importance, consumers also choose carriers based on the quality of the carriers' wireless telecommunications networks, including the speeds and consistency of coverage provided by those networks as well as the mobile applications that can be used given the quality of the networks.

[The court then went on to provide an overview of mobile wireless network design and mobile wireless technological standards.]

C. <u>COMPETITION IN THE RMWTS MARKET</u>

Service providers in this dynamic and rapidly changing market can be divided broadly into two categories: those which have built and operate their own mobile networks (Mobile Network Operators, or "MNOs"), and those which lease RAN access from the MNOs (Mobile Virtual Network Operators, or "MVNOs"). Notable competitors from both categories are described further below, as well as potential RMWTS Market entrant DISH Network Corporation ("DISH").

1. <u>Mobile Network Operators</u>

a. <u>Verizon and AT&T</u>

There are four MNOs with nationwide mobile wireless telecommunications network infrastructure, which serve a substantial majority of the United States population: Verizon Communications, Inc. ("Verizon"), AT&T Inc. ("AT&T"), T-Mobile, and Sprint. Verizon and AT&T are the largest MNOs, with each approaching roughly one hundred million or more subscribers. Both earn revenues of over $4 billion and have significant spectrum portfolios, which they have leveraged in developing their mobile networks. Their networks have consequently developed a reputation for reliability and high quality, but their prices also tend to be higher than those of competitors, including T-Mobile and Sprint. The representations of both sides and the evidence developed at trial suggest that while Verizon and AT&T have high quality networks, neither MNO is distinguished for innovation of beneficial consumer services, such as unlimited data plans or the bundling of services such as Netflix with their mobile wireless services. To the extent Verizon and AT&T have implemented measures such as these, those moves have frequently been reactions to innovations first made by T-Mobile or Sprint.

2. <u>Mobile Virtual Network Operators</u>

The second major category of service providers in the RMWTS Market comprises the MVNOs, which differ from MNOs primarily in that they do not have the RAN necessary to support the provision of RMWTS. Although MVNOs compete with MNOs for subscribers in the RMWTS Market, their lack of proprietary RANs means they must simultaneously lease mobile wireless network access from MNOs. In one sense, MNOs can be considered wholesalers of their network access, which MVNOs then resell to their retail subscribers.

There are a variety of MVNOs. The most successful to date has been TracFone Wireless, Inc. ("TracFone"), a provider of prepaid services that claims to have 22 million customers. There are also numerous relatively new MVNOs operated by successful cable companies, including Comcast Corporation ("Comcast"), which operates under the Xfinity Mobile brand; Charter Communications ("Charter"), which operates under the Spectrum Mobile brand; and Altice USA, Inc. ("Altice"), which operates under the Altice Mobile brand. These cable MVNOs currently have a combined national market share of less than two percent, but they have attracted roughly one-third of all new subscribers in the RMWTS Market since 2018.

3. DISH as a Potential Market Entrant

Beyond the current carriers in the RMWTS Market, satellite television service provider DISH has expressed interest in entering the wireless market since at least 2012. Over the past eight years, DISH has amassed a large portfolio of spectrum, roughly equivalent in size to that of Verizon, through a series of private transactions and purchases at FCC auctions. DISH is also financially stable, being a successful provider of consumer services in the satellite TV industry.

Despite having expressed desire to enter the RMWTS Market, DISH has not done so to date. Because DISH is currently not using its large spectrum holdings, industry figures such as Claure have previously cast doubt on the sincerity of DISH's expressed intent and suggested that DISH is speculatively hoarding spectrum in the hopes of later selling it to companies such as T-Mobile and Sprint at a premium. DISH has also been accused of questionable compliance with prior commitments it has made to the FCC, with some of the same industry figures suggesting that DISH might build only a nominal wireless network and thus barely fulfill its regulatory commitments.

DISH chairman Charles Ergen ("Ergen") has taken issue with these statements, viewing them, as he testified at trial, as mere discouragement by threatened industry incumbents. According to Ergen, DISH has been engaging in extensive preparations to ensure it is able to construct a quality network. With respect to timing, he has stated that DISH was first prioritizing the construction of an unrelated Internet-of-Things ("IoT") network, as it would prefer to construct its mobile wireless network once 5G becomes available. Regardless of DISH's intentions, its extensive preparations to build a mobile wireless network as well as its initial opposition to the Proposed Merger made it a significant participant during FCC and DOJ review of the T-Mobile/Sprint merger at issue here.

D. THE PROPOSED MERGER

Sprint and T-Mobile have considered merging on multiple occasions, including in 2010 and 2014. Among other reasons for merging, both parties have highlighted the complementarity of their spectrum holdings. T-Mobile has large low-band holdings, which allow it relatively broad coverage. Sprint has large mid-band holdings, which give Sprint extra capacity to carry network traffic as the era of 5G approaches. While the previously considered mergers in 2010 and 2014 obviously did not come to fruition, Sprint and T-Mobile initiated a new round of discussions in the summer of 2017. Sprint viewed a merger with T-Mobile as a sustainable path forward given its financial struggles and tarnished brand image, both of which hindered its ability to adequately invest in its network and provide superior service in the future. T-Mobile, which had built its success in part on the significant break fee and extra capacity that it gained in 2011 following the failed merger with AT&T, saw a merger with Sprint as an opportunity to avoid exhaustion of its capacity and thus maintain its aggressive pro-consumer strategies. Both parties also envisioned that the merged firm ("New T-Mobile") would have comparable scale to its two largest competitors, AT&T and Verizon.

2. Plaintiff States' Challenge

Like the federal regulators, several state attorneys general scrutinized the Proposed Merger to assess its likely effect on competition in the RMWTS Market. On June 11, 2019, Plaintiff States and the States of Colorado, Mississippi, Nevada, and Texas filed the instant action, alleging that the Proposed Merger would substantially lessen competition, in the RMWTS Market unless enjoined. The States of Colorado, Mississippi, Nevada, and Texas eventually withdrew from this action. Despite the DOJ and FCC's proposed remedies and conditions to the transaction, Plaintiff States maintained their position that the Proposed Merger would likely substantially lessen competition. Accordingly, this action proceeded to a bench trial held before this Court between December 9 to December 20, 2019. Plaintiff States and Defendants then concluded by summarizing their respective positions in post-trial closing arguments on January 15, 2020. Having heard the parties' arguments and considered all relevant facts in this case, the Court now sets forth its conclusions of law.

II. CONCLUSIONS OF LAW

Section 7 prohibits a merger if its effect "may be substantially to lessen competition in any line of commerce in any section of the country." United States v. Phila. Nat'l Bank, 374 U.S. 321, 355 (1963) (internal quotation marks omitted). This prohibition requires a finding of a reasonable probability of a substantial impairment of competition, rather than a mere possibility. Fruehauf Corp. v. FTC, 603 F. 2d 345, 351 (2d Cir. 1979); see also United States v. Marine Bancorporation, Inc., 418 U.S. 602, 622-23 (1974) (noting that Section 7 "deals in probabilities, not ephemeral possibilities" (internal quotation marks omitted)). Courts must judge the likelihood of anticompetitive effects in the context of the "structure, history, and probable future" of the particular markets that the merger will affect. United States v. Gen. Dynamics Corp., 415 U.S. 486, 498 (1974) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 322 n.38 (1962)).

B. DEFENDANTS' REBUTTAL CASE

Defendants' rebuttal evidence may be broadly divided into three categories: (1) evidence that the efficiencies arising from the Proposed Merger will cause New T-Mobile to compete more vigorously with its rivals in the RMWTS Markets; (2) evidence that Sprint is a weakened competitor that is not likely to continue competing vigorously in the RMWTS Markets; and (3) evidence that the DOJ and FCC review of and remedies to the Proposed Merger, and particularly their collective efforts to establish DISH as a new vigorous competitor in the RMWTS Markets, ameliorate any remaining concerns of anticompetitive effect. The Court addresses each category of evidence in turn and concludes that while no one category serves as the sole basis to rebut Plaintiff States' prima facie case, Defendants have satisfied their burden of rebuttal under the totality of the circumstances.

1. Efficiencies of the Proposed Merger

It remains unclear whether and how a court may consider evidence of a merger's efficiencies. While the Supreme Court has previously stated that "[p]ossible economies cannot be used as a defense to illegality," FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967), lower courts have since considered whether possible economies might serve not as justification for an illegal merger but as evidence that a merger would not actually be illegal.

Additionally, the DOJ and FTC have indicated that they will not challenge a merger if its efficiencies indicate that the merger will not be anticompetitive in any relevant market. See Merger Guidelines § 10 (noting as an example that "merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets"). Courts and the Merger Guidelines generally require that claimed efficiencies be both merger-specific and verifiable. See FTC v. Penn State Hershey Med. Ctr., 838 F. 3d 327, 348-49 (3d Cir. 2016).

Despite the skepticism that some courts have expressed and the lack of Second Circuit precedent on point, this Court will consider evidence of efficiencies, given courts' and federal regulators' increasingly consistent practice of doing so, and because Section 7 requires evaluation of a merger's competitive effects under the totality of the circumstances. See Baker Hughes, 908 F. 2d at 984.

Defendants project that the Proposed Merger would result in a variety of efficiencies that would be passed on to consumers through more aggressive service offers, leading to annual consumer welfare gains that will range from $540 million in 2020 to $18.17 billion by 2024. Defendants' claimed efficiencies include: (1) more than doubling the standalone firms' network capacity, which is projected to result in 15 times the speeds now offered by the four major MNOs to consumers; (2) saving $26 billion in network costs and another $17 billion in other operating costs; (3) increasing network coverage to strengthen competition in underserved markets; and (4) accelerating the provision of 5G service.

Defendants' bottom-line conclusion is that they will use these advantages to lower prices and thus compete more effectively against AT&T and Verizon. Even if the Court assumed that the efficiencies cited by Defendants would not, absent other circumstances, rebut Plaintiff States' prima facie case, the Court concludes that the efficiencies are sufficiently verifiable and merger-specific to merit consideration as evidence that decreases the persuasiveness of the prima facie case.

The primary efficiency Defendants claim is the increased capacity that New T-Mobile would gain from adding Sprint's mid-band spectrum and 11,000 cell sites to T-Mobile's network. T-Mobile argues that these cell sites and spectrum would provide it with enough additional capacity to meet the market's projected growth in data consumption and thus avoid the erosion in quality of service that would result from saturating its existing capacity. The undisputed evidence at trial reflects that combining Sprint and T-Mobile's low-band and mid-band spectrum on one network will not merely result in the sum of Sprint and T-Mobile's standalone capacities, but will instead multiply the combined network's capacity because of a technological innovation referred to as "carrier aggregation" and certain physical properties governing the interaction of radios. Because mobile networks are the basis for mobile wireless telecommunications services, this increase in network capacity would translate to what T-Mobile's President of Technology, Neville Ray ("Ray"), described as an "inordinate amount" of new supply in the market. Not only would this excess capacity allow New T-Mobile to support additional subscribers at reduced marginal costs, it would improve the speeds at which current subscribers could use data services. Defendants argue that this is particularly important in a world where data-intensive streaming video now accounts for over 50 percent of the traffic on T-Mobile's network. Defendants project that the Proposed Merger would result in speeds averaging between 400 to 500 mbps, or at least 15 times current speeds.

Defendants next note that the Proposed Merger would allow New T-Mobile to operate at reduced cost, projecting that roughly $26 billion in efficiencies will result from network cost synergies alone. They project that the retirement of Sprint's network would save $4.2 billion in operating costs per year. In addition to reduced operating costs and the benefits of combining spectrum on one network, that New T-Mobile will take over 11,000 of Sprint's existing towers would reduce the cost and delay that T-Mobile would otherwise incur from building new towers for future network development. By reducing these network costs while combining the standalone firms' customers onto one network, New T-Mobile would achieve economies of scale on par with those of market leaders AT&T and Verizon.. Defendants also project savings from streamlined advertising, the closing of 3,000 redundant retail stores, and reducing the costs of billing and other professional "back office" services, which combine with the network cost savings for total net cost savings of $43 billion.

Apart from capacity and cost benefits, Defendants claim that New T-Mobile will provide better coverage than Sprint customers currently receive because T-Mobile's low- band spectrum covers a broader range and penetrates through buildings more effectively than Sprint's mid-band holdings can. Having a broad range of spectrum would allow New T-Mobile to dedicate each band of spectrum to its best use; it could prioritize the use of low-band in areas that mid-band and mmWave could not reach, while instead prioritizing the other two bands in areas correspondingly closer to the cell sites.

Defendants further claim that the Proposed Merger would accelerate mobile wireless carriers' provision of 5G service in the United States. They argue that in fact, the mere announcement, of the Proposed Merger has already procompetitively improved the rollout of 5G services. Defendants state that though AT&T and Verizon originally planned to deploy 5G service primarily on mmWave spectrum, they have since, in response to the prospect that New T-Mobile would deploy 5G services across its broader-reaching low-band and mid-band holdings, broadened the spectrum that they will use. Because spectrum must generally be dedicated to either 4G or 5G and carriers must continue to serve customers without 5G-capable handsets, acquiring Sprint's currently underused mid-band assets would allow New T-Mobile to dedicate spectrum to 5G more quickly than either standalone firm could.. Apart from the greater spectral efficiency associated with 5G, Defendants state that faster adoption of 5G will also catalyze the earlier creation of new applications and services not currently possible in the 4G/LTE environment.

Defendants conclude that New T-Mobile would use these advantages to decrease consumer prices because doing so would actually be profitable. As New T-Mobile would have relatively low network marginal costs and more excess capacity to fill than AT&T and Verizon, it could rationally lower its prices and advertise the higher quality of its network to- attract customers away from AT&T and Verizon, thus increasing competition in the RMWTS Markets.

Other courts have similarly noted that the incentive to use excess capacity given lower marginal costs, as well as the reduction of required capital and operational expenditures, increases the likelihood of competition rather than coordination.

These cases and the record evidence confirm that there is substantial merit to Defendants' claims that the efficiencies arising from the Proposed Merger will lead T-Mobile to compete more aggressively to the ultimate benefit of all consumers, and in particular the subscribers of each of the four major competitors. Sprint customers would benefit from greater coverage, T-Mobile customers would benefit from greater speeds and 5G service sooner. And even AT&T and Verizon customers would benefit insofar as New T-Mobile continued T-Mobile's past practice of pushing AT&T and Verizon to adopt pro-consumer offerings.

While Plaintiff States do not deny that generally the Proposed Merger could generate efficiencies, they respond that these efficiencies are not cognizable because they are neither merger-specific nor verifiable. The Court now considers both grounds pressed by Plaintiff States, concluding that these arguments lack sufficient merit to warrant disregard of Defendants" claimed efficiencies.

a. Merger Specificity

Efficiencies are merger-specific if they "cannot be achieved by either company alone," as otherwise those benefits could be achieved "without the concomitant loss of a competitor." Penn State, 838 F. 3d at 348 (internal quotation marks omitted); see also Merger Guidelines § 10 (stating that the DOJ and FTC credit "only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects"). In this regard, the DOJ and FTC consider "[o]nly alternatives that are practical in the business situation faced by the merging firms" and "do not insist upon a less restrictive alternative that is merely theoretical." Id. Plaintiff States argue that Defendants' claimed efficiencies are not merger specific because Defendants have alternate means of increasing capacity and coverage, and because both Sprint and T-Mobile will inevitably provide 5G services on a nationwide basis.

Plaintiff States are correct that both Sprint and T-Mobile will provide 5G service without the Proposed Merger. But they fail to adequately acknowledge that the standalone firms" 5G networks will be materially more limited in their scope and require a longer timeframe to establish. Legere testified that while T-Mobile will deploy 5G across its low-band spectrum, that could not compare to the ability to provide 5G service to more consumers nationwide at faster speeds across the mid-band spectrum as well. Sprint's deployment of 5G has been limited to discrete and distant markets, and its prospects for deploying 5G more broadly are uncertain given mid-band spectrum's limited reach and Sprint's financial challenges, discussed further below in Section II.B.2. And though Plaintiff States make much of the possibility that a technology called Dynamic Spectrum Sharing ("DSS") can allow spectrum to be used for either 4G or 5G, the evidence at trial reflected that the technology is still experimental, will not be deployed for at least a year, and currently results in a 20 to 30 percent loss of usable spectrum wherever it is deployed. Considering the significant uncertainty surrounding this technology, the Court is not persuaded that it promises nearly the same efficiencies as the Proposed Merger.

In sum, it may be that Defendants are not entirely incapable of improving their networks and services through means other the Proposed Merger. But none of those alternatives appear reasonably practical, especially in the short term, and neither company as a standalone can achieve the level of efficiencies promised by the Proposed Merger. Accordingly, the Court concludes that Defendants' claimed efficiencies satisfy the merger-specific test.

b. Verifiability

Courts consider efficiencies verifiable if they are not speculative and "shown in what economists label 'real' terms." Penn State, 838 F. 3d at 348-49 (quoting Univ. Health, 938 F. 2d at 1223). The DOJ and FTC similarly state that "[e]fficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means. Projections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process. By contrast, efficiency claims substantiated by analogous past experience are those most likely to be credited." Merger Guidelines § 10. The Merger Guidelines also note that "efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the incremental cost of production, are more likely to be susceptible to verification and are less likely to result from anticompetitive reductions in output." Id.

Most of Plaintiff States' criticisms regarding the verifiability of Defendants' claimed efficiencies center on the "Montana Model, "which Defendants prepared to quantify the benefits of increased capacity for the purposes of this action. The Montana Model is an adaptation of a Network Engineering Model ("NEM") that T-Mobile uses in its ordinary course of business to predict which of its cell sites will become "congested," or reach a threshold capacity at which T-Mobile deems its customers would not receive the quality of service they expect. This "congestion threshold" is defined in terms of speed, as the NEM forecasts the speeds that consumers would require for their anticipated future uses. T-Mobile typically uses the NEM to plan solutions aimed at avoiding congestion, such as the deployment of small cells or the creation of new macro cell towers. The NEM is updated every year and forecasts network traffic over a five-year period, predicting consumer demand by incorporating information from T-Mobile's marketing teams and studies on likely future consumer applications and data demands. T-Mobile employees expressed satisfaction with the NEM at trial, noting that it predicts capacity needs at over 99 percent accuracy in the ordinary course of business.

T-Mobile's Vice President of Network Technology, Ankur Kapoor ("Kapoor"), oversaw the creation of the Montana Model by adapting the NEM (which he regularly oversees) to account for both the advent of 5G and Sprint's future standalone performance. . . . Defendants' economic expert, Katz, then quantified the value of the resulting efficiencies by measuring the marginal costs required to solve network congestion and comparing New T-Mobile's marginal costs with those for standalone T-Mobile and Sprint. Katz also quantified the value of increased speeds by extrapolating from a 2012 study regarding the fixed in-home broadband services market, which he considered sufficiently analogous based on the increasing convergence between the mobile wireless (also called mobile broadband) and fixed in-home broadband markets. Based on these assumptions, Katz calculated that New T-Mobile's network marginal costs would be 1/10 of standalone T-Mobile's, and the value of its increased speeds would be over $15 per month per subscriber.

Plaintiff States claim that Defendants' claimed efficiencies are unverifiable because the Montana Model was prepared for the purposes of litigation rather than in the ordinary course of business. They note as an example that the Montana Model predicts Sprint's future congestion even though Sprint does not do any similar modeling in the ordinary course of its business, and even though Sprint would not actually follow the April 2018 plan of record used to supply the Montana Model's inputs if the Proposed Merger did not occur. Plaintiff States add that the NEM is updated every year, whereas the Montana Model has not been updated since its completion in roughly September of 2018. They finally cite a letter from T-Mobile's counsel stating that "any model created in the ordinary course would not have attempted to model as far into the future" as the Montana Model does.

The Court is not persuaded that these criticisms render the Montana Model so unreliable that it should not be credited to any degree. Although T-Mobile's NEM had not yet been adapted to account for 5G and naturally would not normally account for Sprint, it is unsurprising that Defendants would want to account for these salient factors when trying to demonstrate the extent of their claimed efficiencies in this action. Plaintiff States' criticisms are relevant and noted, but that does not mean that the Montana Model is without value.

Plaintiffs next claim that the Montana Model is unreliable because it artificially restricts the standalone firms' ability to acquire spectrum or adopt new technology like DSS. They provided an example of a "sensitivity analysis" in which they changed the inputs of the Montana Model to see how significantly its output would change. By altering the model's inputs to give the standalone firms 30 MHz of spectrum and/or new technologies including DSS, the sensitivity analysis suggested that the difference in future network marginal costs between New T-Mobile and the standalone firms could dramatically decrease from as high as $6.21 to as low as 40 cents. While this methodological limitation does decrease the probative value of the Montana Model in absolute terms, the decrease is again not great enough to render the model altogether untrustworthy. As noted above, these spectrum acquisition and technological alternatives do not appear to be practicable business solutions for the standalone firms given their costs and the uncertainty surrounding them. As Plaintiff States' economic expert Fiona Scott-Morton ("Scott-Morton") testified at trial, acquiring 30 MHz of spectrum can cost up to $10 billion, which a company like Sprint could not readily afford. Although it is certainly possible that the standalone firms would acquire some new spectrum and deploy some new technologies, the Court is not persuaded that the actual decrease in the value of efficiencies would be so dramatic.

As the Merger Guidelines explicitly note, efficiencies are generally more susceptible to verification where they result from combining separate facilities and thus reducing the incremental cost of production. No party in this action has disputed that combining Sprint and T-Mobile's network facilities will result in reduced network marginal costs and a large increase in capacity, which in the RMWTS Market effectively equates to supply or output. None of Plaintiff States' arguments challenge this basic reality. Their arguments instead go primarily to the weight that the Court accords to the model's output, rather than barring altogether any recognition of the model's results. As a practical matter, the model almost certainly cannot exactly quantify the extent to which each specific aspect of the Proposed Merger would benefit consumers, even if it is 99 percent accurate.

As the Supreme Court noted almost sixty years ago, the predictive exercises demanded by Section 7 are not "susceptible of a ready and precise answer in most cases." Phila, Nat'l Bank, 374 U.S. at 362. To expect otherwise in the dynamic and rapidly changing RMWTS

Market is to invite almost certain disappointment. Section 7 calls for "[a] predictive judgment, necessarily probabilistic and judgmental rather than demonstrable." Hospital Corp. of Am. v. FTC, 807 F. 2d 1381, 1389 (7th Cir. 1986); see also United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 88 (D.D.C. 2011) (noting that modeling, while "an imprecise tool," may nonetheless have probative value where its results "tend to confirm the Court's conclusions based upon the documents, testimony, and other evidence" in the record). Accordingly, the Court concludes that the Montana Model is sufficiently reliable to indicate that Defendants' claimed efficiencies will be substantial, even if not quite as large as the model's precise prediction.

Of course, the Court need not, and does not, rest its conclusion of verifiability on the Montana Model alone. Indeed, despite the considerable trial time dedicated to the trustworthiness of the Montana Model, the Court is not persuaded that the model's results are particularly integral to a finding of verifiability or lack of it. As noted above, the Merger Guidelines state that efficiency claims may be verifiable if substantiated by analogous past experience. See Merger Guidelines § 10. Defendants' claimed efficiencies are verifiable in significant part because of T-Mobile's successful acquisition of MetroPCS in 2013. T-Mobile actually underpredicted the efficiencies that would result from the. MetroPCS merger: the merger resulted in network synergies of $9-10 billion rather than the $6-7 billion predicted. Those economies were realized in two years rather than the three predicted. Moreover, Metro's customers have more than doubled since the merger, and Metro's unlimited plans have decreased in price from $60 to $50.

As multiple witnesses noted at trial, the integration of Sprint and T-Mobile would be very similar to the integration of T-Mobile and MetroPCS and could follow the same basic organizational structure and strategy. . . . Considering T-Mobile has already overdelivered on its projected efficiencies in an analogous past merger, the Court is persuaded that the Proposed Merger's efficiencies are ultimately verifiable rather than speculative.

In sum, the Court concludes that Defendants' proposed efficiencies are cognizable and increase the likelihood that the Proposed Merger would enhance competition in the relevant markets to the benefit of all consumers. However, mindful of the uncertainty in the state of the law regarding efficiencies and Plaintiff States' pertinent criticisms, the Court stresses that the Proposed Merger efficiencies it has recognized constitute just one of many factors that it considers and do not alone possess dispositive weight in this inquiry.

2. Sprint's Status as a Weakened Competitor

3. Federal Agency Review and DISH as a New Entrant

a. FCC and DOJ Review and Remedies

Prior to and during the pendency of this action, the FCC and DOJ each heavily scrutinized the Proposed Merger and considered its likely effect on competition. Those agencies' conditional approval of the Proposed Merger does not immunize it from Plaintiff States' antitrust challenge or this Court's judicial scrutiny. See S. Austin Coalition Cmty. Council v. SBC Commc'ns, Inc., 274 F. 3d 1168, 1170 (7th Cir. 2001). Nevertheless, the reality remains that the

Court must now assess the Proposed Merger as conditioned by both regulators after lengthy review. See FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 46 (D.D.C. 2002).

b. Market Entry by DISH

The DOJ's efforts to establish DISH as a fourth nationwide MNO and replacement for Sprint comprise the most prominent remedies that contribute substantially to rebutting Plaintiff States' prima facie case. The Court accordingly devotes the following discussion primarily to these remedies.

. . . [T]he Supreme Court has helpfully observed that "[t]he existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated." United States v. Penn-Olin Chem. Co., 378 U.S. 158, 174 (1964); see also Waste Mgmt., 743 F. 2d at 982-83. Additionally, the Merger Guidelines provide that new market entry may counteract concerns about anticompetitive effects if entry would be "timely, likely, and sufficient in its magnitude, character, and scope" to address those concerns. Merger Guidelines § 9; see also United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001). At trial, the parties similarly used the Merger Guidelines" provisions on entry to frame their arguments regarding DISH and the sufficiency of the proposed regulatory remedies.

Based on the judicial precedent cited above, the Court is persuaded that the presence of DISH as a new entrant will constitute a substantial incentive to competition in the RMWTS Markets. DISH is undeniably well equipped to enter the market by virtue of its large spectrum portfolio, which is worth roughly $22 billion dollars and rivals Verizon's in size. This large spectrum position combines significant quantities of both low- and mid-band spectrum capable of supporting highly data-intensive consumer uses. DISH has clearly been financially sound over the past decade. Furthermore, DISH Chairman Ergen has expressed a desire for DISH to enter the RMWTS Market since at least 2012, and he reiterated at trial his intention to "compete with the largest wireless operators in the United States . . . from day one." DISH's track record and numerous awards for innovation and customer experience, as well as evidence of the currently confidential and creative strategic partnerships that DISH is planning, suggest that DISH would compete as a disruptive "maverick" in the RMWTS Markets, offering low prices for innovative and high- quality services.

The Court structures its discussion of DISH's entry to roughly track the Merger Guidelines' three criteria for entry: (1) the sufficiency of DISH's entry, which the Court assesses with respect to both DISH's MVNO phase and its plans to become an MNO with a 5G network; (2) the likelihood of DISH's entry, focusing on evidence Plaintiff States cite in support of their contention that DISH does not intend to meaningfully compete in the market; and (3) the timeliness of DISH's entry.

i. Sufficiency of DISH's Entry

Though the Court titles this section the "Sufficiency of DISH's Entry," the following discussion covers aspects of DISH's entry that the Merger Guidelines would consider evidence of both sufficiency and likelihood. The Merger Guidelines define likelihood with respect to the profitability of entry, accounting for "the assets, capabilities, and capital needed and the risks involved." Merger Guidelines § 9.2. Sufficiency under the Merger Guidelines appears to be a less definite standard that considers whether the entrant would have the scale or type of product needed to compete effectively with market incumbents. See id. at § 9.3.

When DISH enters the market, it will start as an MVNO utilizing New T-Mobile's network to provide services to Boost customers. The divestiture of Boost would be a strong starting point for DISH to compete because of Boost's considerable success in the prepaid segment of the RMWTS Market and the subscribers and assets that DISH would receive: 9.4 million existing Boost customers, Boost's strong brand awareness and high customer satisfaction, 500 Boost employees with experience in the RMWTS Market, and 7,500 retail storefronts. As one court has observed, "[d]ivestiture of an existing business entity might be [relatively] likely to effectively preserv[e] the competition that would have been lost through the merger, because it would have the personnel, customer lists, information systems, intangible assets, and management infrastructure necessary to competition." United States v. Aetna Inc., 240 F. Supp. 3d 1, 60 (D.D.C. 2017) (internal quotation marks omitted).

In connection with the Boost divestiture, New T-Mobile must provide DISH with access to its network for seven years at wholesale rates significantly lower than those provided under typical MVNO agreements. Ergen projected that Boost customers would actually pay a lower price under DISH than they currently do as a result of this low wholesale rate, which will also help DISH to focus on building its own network rather than paying the higher costs that an MVNO usually would to access the New T-Mobile network. Ergen added that DISH will also lower prices in anticipation of its transition to an MNO; DISH could recoup any short-term losses from lower prices by attracting subscribers to its own network and thus avoiding the costs associated with use of the New T-Mobile network.

Plaintiff States correctly note that DISH's reliance on New T-Mobile's network during its MVNO phase presents the risk that New T-Mobile may try to hinder DISH's ability to compete effectively. "Courts are skeptical of a divestiture that relies on a continuing relationship[ ] between the seller and buyer of divested assets because that leaves the buyer susceptible to the seller's actions -- which are not aligned with ensuring that the buyer is an effective competitor." Aetna, 240 F. Supp. 3d at 60 (internal quotation marks omitted). But here, the DOJ has already prepared multiple means to mitigate this potential conflict. It has appointed a monitor to ensure that New T-Mobile does not limit DISH's ability to use the New T-Mobile network, and it has established a formula that provides the wholesale price to DISH will never increase. On the contrary, DISH's price is designed to decrease as New T-Mobile experiences increases in capacity.

Plaintiff States next state that Boost's 9.4 million subscribers are significantly fewer than Sprint's current 40 million, and they argue that DISH is unlikely to reach Sprint's scale as an MNO because of the heavy costs and long time required to build a mobile wireless network. They cited at trial numerous internal documents from the Defendants expressing this same concern. Mobile wireless networks do require significant expenditures and time to build, and barriers to entry in the RMWTS industry are generally high.

DISH's innovative network plans also demonstrate that construction of its mobile wireless network will be less costly and time-intensive than might normally be expected. While the mobile cores of traditional networks require large amounts of hardware that are costly to install and maintain, DISH plans to construct a "virtualized network" that relies more heavily on software and cloud-hosting services provided by potential partners like Amazon. This measure promises to cut installation and maintenance costs, such that DISH currently projects network constructions costs of roughly $8-10 billion.

The Merger Guidelines specifically state that "[e]ntry by one or more firms operating at a smaller scale may be sufficient if such firms are not at a significant competitive disadvantage." Merger Guidelines § 9.3. Granting that initially DISH' s customer base will be smaller than Sprint's current base, the numerous considerations detailed above demonstrate that DISH is hardly at any competitive disadvantage at all, let alone a significant one. DISH is well poised to become a fourth MNO in the market, and its extensive preparations and regulatory remedies indicate that it can sufficiently replace Sprint's competitive impact in the RMWTS Markets.

ii. Likelihood of DISH's Entry

Although the Merger Guidelines use the term "likelihood" to refer to the profitability of entry, as noted above, the Court uses the term here to address the evidence at trial regarding DISH's past behavior and intentions to enter the RMWTS Market. Throughout trial, Plaintiff States cast doubt on DISH's intent to seriously compete in the RMWTS Market or comply in good faith with its commitments to the DOJ and FCC. They cited several statements made over time by executives of Defendants for the broad point that building a mobile wireless network would be one of many "stupid bluffs" by Ergen, and that he would merely build a "meaningless thin network so that he doesn't get in trouble with the FCC." Plaintiff States supplemented these statements with evidence suggesting that DISH has not complied in good faith with prior FCC commitments and has a history of "broken promises," as well as statements from the FCC taking issues with DISH's behavior in other contexts. Combining these statements regarding DISH's behavior and history with the fact that developing a mobile wireless network is generally a time- and capital-intensive effort, Plaintiff States suggested that DISH's network would be, in the words of one DT official, "something the lawyers can use, but not something customers can use."

The Court is not persuaded that this evidence carries the weight that Plaintiff States ascribe to it. On the contrary, the DOJ and FCC have strongly supported DISH's entry into the market despite being fully aware of these concerns. Indeed, the same FCC commissioners who criticized DISH in other contexts collectively described the company in this specific context as a "serious and credible third-party buyer" with "access to the financial resources to acquire, maintain, and expand the Divested Business [Boost]" as well as "considerable experience providing communications services to end-user customers." The FCC concluded in the context now before the Court that DISH "would be an entity well positioned to take up and expand upon Boost's competitive role in the mobile wireless marketplace." Under the commitments made to the FCC, DISH would stand to lose $2 billion in fines and $12 billion of spectrum if it fails to deploy a nationwide 5G network covering at least 70 percent of the United States population by June 2023. These potential penalties constitute strong disincentives for DISH to skirt compliance. Moreover, DISH has committed to provide speeds of at least 35 mbps on its network, at least 15,000 5G cell sites, and an average of at least 30 MHz of downlink 5G spectrum across its 5G cell sites in the same timeframe. These undertakings further increase the likelihood that DISH's network will be more than a mere façade.

Moreover, DISH has a great incentive to enter the RMWTS Market given its increasing importance to consumers and its potential profitability. The DOJ appears to have favored DISH as a new entrant at least in part because DISH could substantiate its alleged interest through proof of its extensive research and detailed preparations for market entry, exemplified by the depth of DISH's Request for Proposals for a virtualized 5G network.

The Court is also persuaded that DISH intends to transition from an MVNO to an MNO as soon as practically possible, as doing so would allow it to receive subscriber revenues without making wholesale payments to New T-Mobile. DISH now has all of the incentives and necessary resources to compete in the RMWTS Markets. And it has received favorable remedies that strengthen its ability to do so, and is subject to severe potential penalties, at a time when the industry is transitioning to a new technological standard. Accordingly, the Court is persuaded that DISH will likely take advantage of its opportunity to enter the RMWTS Markets, first building out its 5G network in dense cities and leveraging Boost's positive brand image to cater to price-conscious customers, and shortly thereafter expanding nationwide to challenge the dominance of the incumbent MNOs more broadly.

iii. Timeliness of DISH's Entry

Plaintiff States also contend that, to establish that the Proposed Merger would not likely lessen competition, DISH must replace Sprint's competitive viability within two to three years. In support of that proposition, Plaintiff States rely on multiple district court cases that in turn rely either on the standard expressed in a prior iteration of the Merger Guidelines or previous expert testimony by Shapiro. The Court recognizes that the Merger Guidelines are undoubtedly helpful in analyzing the competitive impact of mergers, and therefore has endeavored to give them due consideration throughout this analysis. The Merger guidelines, however, are not ultimately binding upon the courts. See Natsource LLC v. GFI Grp., Inc., 332 F. Supp. 2d 626, 636 n.3 (S.D.N.Y. 2004) (noting that Merger Guidelines and their two-year test do not carry the force of law); Anthem, 855 F. 3d at 349 (noting that courts are "not bound by, and owe[] no particular deference to" the Merger Guidelines).

. . . [T]he Merger Guidelines now specify that entry must be "rapid enough to make unprofitable overall" any potential anticompetitive actions. Merger Guidelines § 9.1. The Court concludes that that test would be satisfied here, particularly because the Court also concludes that New T-Mobile would be especially unlikely to act anticompetitively in the short term, as explained further below in Sections II.C-D. Even if DISH alone did not completely replace Sprint's competitive impact in DISH's first two years of competition, the effect of its failure to do so may not be significantly consequential because of the increased likelihood that New T-Mobile, reinforced with additional resources and greater market share, would continue to behave procompetitively during that same time period and encourage AT&T and Verizon to act more competitively than they have to date.

Looking beyond the short term, DISH's entry would likely be timely enough to replace the competitive impact of Sprint in the long term. It is clear that the commercial significance of DISH is trending upwards while Sprint is trending downwards. Unlike Sprint, DISH is acquiring spectrum at auction, hiring employees, and significantly investing in its network. And whereas Sprint would likely diminish from a national competitor to a regional one, DISH is obligated to expand from a regional competitor to a national one. As DISH's chairman aptly stated at trial, "Sprint doesn't want to be in the business. We do."

The Court consequently concludes that the FCC and DOJ remedies, and particularly those designed to ensure that DISH becomes an aggressive fourth national MNO, significantly reduce the concerns and persuasive force of Plaintiff States' market share statistics. Taking this evidence together with the evidence that the Proposed Merger's efficiencies will cause T-Mobile to continue competing vigorously, and that Sprint's ability to compete in the RMWTS Markets will continue to decrease without the Proposed Merger, the Court concludes that Defendants have carried their burden to rebut Plaintiff States' prima facie case. Though Plaintiff States' post-merger market share figures are undeniably high, the combined weight of the three different forms of rebuttal evidence Defendants presented nevertheless demonstrates that the concentration and market share statistics associated with the Proposed Merger do not accurately reflect the variety of ways in which the Proposed Merger is not likely to substantially lessen competition. Accordingly, the Court turns to consider whether Plaintiff States have satisfied their ultimate burden of proof through evidence beyond concentration and relevant market share data.

Notes and Questions

1. Psychology over economics? Judicial assessment of motivations versus economic analysis of incentives? What do you make of the opening paragraphs of the excerpt above? Does the judge

leave any room for economics or technical expertise to sway the court? What role is there for economic analysis in Judge Marrero's framework for predicting merger effects?

2. What drives the court's assessment of the merger efficiencies in this case? Do you agree with his application of the Guidelines? What about the effects of entry by Dish?

FTC et al. v. Thomas Jefferson University et al.,

505 F.Supp.3d 522 (E.D. Pa 2020)

Pappert, J.

The Federal Trade Commission and Pennsylvania Office of Attorney General, collectively the Government, seek to preliminarily enjoin a proposed merger between Thomas Jefferson University and the Albert Einstein Healthcare Network pending an administrative determination of whether the combination violates Section 7 of the Clayton Act.

To obtain the relief it seeks, the Government must define a relevant geographic market—that area where potential buyers look for the goods or services they want—within which the likely competitive effects of the merger can be evaluated. That market's definition is dependent on the special characteristics of the industry involved and the Court is required to take a pragmatic and factual approach in determining whether the Government has done it correctly. Of greatest importance to this case, the market's geographic scope must "correspond to the commercial realities of the industry at issue." The healthcare industry's market is represented by a "two-stage model of competition." In the first stage, hospitals compete to be included in an insurer's hospital network. In the second, hospitals compete to attract individual members of the insurers' plans.

This means that insurers, not patients seeking and receiving medical care, are the payors—those who will most directly feel the impact of the increased price of care. This is what the Third Circuit Court of Appeals has called the "commercial reality" of the uniquely structured healthcare industry. Patients are not irrelevant to a hospital system merger analysis; their choices and behavior can affect the bargaining leverage that hospitals and insurers possess when they negotiate hospitals' inclusion in insurers' networks and the reimbursement rates insurers agree to pay hospitals. But as the entities bearing the immediate impact of the cost of medical care, the insurers' perspective is extremely important in deciding whether a merger will substantially lessen the competition for healthcare in a proposed geographic market.

The propriety of a relevant geographic market in this industry must therefore be assessed "through the lens of the insurers." To establish its prima facie case, the Government must put forth enough evidence to prove that the insurers would not avoid a price increase in any one of the Government's proposed markets by looking to hospitals outside those markets.

The Government has not met this burden. It contends that a combination of its expert's econometric algorithm and testimony primarily from two (of the region's four) major commercial insurers shows that its geographic markets correspond to the commercial realities of southeastern Pennsylvania's competitive healthcare industry. But the expert's calculations alone do not do so, and the insurers' testimony is neither unanimous, unequivocal nor supported by the record as a whole. Their conclusory assertions that they would have to succumb to a price increase for services in the Government's proposed markets instead of looking to healthcare providers outside those markets are not credible.

The Court denies the Government's request for a preliminary injunction.

I

B

Jefferson and Einstein operate in a densely populated, major metropolitan region. There are abundant healthcare options in southeastern Pennsylvania, including fifty-one hospitals dedicated to general acute care ("GAC"), children's specialty care, orthopedics and cancer care. Philadelphia's healthcare market is less consolidated than others around the country. In 2018, Jefferson and Einstein were just two of thirteen health systems providing inpatient GAC services in the region.

i

Jefferson includes a nonprofit health system operating fourteen hospitals with 2,885 licensed beds in Pennsylvania and New Jersey. Jefferson hospitals providing inpatient GAC services include its flagship, Thomas Jefferson University Hospital ("TJUH") in Philadelphia and Abington Hospital and Abington- Lansdale Hospital in Montgomery County. Jefferson provides inpatient rehabilitation services in a twenty-three-bed unit at Abington Hospital and at the ninety-six-bed freestanding inpatient rehabilitation facility ("IRF") Magee Rehabilitation Hospital, which is in Philadelphia. Jefferson also operates urgent care centers, outpatient centers, testing and imaging centers and a cancer center.

ii

Einstein is a non-profit health system which includes three GAC hospitals: its 548-bed Einstein Medical Center Philadelphia ("EMCP") in North Philadelphia, the sixty-seven-bed Einstein Medical Center Elkins Park ("EMCEP") in southeastern Montgomery County and its 191-bed Einstein Medical Center Montgomery ("EMCM") in East Norriton, Montgomery County.

EMCP accounts for seventy percent of Einstein's revenues. However, Einstein's commercially insured population is declining and many of EMCP's commercially insured patients arrive through the hospital's Emergency Department. EMCP is viewed as a "safety net hospital" because it has one of the highest percentages of government-insured inpatients—eighty seven percent or more—among large hospitals in the United States. Among the more than 800 large GAC hospitals in the United States, only sixteen recently had a comparable percentage of government-insured patients and six of those were government-operated. Medicare and medical assistance coverage "do not cover the cost" of patient care because government reimbursement rates do not keep up with Einstein's inflationary costs. Einstein concluded that it should seek a strategic partner in order to create scale to allow for savings that could improve its financial situation driven by its payor mix.

Einstein also provides inpatient rehabilitation services through MossRehab at its EMCP and EMCEP locations. MossRehab at Elkins Park is a 130-bed freestanding IRF. MossRehab also has inpatient beds at Jefferson's Frankford and Bucks Hospitals and at Doylestown Hospital.
iii

[The opinion them went through facts showing facilities of numerous other health systems in the area providing a variety of healthcare and rehabilitation services.]
C

The region's commercial health insurance market is far more consolidated than the provider market. Jefferson's Chief Executive Officer Dr. Stephen Klasko characterized the area as having "the worst externalities of any city in the country" for healthcare systems because there is "pretty much a monopolistic type insurance situation with a few insurers." The region has only four major commercial health insurance providers: Independence Blue Cross ("IBC"), Aetna, Cigna and United Healthcare ("United"). Because healthcare provider competition in the area is extensive, Klasko explained that commercial insurers "especially the big ones, United, Aetna, IBC, of course, and Cigna, they could just say fine, we won't [keep a provider in-network]" and not suffer negative repercussions.

IBC is the area's dominant commercial insurer, with more than fifty percent market share covering approximately 1.3 million lives and coverage agreements with every area health system. At the evidentiary hearing, IBC could not identify a single health system that has been out of its coverage network for longer than six months. IBC has "a very strong market position" because there are significantly more other hospital options than other insurance options. All other major commercial insurers in southeastern Pennsylvania recognize IBC as the prevailing player in the commercial insurance market.

According to Aetna and United, healthcare providers fear IBC will retaliate against them if they partner with other payors by reducing benefits or terminating its relationships with them.

Multiple witnesses testified that neither Jefferson nor Einstein can afford being out of IBC's network. At Jefferson, payments from IBC comprise approximately fifty-eight percent of commercial GAC revenues, roughly fifty percent of its total commercial insurance reimbursements and approximately twenty percent of its total revenue.

An IBC short-term financial analysis showed that if Jefferson were not included in IBC's network, the resulting harm to Jefferson could amount to tens of millions of dollars. It [IBC] determined that cutting Jefferson out of its network would not impact its network adequacy from a regulatory standpoint.

IBC accounts for approximately fifty-seven percent of Einstein's commercial GAC revenues and approximately nineteen percent of the system's hospital revenues. An IBC analysis contemplating Einstein's termination from its network showed that Einstein would lose tens of millions of dollars from termination and IBC would have sufficient network access and adequacy from a regulatory standpoint without Einstein.

Aetna covers approximately 550,000 to 650,000 lives in the Philadelphia area. It is the second largest commercial payor for both Jefferson and Einstein. Aetna accounts for approximately twenty-five percent and twenty- nine percent of Jefferson and Einstein's commercial GAC revenues, respectively. Its reimbursement payments constitute eight to ten percent of Jefferson's total revenue and approximately seven percent of Einstein's hospital revenues. [Opinion goes on to discuss smaller presence of United and Cigna].

D

The Government proposes three relevant markets in which to assess the proposed merger's competitive effects. Two of the proposed markets are for inpatient GAC services sold to commercial insurers and their members and the third is for inpatient acute rehabilitation services sold to commercial insurers and their members. Each proposed product market has different geographic boundaries.

i

GAC services include a broad cluster of medical, surgical, and diagnostic services that require an overnight hospital stay. The parties agree that GAC services is a relevant product market. Insurers include local GAC hospitals in their networks because patients prefer to receive GAC services near their homes.

The FTC does something in this case that it has never attempted in an effort to block a merger in the healthcare industry—allege multiple geographic markets for the same product, here GAC services. The Government includes three of the same hospitals in overlapping markets, magnifying their competitive significance.

a

The Government first attempts to define what it terms the "Northern Philadelphia Area" market, in which it includes eleven hospitals: Einstein's EMCP and EMCEP; Jefferson's Abington and Frankford Hospitals; Prime's Roxborough Memorial Hospital; Temple University Hospital; Jeanes; Tower Health's Chestnut Hill Hospital; Fox Chase Cancer Center; Cancer Treatment Centers of America, Philadelphia; and St. Christopher's Hospital for Children. Notably, Abington sits on the edge of the market at its far northern end.

b

The Government's proposed "Montgomery Area" market for GAC services also includes Jefferson's Abington Hospital, Prime's Roxborough Memorial Hospital and Tower Health's Chestnut Hill Hospital along with seven other hospitals: Jefferson's Abington Lansdale Hospital; Einstein's EMCM; Main Line Health's Bryn Mawr and Paoli Hospitals; Prime's Suburban Community Hospital; Tower Health's Phoenixville Hospital; and Physician's Care Surgical Hospital. Abington sits on the edge of this market as well, this time at its far eastern end.

c

While Einstein aspires to compete with Jefferson, Jefferson identifies its primary competition as Penn Medicine, Main Line Health, Temple University and Tower Health. It does not consider Einstein to be "a primary competitor for commercial patients because their commercial pay[o]r mix is so small. And their commercial payer mix comes almost entirely from their emergency room . . . we don't compete with them for elective cases because less than 1 percent of their volume is actually that kind of elective commercial case." EMCM is not a primary competitor for Jefferson's Abington Hospital because I-476 acts as a dividing line for where patients seek care—Abington is east of I-476 and EMCM is west of I-476. Jefferson sees Abington's primary competitors as Grand View Hospital and Doylestown Hospital, Holy Redeemer Hospital, "maybe to a much smaller extent Chestnut Hill [Hospital], and to a smaller extent Main Line Health." In Jefferson's view, Abington-Lansdale's primary competitors are Grand View and Doylestown.

Most insurers recognize Penn Medicine as Jefferson's closest competitor. During negotiations over coverage agreements, payors leverage Jefferson and Penn against each other. They compare Jefferson to Penn or Temple, and not to Einstein.

ii

The Government's third proposed relevant market is for inpatient acute rehabilitation services ("Acute Rehabilitation Services") sold and provided to commercial insurers and their members in what it terms the "Philadelphia Area." This represents another first for the FTC—it has never before litigated a case where it has attempted to define rehabilitation services as a relevant product market.

The Acute Rehabilitation Services product market includes only inpatient rehabilitation services provided at IRFs: a "cluster of intensive inpatient rehabilitation therapy services that include, at a minimum, multi-disciplinary therapy at least three hours a day for five days per week, three face-to-face visits with a physician per week, and 24-hour nursing care." The product market excludes inpatient rehabilitation services provided at SNFs, which the Government defines as "non-hospital post-acute care settings that provide short-term and long-term nursing services and, at some SNFs, subacute rehabilitation services."

The Government claims that "Acute Rehab Services are provided only at IRFs." (Pls.' FF ¶ 37.) According to the Government, IRF Acute Rehabilitation Services are "[d]emanded by [d]istinct [c]ustomers," have "[d]istinct [c]haracteristics" compared to SNF services, are recognized "as a [d]istinct [l]evel of [p]ost-[a]cute [c]are" by industry participants, are provided at "[u]nique [f]acilities by [s]pecialized [v]endors," and have distinct prices relative to other services.
a

The proposed Philadelphia Area geographic market for Acute Rehabilitation Services includes seven IRFs: three freestanding—Magee, MossRehab at Elkins Park and "Penn Rehab" (also known as Good Shepherd Penn Partners)—and five hospital- based—Jefferson Frankford (MossRehab), EMCP (MossRehab), Abington and Trinity's Nazareth Hospital. The Government's proposed geographic market does not include freestanding IRFs at Bryn Mawr Rehab, St. Mary Rehab or Kessler Marlton.

II

If the FTC establishes a likelihood of success on the merits, it creates a presumption in favor of preliminary injunctive relief. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001). "Defendants can . . . rebut this presumption by demonstrating that the FTC's prima facie case and market-share statistics inaccurately predict the merger's probable effects in the relevant market." *RAG-Stiftung*, 436 F. Supp. 3d at 291. They must show "either that the combination would not have anticompetitive effects or that the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger." *Penn State Hershey*, 838 F.3d at 347.

If Defendants rebut the prima facie case, the burden of production returns to the Government, joining with the burden of persuasion which the Government always has. *See id.* at 337 (citations omitted). Even if the FTC establishes a likelihood of success on the merits, the Court "'must still weigh the equities in order to decide whether enjoining the merger would be in the public interest.'" *Id.* at 352 (quoting *H.J. Heinz Co.*, 246 F.3d at 726); *see also* 15 U.S.C. § 53(b). The Court considers "whether the *injunction*, not the *merger*, would be in the public interest." *Penn State Hershey*, 838 F.3d at 353 (emphasis in original). "The question is whether the harm that the Hospitals will suffer if the merger is delayed will, in turn, harm the public more than if the injunction is not issued." *Id.* at 352.

III

Market definition allows "measurement of market shares and market concentration," which "is not an end in itself, but is useful to the extent it illuminates [a] merger's likely competitive effects." U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 4 (rev. Aug. 19, 2010) ("*Merger Guidelines*"). In other words, a properly identified relevant market must "correspond to the commercial realities of the industry." *Brown Shoe*, 370 U.S. at 336 (internal quotations omitted); *Penn State Hershey*, 838 F.3d at 338. As the *Merger Guidelines* explain, "merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time." *Merger Guidelines* § 1.

Economic analysis that reliably illuminates the likely competitive effects of a merger requires measuring shares that are aligned with industry characteristics. As Defendants' expert economist Dr. Corey S. Capps explained, "in this case that means aligning with two-stage competition and keeping the focus on stage one [competition] *with the insurers as the customers*." The Government's expert economist Dr. Loren K. Smith likewise explained that the appropriate focus "is the extent to which the merger will change the relative bargaining power of . . . the provider versus the insurer and how that will affect prices."

A

The Government must establish the relevant geographic market, defined as the "area in which a potential buyer may rationally look for the goods or services he seeks." The market must contain the sellers or producers who are able "to deprive each other of significant levels of business" and is where the merger's effect "on competition will be direct and immediate." *Advocate Health Care*, 841 F.3d at 468 (internal quotations and citations omitted).

The hypothetical monopolist test ("HMT") is a "common method" used to define the relevant geographic market for evaluating a plaintiff's likelihood of ultimate success with respect to claims that a merger will substantially lessen competition. *Penn State Hershey*, 838 F.3d at 338; *see also Merger Guidelines* § 4.

The HMT "asks what would happen if a single firm became the only seller in a candidate geographic region." *Advocate Health Care*, 841 F.3d at 468 (citation omitted). If that single firm–the hypothetical monopolist–could profitably raise prices above competitive levels, the candidate geographic region is a relevant geographic market.

B

The Government's candidate GAC markets focus more on patients, not the insurers who will bear the immediate impact of any price increases. When Dr. Smith selected his candidate markets, he considered "how closely substitutable healthcare providers are to groups of patients" because, in his opinion, insurer demand to have particular healthcare providers in-network "is derived from patient demand for those providers." Relying on insurer declarations, Dr. Smith concluded that "whether an insurer considers healthcare providers to be close substitutes derives from whether the insurer's health plan members consider those providers to be close substitutes." Dr. Smith posited that "[p]atient substitution patterns play a critical role in determining the extent to which commercial insurers can credibly threaten to exclude a provider from their networks during a negotiation over prices and other terms." (*Id.* at ¶ 90.) He contends that "[i]n the context of two-stage competition among healthcare providers, market definition requires using patient substitution patterns to identify a collection of close substitute facilities that is just large enough that a hypothetical monopolist of that set of facilities could profitably impose a SSNIP in negotiations with insurers." Accordingly, Dr. Smith used diversion ratios, which are "a measure of patient substitution patterns" to define the relevant geographic markets for GAC.

But the Court's geographic market determination is not merely a "statistical exercise" looking for a hypothetical monopolist that can impose a SSNIP. Market definition can rest on a mathematical equation only if the variables used in the equation reflect the market's commercial realities. Diversion ratios only capture insurer preferences for the purpose of constructing a relevant geographic market where there is evidence to show that insurer decisions about which hospitals to include in their networks are aligned with patient decisions about where to seek care.

Although diversion ratios are one piece of evidence, they do not completely capture the commercial realities of a healthcare market with two-stage competition and provider/insurer dynamics like those in southeastern Pennsylvania. The Court must consider the Government's application of the HMT to their proposed geographic markets for GAC "through the lens of the insurers . . . ." *Penn State Hershey*, 838 F. 3d at 342. And "measures of patient substitution like diversion ratios do not translate neatly into options for insurers." *Advocate Health Care*, 841 F. 3d at 475.

Dr. Smith purported to "test whether the candidate geographic market satisfie[d] the [HMT] through a price increase at EMCP—i.e., whether a hypothetical monopolist of all hospitals in the candidate market could profitably increase prices at EMCP by a SSNIP of at least [five percent] *in negotiations with insurers*." (emphasis added).) If the candidate market did not satisfy the HMT, Dr. Smith would repeat steps two through four, starting over at step two to add "the next closest substitute hospital *by diversion ratio* that is not already included in the candidate market" until identifying "a set of hospitals that satisfie[d] the [HMT]." (emphasis added).)

No one disputes that the geographic market boundaries which arise from Dr. Smith's calculations result in SSNIP values that satisfy the HMT. That is all the Government believes it has to show: that once any geographic market which can be drawn passes the HMT, it can move to the next step and calculate market share. The Government acknowledges, however, that the geographic market which passes the HMT must correspond with commercial realities. And as Dr. Capps explained, "some markets can pass [the HMT] and be more logical with respect to competitive realities and others can be less [so]."

Econometric evidence "can be powerful evidence, but it is not the only evidence that courts consider in defining the relevant market." *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 39 (D.D.C. 2017). Because Dr. Smith relies on *patient* diversion ratios to construct his candidate markets in step one and two of his model, the results of his algorithm do not in and of themselves address, much less answer, the relevant antitrust question, which is whether a hypothetical monopolist could profitably impose a SSNIP without insurance companies turning to providers outside the geographic markets. Specifically, Dr. Smith does not show whether "enough insurers, in the face of a [SSNIP], would avoid the price increase by looking to hospitals outside the proposed geographic market . . . ." *Penn State Hershey*, 838 F.3d at 342.

Courts must consider whether insurer and patient behavior is "correlated." *Id.* at 343. The *Merger Guidelines* instruct the Agencies that "[w]hen direct customers of the merging firms,"—here insurers—"compete against one another in a downstream market, their interests may not be aligned with the interests of final consumers,"—here patients—"especially if the direct customers expect to pass on any anticompetitive price increase." *Merger Guidelines* § 2.2.2. There is a "fundamental difference between analyzing the likely response of consumers through the patient or payor perspective." *Penn State Hershey*, 838 F.3d at 342.

Here too, the Government realizes that testimony from this region's major insurers is an indispensable component of Dr. Smith's analysis, if his proposed geographic markets are to correspond with the commercial realities of the southeastern Pennsylvania healthcare industry. Dr. Smith relies on insurer testimony for his conclusion that if the merger results in price increases for insurers, "they'd have to pass them onto their customers." But as explained below, the insurers' testimony here is not unanimous or unequivocal, is undercut by other evidence in the record and is ultimately not credible.

As a matter of academic econometric analysis, Dr. Smith could be correct, but relying on that simple principle is insufficient. Dr. Smith's basic economics have to be supported by credible evidence that the insurers would have to agree to price increases instead of looking outside his proposed geographic markets.

C

The *Merger Guidelines* caution that while "[i]nformation from customers about how they would likely respond to a price increase, and the relative attractiveness of different products or suppliers, may be highly relevant, especially when corroborated by other evidence," in evaluating customer testimony it is important to be "mindful that customers may oppose, or favor, a merger for reasons unrelated to the antitrust issues raised by that merger." *Merger Guidelines* § 2.2.2. Courts in healthcare merger cases have expressed similar skepticism of insurer testimony and its potentially self-serving nature. *See, e.g.*, *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054 (8th Cir. 1999) (reversing district court order enjoining a hospital merger, in part because of the district court's "reliance on the testimony of managed care payers, in the face of contrary evidence, that these for-profit entities would unhesitatingly accept a price increase rather than steer their subscribers to [other hospitals]. Without necessarily being disingenuous or self-serving or both, the testimony is at least contrary to the payers' economic interests and thus is suspect."); *Advocate Health Care*, 2017 WL 1022015, at *5 ("The Court shares some of defendants' concerns about the credibility of the insurers' testimony, which may indeed be self-serving . . . .").

c. iii

The "extensive evidence" that figured so prominently in *Penn State Hershey* showing that insurers in central Pennsylvania would have no choice but to accept a price increase does not exist in this case. First and foremost, the second largest health insurer in southeastern Pennsylvania has "no concerns" about the Jefferson-Einstein merger and the third largest never said it would pay higher rates for GAC services post-merger. Given the numerous healthcare systems here, no insurer can credibly assert that there would be "no network" without a combined Jefferson and Einstein— something the insurers could say when Hershey and Pinnacle, the two largest Harrisburg area hospitals (which together would have controlled seventy-six percent of GAC services in that market), attempted to merge.

The Court lacks the benefit, and evidence, of the results of any "natural experiment" where an insurer tried to market a plan without Jefferson and Einstein in it and lost half of its membership as a result—despite its plan being much cheaper than its competitors. And no employers testified they would have a difficult time marketing a health plan without Jefferson and Einstein. To the contrary, the one employer who did weigh in, a large school district, said its employees would be fine with a health plan excluding the two systems (employees have many options for inpatient GAC services and, if a facility ever became too costly, employees could go to another provider down the street)). The Government has not proven that the Government's Northern Philadelphia and Montgomery Areas correspond to the commercial realities of the southeastern Pennsylvania healthcare industry.

D

Nor does the Government's innovation of a third market for inpatient Acute Rehabilitation Services provide a basis for enjoining the merger. The Hospitals do not agree that the Government has properly defined the relevant product market to include only services provided at IRFs, and not a cluster of the same services regardless of whether provided at an IRF or in another post-acute care setting like a high-end SNF. Even assuming the relevant product market appropriately includes only those services provided at IRFs, the Government still fails to meet its burden to establish a relevant geographic market for inpatient Acute Rehabilitation Services. As it did for its GAC geographic markets, the Government relies on econometrics and insurer testimony to prove the propriety of its proposed Philadelphia Area market. But it has not shown that the market corresponds with commercial realities and it thus cannot pass the HMT.

Notes and Questions

1. This case is notable for its application of the 2010 Horizontal Merger Guidelines principles on market definition. It is a comparatively rare case since 2010 where the government has lost on market definition. The Commission had unanimously voted to enjoin the merger.

2. What was the key flaw the court identified in the FTC's alleged market definition? Does the case mean that anytime the non-econometric evidence of a market's practical realities are ambiguous the statistical evidence should be disregarded? Or, was it the case here that the non-statistical evidence particularly favored the defendant's view?

3. One interesting aspect of this case was the court's treatment of the FTC's use of patient "diversion ratios" to define the relevant geographic markets. As all parties agreed, insurers, not patients, were the direct customers here whose bargaining with the hospitals might be affected. The FTC used evidence of how patients switch among hospitals on grounds that insurers must adhere closely to patient preferences in order to attract them to sign up for the particular insurer's policies. Here, the court did not find there was sufficient "correlation" between patients and insurers for the FTC's premise to hold true. Does that seem right to you? Why or why not? If insurers might be indifferent to the hospitals' mergers but patients would be inconvenienced, should that matter? Did the court disregard that here?

Insert at p. 1073, before part III:

NOTE: NOVELIS/ALERIS: A NOVEL PROCEDURE FOR ACHIEVING FASTER REMEDIES AND DEAL CLOSURE

In September 2019, the DOJ filed suit in federal court in Ohio to block Novelis, Inc. from acquiring Aleris Corp, a rival producer of rolled aluminum products. The DOJ's complaint specifically alleged that the combination would reduce competition in the market for "rolled aluminum sheet for automotive applications." Novelis disagreed with the DOJ's definition of the relevant market. Before the DOJ filed its complaint, however, the parties agreed to a novel approach to resolve their dispute: they would conduct civil discovery under the jurisdiction of the court and try to resolve their dispute. If they could not, the court would then refer the case to binding arbitration. If the merging parties won, the DOJ would move to dismiss its complaint; if the DOJ won, the parties could close their transaction subject to an obligation to divest certain overlapping assets (notably Aleris' Lewisport, Kentucky plant) within a specified time. The DOJ won the arbitration and ultimately filed a Proposed Final Judgement setting out the assets to be divested and the relevant time for compliance. As of this writing, Novelis is in the midst of the bidding process for potential buyers of the Lewisport plant.

The arbitration process used for the Novelis/Aleris deal was novel, and it remains to be seen whether it was a one-time experiment or may become a more commonly used procedure to expedite merger disputes. As a policy matter, it is worth considering carefully the costs and benefits that the process might have both for parties and for the development of U.S. antitrust law.

V. Private Enforcement of Section 7

Add at p. 1093, before *Cargill*

Note: Are States Private or Public Enforcers under Section 7?

A number of states have recently become increasingly aggressive enforcers of the antitrust laws, against mergers in particular. The coalition of state attorneys general suing to block T-Mobile's acquisition of Sprint (discussed earlier in this supplement) is the most notable example to date because the states decided to go it alone even after the U.S. Department of Justice had settled its own complaint against the merger. However, states frequently join in federal agency investigations or launch their own investigations that they later settle (as, e.g., the state of Colorado did in the T-Mobile/Sprint matter[5]). As states move in a more independent direction in enforcing federal merger laws, the question arises of whether their *parens patriae* standing puts them on the same legal footing as the federal agencies or makes the states more like private plaintiffs.

In a recent decision dismissing a complaint against Facebook joined by almost every state, the U.S. District Court for the District of Columbia held that the states were private plaintiffs and not public enforcers like the FTC or DOJ. The district court parsed the history of the standing provisions of Section 16 of the Clayton Act and found that "[i]n expanding the universe of antitrust enforcers beyond the United States itself, Congress thus drew no distinction between States and private litigants."[6] The decision is important. The district court dismissed the state claims against Facebook as barred by the doctrine of laches (i.e. that the states had slept on their rights and waited too long to bring their claims). Because the laches doctrine does not apply to the public federal agencies, the states argued that laches should not apply to them as public agencies filing their claims in the public interest. In rejecting that claim, the court lumped the state attorneys general in with other private plaintiffs under the Clayton Act. Whether the states will appeal or the district court's ruling will stand remain to be seen as of this writing.

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[5] https://coag.gov/press-releases/attorney-generals-office-secures-2000-jobs-statewide-5g-network-deployment-under-agreements-with-dish-t-mobile-10-21-19/.

[6] https://storage.courtlistener.com/recap/gov.uscourts.dcd.224923/gov.uscourts.dcd.224923.137.0.pdf, at 48-49.

CHAPTER 9: ANTITRUST, OTHER FORMS OF REGULATION, AND EXEMPTIONS

I. Antitrust and Agency Regulation

[D] Antitrust Exemptions

[1] Labor Organizations

Insert before Problem 9.1 on p.1138:

Confederacion Hipica de Puerto Rico v. Confederaction de Jinetes Puertorriquenos

30 F.4th 306 (1st Cir. 2022)

LYNCH, Circuit Judge.

The Sherman Antitrust Act usually forbids would-be competitors from staging a group boycott. … Federal statutes and controlling Supreme Court case law create an exemption for certain conduct, commonly called the labor-dispute exemption. See 15 U.S.C. § 17; 29 U.S.C. §§ 52, 101, 104, 105, 113.

In this action, brought by an association of horse owners ("Hípica") and the owner of a racetrack ("Camerero") against a group of jockeys who demanded higher wages and refused to race, the district court erroneously determined that the labor-dispute exemption does not apply. The district court preliminarily and permanently enjoined the work stoppage, awarded summary judgment against the jockeys, their spouses and conjugal partnerships, and an association representing them ("inetes"), and imposed $1,190,685 in damages….

Puerto Rico is home to one horse-racing track, the Hipódromo Camarero in Canóvanas, which is operated by plaintiff Camarero. Horse owners hire jockeys on a race-by-race basis. Since 1989, the jockeys have been paid a $20 mount fee for each race they participate in. The fortunate jockeys who finish in the top five positions in each race share in the "purse" -- the prize money for the top five horses. …

The jockeys have long chafed at their employment conditions. They object to the mount fee, which is about one-fifth what jockeys receive in the mainland United States. They also complain about pre-race weigh-in procedures and about the conduct of racing officials….

After negotiations failed, in pursuit of their demands for increased compensation, thirty-seven jockeys refused to race for three days…. Hípica and Camerero sued the jockeys, their spouses and conjugal partnerships, and Jinetes, alleging that the defendants engaged in a group boycott in violation of federal antitrust law.

After the hearing, the district court granted a preliminary and permanent injunction, holding that the jockeys are independent contractors, that they had acted in concert to restrain trade, and that they could not benefit from the labor-dispute exemption because of their independent-contractor status….

"[T]here is an inherent tension between national antitrust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation among workers to improve the conditions of employment." H. A. Artists & Assocs., Inc. v. Actors' Equity Ass'n, 451 U.S. 704, 713. Most of the time, antitrust law forbids would-be competitors from colluding to increase prices. When the price is a laborer's wage, however, a different set of rules apply. That must be so, lest antitrust law waylay ordinary collective bargaining. See Brown v. Pro Football, Inc., 518 U.S. 231, 236-37 (1996). Thus a pair of exemptions -- one statutory and one nonstatutory -- shield legitimate labor conduct from antitrust scrutiny. We deal here with the statutory exemption.

The statutory labor-dispute exemption flows from both the Clayton Act and the Norris-LaGuardia Act. Through those two statutes, Congress exempted labor disputes from antitrust law…. The Clayton Act declares that "[t]he labor of a human being is not a commodity or article of commerce," subject to antitrust law. To implement that policy, the Norris-LaGuardia Act provides that "persons participating or interested in [a labor dispute]" may engage in an enumerated set of acts -- including entering agreement to "refus[e] to perform work" -- without falling afoul of the Sherman Act's prohibition on "engag[ing] in an unlawful combination or conspiracy." 29 U.S.C. §§ 104, 105… The Norris-LaGuardia Act defines a "labor dispute" by specifically providing that:

> (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein ... when the case involves any conflicting or competing interests in a "labor dispute" ... of "persons participating or interested" therein ....
>
> (b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry ... in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry ....
>
> (c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113.

The Supreme Court has explained that the statutory exemption applies when four conditions are met…. First, the conduct must be undertaken by a "bona fide labor organization." H.A. Artists & Assocs., 451 U.S. at 717 n.20. Second, the conduct must actually arise from a labor dispute, as defined under the Norris-LaGuardia Act. 29 U.S.C. § 113. Once those two prerequisites are satisfied, we apply a further "two-prong test": the organization must "act in its self-interest and ... not combine with non-labor groups." See Am. Steel Erectors, Inc. v. Loc. Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 536 F.3d 68, 76 (1st Cir. 2008). To summarize, then, the statutory labor-dispute exemption applies to conduct arising (1) out of the actions of a labor organization and undertaken (2) during a labor dispute, (3) unilaterally, and (4) out of the self-interest of the labor organization….

We apply the statutory framework, emphasizing the first two elements, as the second pair are not seriously disputed here. We conclude that the jockeys' action fell within the labor-dispute exemption. Jinetes, which advocates for the jockeys' terms of employment, is a labor organization. The defendants sought higher wages and safer working conditions, making this a core labor dispute…. The plaintiffs make no assertion that the defendants coordinated with any nonlabor group. And the defendants acted to serve their own economic interests. Because the dispute meets the statutory criteria, the labor-dispute exemption applies.

The district court erred when it concluded that the jockeys' alleged independent-contractor status categorically meant they were ineligible for the exemption. We express no opinion on whether the jockeys are independent contractors, because, by the express text of the Norris-LaGuardia Act, a labor dispute may exist "regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c). The Court interpreted that provision in New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938). There, a community association encouraged a boycott of a grocery store in protest of the store's refusal to hire black employees. The Supreme Court held that the association's conduct fell within the labor-dispute exemption because the association sought to influence the store's terms of employment. It explained that the text of the Norris-LaGuardia Act was "intended to embrace controversies other than those between employers and employees; between labor unions seeking to represent employees and employers; and between persons seeking employment and employers." *New Negro Alliance* thus precludes an interpretation of the exemption limited to employees alone….

The key question is not whether the jockeys are independent contractors or laborers but whether what is at issue is compensation for their labor. We draw that principle from Columbia River Packers Ass'n v. Hinton, 315 U.S. 143 (1942). In that case, a group of fishermen tried to force exclusive contracts on the canneries to which they sold fish. Id. at 145. Relying on the fact that the fishermen were "independent entrepreneurs," the Supreme Court held that the labor-dispute exemption did not apply. Instead, it explained that the dispute "is altogether between fish sellers and fish buyers" and "relat[es] solely to the sale of fish," without implicating "wages or hours or other terms and conditions of employment."… From *Columbia River Packers*, thus, comes a critical distinction in applying the labor-dispute exemption: disputes about wages for labor fall within the exemption but those over prices for goods do not…. Whether or not the jockeys are independent contractors does not by itself determine whether this dispute is within the labor-dispute exemption.

NOTES AND QUESTIONS

1. Suppose that Uber Drivers in a city went on strike, refusing to drive unless their compensation was increased or working conditions improved. Is their shutdown exempt from antitrust prosecution under the labor immunity? What of the fact that they provide their own automobiles? Does that put them somewhere between the jockeys, who sold only their labor, and the fishermen in the *Columbia River Packers* case, whom the Supreme Court characterized as selling fish? How about Airnb home owners who lease out their own houses? There, the ratio of "labor" to "product" seems quite different. See Capriole v. Ubert Tech., Inc., 7 F.4th 854 (9th Cir. 2021) (refusing to upset Massachusetts state law rule classifying Uber drivers as independent contractors); Cunningham v. Lyft, Inc., 17 F.4th 244 (1st Cir.2021) (similar). Cf. James v. Uber Tech., Inc., 338 F.R.D. 123 (N.D. Cal. 2021) (certifying class of Uber drivers claiming that they should be classified as employees under state law). See generally Eric A. Posner, The Economic Basis of the Independent Contractor/Employee Distinction, 100 Tex. L. Rev. 353 (2021); Catherine Engelmann, Who's an Employee Now? Classifying Workers in the Age of the "Gig" Economy, 49 Fordham Urb. L.J. 959 (2022).

2. Under the First Circuit's decision, would it be necessary for the Uber drivers to have an organization representing their interests?

3. Note that the court's analysis is not limited to relatively low income workers such as Uber drivers. Physicians, some of them highly paid, stand in a similar position when they bargain with a hospital, insurer, or other provider. Should they be able to go on strike as well? Should the outcome differ depending on whether the issue was right to strike or physician's liability for negligence? What about employment discrimination? See Levitin v. Northwest Community Hosp., 923 F.3d 499 (7th Cir. 2019) (terminated physician was independent contractor, not covered by Title VII).

4. How important is it that Puerto Rico has only one horse-racing track? That could make its owner a monopsonist in the purchasing of the jockeys' services. For example, competition among multiple tracks in the Continental United States might indicate why the mount fees paid to jockeys were much higher there. Should that make a difference? See Herbert Hovenkamp, Worker Welfare and Antitrust, __ Univ.

Chi. L. Rev. (2022) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4015834.

5. What if there were two tracks in Puerto Rico and the owners agreed with each other on the wages that they would pay their jockeys? Does the labor immunity apply to collaborations of employers just as much as collaborations of employees. Should it? The labor immunity in §6 of the Clayton Act states, in full:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Clearly, everything after the first sentence refers to organizations that represent workers. But what about that first sentence, which says that "labor" is not an article of commerce? Doesn't that apply to both sellers and buyers of labor?

III. Problems of Federalism: Preemption and the "State Action" Doctrine

[B] The "State Action" Doctrine

[1] The Authorization Requirement and the Antitrust Liability of Municipalities and Other Governmental Subdivisions

*Insert at page 1198 before Problem 9.3***:**

5. In *Western Star Hospital Authority, Inc. v. City of Richmond,* 986 F.3d 354, 358-359 (4th Cir. 2021), the court held that a municipality's refusal to grant the plaintiff's EMS (Emergency Medical Services) a permit to operate was immune under the "state action" doctrine:

> Here, the City and the RAA [Richmond Ambulance Authority] easily satisfy *Hallie's* clear-articulation test. The Virginia legislature has expressly conferred broad authority on local governing bodies to engage in anticompetitive conduct in the EMS vehicle services market. See Va. Code Ann. § 32.1-111.14(A). A local government may make it unlawful to operate EMS vehicles without a permit, control the issuance of permits, determine where EMS vehicles can and cannot operate, and fix the prices of EMS vehicle services. Id. As one court observed over two decades ago, these provisions "expressly authorize anticompetitive conduct." Forest Ambulance Serv., Inc. v. Mercy Ambulance of Richmond, Inc., 952 F. Supp. 296, 300 (E.D. Va. 1997). Far from granting localities

> "simple permission to play in a market," Phoebe Putney, 568 U.S. at 231, 133 S.Ct. 1003 (internal citation omitted), the Virginia statute greenlights regulation and service provision that necessarily supplants unrestrained market competition. In these circumstances, anticompetitive conduct is the "foreseeable result" of the state's policy. *Hallie*, 471 U.S. at 42, 105 S.Ct. 1713. Accordingly, the City and the RAA are entitled to state action immunity.

Contrast *Quadvest, L.P. v. San Jacinto River Authority*, 7 F.4th 337 (5th Cir. 2021) (state agency involved in water distribution did not have authority to engage in anticompetitive agreements; authorizing statute permitted it to buy and sell water but not to engage in price fixing with private water provider).

* * * * [new note:]

One ongoing question with respect to federal immunities is appealability of interlocutory judgments. The issue is important because one value of an immunity is that it creates a legal issue that can dispose of a case at an early stage. Suppose that a district court either denies the immunity or denies summary judgment on the immunity issue and lets the case proceed to further discovery and trial. If that order is not appealable the party (usually the defendant) may have to go through an entire trial only to get a ruling later that the conduct was immune all along. Nevertheless, the courts have severely restrictive rules about the appealability of non-final orders. See *SmileDirectClub, LLC v. Battle*, 4 F.4th 1274 (2021), which denied an interlocutory appeal of a district court's order that "state action" doctrine did not preclude an antitrust challenge to a state dental board rule requiring a licensed dentist to be present for digital scans attending fabrication of orthodontics:

> So-called "state-action immunity" flows from the fact that state action falls outside the ambit of the Sherman Act as written. Parker v. Brown, 317 U.S. 341 (1943). A statute can confer a right not to be tried—that is, an immunity from suit—only through an "explicit statutory ... guarantee that trial will not occur." Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 874 (1994) … By contrast, a statutory omission establishes a mere defense to liability. … Properly understood as a defense to liability, state-action immunity does not satisfy the requirements for immediate appealability. Cf. Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 42 (1995) (explaining that the denial of qualified immunity is immediately appealable because qualified immunity is "an immunity from suit rather than a mere defense to liability" (internal quotation marks omitted)).

Judge Tjoflat concurred:

> An immunity from suit—like qualified immunity or absolute immunity—is "an entitlement not to stand trial or face the other burdens of litigation."… As such, it is "effectively lost if a case is erroneously permitted to go to trial."…