ORAL ARGUMENT NOT YET SCHEDULED
No. 18-5214

In the United States Court of Appeals for the District of Columbia Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

AT&T, INC., DIRECTV GROUP HOLDINGS, LLC, and TIME WARNER, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NO. 17-CV-2511 (THE HON. RICHARD J. LEON)

BRIEF OF OPEN MARKETS INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE PLAINTIFF-APPELLANT AND VACATUR

JONATHAN E. TAYLOR
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
(202) 888-7792 (fax)
jon@guptawessler.com

SANDEEP VAHEESAN
OPEN MARKETS INSTITUTE
1440 G Street, NW
Washington, DC 20005

August 13, 2018

Counsel for Amicus Curiae

COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases

A. ***Parties and amici curiae.*** All parties and amici who appeared before the district court are listed in the Plaintiff-Appellant's brief. The parties and amici appearing in this Court are also listed in the Plaintiff-Appellant's brief.

B. ***Rulings under review.*** The rulings under review appear in the Plaintiff-Appellant's brief.

C. ***Related cases.*** The case now pending before this Court was not previously before this Court or any court other than the district court below. Counsel is not aware of any related case pending before this Court or any court.

Certificate of Amicus Curiae Under Circuit Rule 29(d)

The Open Markets Institute seeks to file a separate brief to provide its distinctive perspective on the economic, legal, and other public issues implicated in this appeal. Its brief presents the economic harms from vertical mergers in general and the non-economic harms from vertical mergers in information and news media markets in particular. It also explains the Clayton Act's prohibition on corporate mergers that could reduce competition and describes how the reasonable-probability standard in merger cases advances the Act's preventative purpose.

Corporate Disclosure Statement

As required by Federal Rule of Appellate Procedure 26.1, I certify that amicus curiae Open Markets Institute is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

/s/ Jonathan E. Taylor
Jonathan E. Taylor

TABLE OF CONTENTS

Combined certificates i

Table of authorities iv

Introduction and interest of the amicus curiae 1

Argument 4

I. Vertical mergers can cause serious competitive harms 4

II. The Clayton Act prohibits all mergers that pose a reasonable threat to competition. 12

A. The Clayton Act is a prophylactic statute that prevents competitive harms. 13

B. The government satisfies its burden under the Clayton Act if it shows that a merger creates a reasonable probability of a substantial lessening of competition. 16

Conclusion 20

TABLE OF AUTHORITIES

Cases

Associated Press v. United States,
326 U.S. 1 (1945) 10, 11

Brown Shoe Co. v. United States,
370 U.S. 294 (1962) 12, 14, 17, 19

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,
429 U.S. 477 (1977) 15

California v. American Stores Co.,
495 U.S. 271 (1990) 17

Chicago Bridge & Iron Co. v. FTC,
534 F.3d 410 (7th Cir. 2008) 18

Fruehauf Corp. v. FTC,
603 F.2d 345 (2d Cir. 1979) 12

FTC v. H.J. Heinz Co.,
246 F.3d 708 (D.C. Cir. 2001) 18, 19

FTC v. Penn State Hershey Medical Center,
838 F.3d 327 (3d Cir. 2016) 19

FTC v. Procter & Gamble Co.,
386 U.S. 568 (1967) 15, 17, 19

FTC v. Whole Foods Market, Inc.,
548 F.3d 1028 (D.C. Cir. 2008) 18

Hawaii v. Gannett Pacific Corp.,
99 F. Supp.2d 1241 (D. Haw. 1999), *aff'd*, 203 F.3d 832 (9th Cir. 1999) 11

Hospital Corp. of America v. FTC,
807 F.2d 1381 (7th Cir. 1986) 18

Jacobs v. Tempur-Pedic International, Inc.,
626 F.3d 1327 (11th Cir. 2010) 16

Polypore International, Inc. v. FTC,
686 F.3d 1208 (11th Cir. 2012).. 18

Realcomp II, Ltd. v. FTC,
635 F.3d 815 (6th Cir. 2011) 16

St. Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd.,
778 F.3d 775 (9th Cir. 2015) 19

United States v. Anthem, Inc.,
855 F.3d 345 (D.C. Cir. 2017).. 16, 19

United States v. Baker Hughes Inc.,
908 F.2d 981 (D.C. Cir. 1990) 18

United States v. Dairy Farmers of America, Inc.,
426 F.3d 850 (6th Cir. 2005).. 18

United States v. E.I. du Pont de Nemours & Co.,
353 U.S. 586 (1957) 17

United States v. Microsoft Corp.,
253 F.3d 34 (D.C. Cir. 2001).. 16

United States v. Paramount Pictures, Inc.,
334 U.S. 131 (1948).. 4

United States v. Penn-Olin Chemical Co.,
378 U.S. 158 (1964).. 16, 17

United States v. Philadelphia National Bank,
374 U.S. 321 (1963).. 15, 19

United States v. Von's Grocery Co.,
384 U.S. 270 (1966).. 2, 15, 17

Statutes and regulations

15 U.S.C. § 18 13

56 Fed. Reg. 26,242 (1991).. 12

Legislative materials

95 Cong. Rec. 11,493 (1949) 14

S. Rep. No. 1775, 81st Cong., 2d Sess. 4 (1950) 14

Sen. Rep. No. 698, 63d Cong., 2d Sess. 1 (1914) 14

Other authorities

C. Scott Hemphill & Tim Wu,
Parallel Exclusion, 122 Yale L.J. 1182 (2013) 6

Curtis M. Grimm, et al.,
Foreclosure of Railroad Markets: A Test of Chicago Leverage Theory,
35 J.L. & Econ. 295 (1992) 5

Janusz A. Ordover, Garth Saloner & Steven C. Salop,
Equilibrium Vertical Foreclosure, 127 Am. Econ. Rev. 127 (1990) 5

Jeffrey Church,
"Vertical Mergers," 2 *Issues in Competition Law and Policy* 1455
(ABA Section of Antitrust Law 2008) 5

Jonathan B. Baker et al,
The Year in Economics at the FCC, 2010-11: Protecting Competition Online,
37 Rev. Indus. Org. 279 (2010) 6

Jonathan B. Baker,
Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis,
25 Antitrust 36 (2010) 8

Jonathan B. Baker,
Exclusion as a Core Competition Concern, 78 Antitrust L.J. 527 (2013) 6, 9

Justine S. Hastings & Richard J. Gilbert,
Market Power, Vertical Integration and the Wholesale Price of Gasoline,
53 J. Indus. Econ. 469 (2005) 7

Michael H. Riordan & Steven C. Salop,
Evaluating Vertical Mergers: A Post-Chicago Approach,
63 Antitrust L.J. 513 (1994) 5, 10

Michael H. Riordan,
"Competitive Effects of Vertical Integration," *Handbook of Antitrust Economics* (Paolo Buccirossi ed., 2008) 4

Patrick Bolton & Michael D. Whinston,
The "Foreclosure" Effects of Vertical Mergers, 147 J. Instit. & Theo. Econ. 207 (1991)..... 4

Patrick Rey & Jean Tirole,
A Primer on Foreclosure, 3 Handbook Indus. Org. 2145 (2007) 5

Paul L. Joskow & Roger G. Noll,
The Bell Doctrine, Applications in Telecommunications, Electricity, and Other Network Industries, 51 Stan. L. Rev. 1249 (1999).......... 4

Phil C. Neal,
The Clayton Act and the Transamerica Case, 5 Stan. L. Rev. 179 (1953) 13

Robert H. Lande,
Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 Hastings L.J. 65 (1982).......... 14

Rudolph J.R. Peritz,
Competition Policy in America: History, Rhetoric, Law (1996) 12

Sara Biancini & David Ettinger,
Vertical Integration and Downstream Collusion, 52 Int'l J. Indus. Org. 90 (2017) 4

Steven C. Salop & Daniel P. Culley,
Revising the U.S. Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners, 4 J. Antitrust Enforcement 1 (2015) 7, 8, 12, 13

Steven C. Salop,
Invigorating Vertical Merger Enforcement, 127 Yale L.J. 1962 (2017)..........4, 8, 9, 10

Tasneem Chipty,
Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry, 91 Am. Econ. Rev. 428 (2001).......... 5, 7

Thomas G. Krattenmaker & Steven C. Salop,
Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, 96 Yale L.J. 209 (1986) 6

U.S. Depertment of Justice & Federal Trade Commission,
Horizontal Merger Guidelines § 2.1.5 (2010) 9, 15

Yongmin Chen,
On Vertical Mergers and Their Competitive Effects, 32 RAND J. Econ. 667 (2001) 4

INTRODUCTION AND INTEREST OF THE AMICUS CURIAE[1]

The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, journalists, and other members of the public. The vigorous enforcement of the antitrust laws is essential to protecting the U.S. economy and democracy from monopoly and oligopoly.

The effectiveness of the antitrust laws against anticompetitive vertical mergers would be seriously weakened if the district court's decision were permitted to stand. The Open Markets Institute files this brief to present the competitive harms from vertical mergers and explain the Clayton Act's prohibition on corporate mergers, including vertical mergers, that pose a reasonable threat to competition.

Vertical mergers, such as the one at issue in this case, can create significant competitive harms. Unlike horizontal mergers, which combine direct competitors, vertical mergers combine firms that have an actual or potential customer-supplier relationship. The competitive harms presented by vertical mergers are most likely to

[1] No parties oppose the filing of this brief, and no counsel for any party authored it in whole or part. Apart from amicus curiae, no person contributed money intended to fund the brief's preparation and submission.

present themselves in markets with only one firm or a few firms (known as monopolistic and oligopolistic markets, respectively). These harms include the exclusion of rivals, collusion between competitors, and the elimination of potential competitors.

This brief discusses these three harms. It explains how a vertical merger allows a newly integrated firm to use its market power to exclude rivals in both directions on the supply chain—upstream as well as downstream. It also briefly touches on the other two risks, describing the increased potential for collusion through elimination of aggressive rivals and the sharing of sensitive cost and price information, and how vertical mergers can eliminate new entrants. Each of these harms can undermine competition and produce anticompetitive effects such as higher prices, decreased quality, and reduced innovation. And in media markets, the resulting harm can also be political in nature, diminishing the freedom of speech and diversity of debate.

To counteract these harms, Congress has taken broad action. The Clayton Act is a prophylactic statute that prohibits anticompetitive conglomerate, horizontal, and vertical mergers. In enacting and amending this statute, Congress made a conscious decision to go beyond the prohibitions in the Sherman Act and stop anticompetitive mergers "in their 'incipiency'"—*before* they could reduce competition and inflict harm on the public. *United States v. Von's Grocery Co.*, 384 U.S. 270, 276 (1966). Under this "incipiency" standard, the government and other plaintiffs seeking to enjoin anticompetitive mergers need not wait until a merger has actually reduced

competition, or demonstrate that future competitive harm is certain. Given the Clayton Act's preventative nature, plaintiffs in merger cases satisfy their burden if they show a reasonable probability that competition will be substantially lessened. Once they have done so, the merging parties cannot defend the merger on the grounds that it will create market efficiencies.

The government has met its burden here. Through a preponderance of the evidence, the government has established that AT&T's acquisition of Time Warner—which owns CNN and HBO, among other networks—creates a reasonable probability that there will be substantial exclusionary effects in the market for "video programming distribution." Presenting testimony from industry participants and economists, the government has demonstrated that the post-merger AT&T likely would have the ability and incentive to use essential Time Warner programming content as an anticompetitive weapon. By raising the price of Time Warner content or withholding it from downstream competitors, AT&T could weaken existing rivals, exclude emerging rivals, and thereby protect and enhance its power in the market for video programming distribution. As the government has shown, this exclusion would create a reasonable probability of substantial short- and long-term anticompetitive effects in the video-programming-distribution market.

ARGUMENT

I. Vertical mergers can cause serious competitive harms.

Vertical mergers can create myriad competitive harms, leading to higher prices, decreased quality, and reduced innovation. Michael H. Riordan, "Competitive Effects of Vertical Integration," *Handbook of Antitrust Economics* (Paolo Buccirossi ed., 2008). American competition policy has thus long favored vertical separation between distribution and production—especially in markets in which one segment is under monopolistic or oligopolistic control. *See, e.g.*, Paul L. Joskow & Roger G. Noll, *The Bell Doctrine, Applications in Telecommunications, Electricity, and Other Network Industries*, 51 Stan. L. Rev. 1249 (1999); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

In monopolistic and oligopolistic markets, the principal threats to competition from vertical mergers are exclusion, collusion, and the elimination of potential competitors.[2] *See, e.g.*, Patrick Bolton & Michael D. Whinston, *The "Foreclosure" Effects of Vertical Mergers*, 147 J. Instit. & Theo. Econ. 207 (1991); Sara Biancini & David Ettinger, *Vertical Integration and Downstream Collusion*, 52 Int'l J. Indus. Org. 90 (2017); Yongmin Chen, *On Vertical Mergers and Their Competitive Effects,* 32 RAND J. Econ. 667 (2001); Tasneem Chipty, *Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable*

[2] Although this brief focuses on these three types of harms, this list is not exhaustive. Vertical mergers can also result in, among other harms, evasion of price regulation. Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 Yale L.J. 1962, 1975 (2017).

Television Industry, 91 Am. Econ. Rev. 428 (2001); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513 (1994); Jeffrey Church, "Vertical Mergers," 2 *Issues in Competition Law and Policy* 1455 (ABA Section of Antitrust Law 2008). We will take up each of these three threats in turn.

Exclusion. Exclusionary conduct is a primary anticompetitive threat posed by vertical mergers. *See* Janusz A. Ordover, Garth Saloner & Steven C. Salop, *Equilibrium Vertical Foreclosure*, 127 Am. Econ. Rev. 127 (1990). This concern arises because, after the merger, the newly integrated firm can use its market power to squelch competition.

The vertically integrated firm can engage in exclusion in either direction on the supply chain. It can deprive non-integrated *downstream* rivals of key inputs. Or it can restrict non-integrated *upstream* rivals' access to important distribution channels. And sometimes, the firm can do both—foreclosing rivals' access to both key inputs and distribution. Patrick Rey & Jean Tirole, *A Primer on Foreclosure,* 3 Handbook Indus. Org. 2145, 11–15 (2007). Exclusion of either form can have adverse effects on competition and consumers. *See, e.g.*, Curtis M. Grimm, et al., *Foreclosure of Railroad Markets: A Test of Chicago Leverage Theory*, 35 J.L. & Econ. 295, 305 (1992) (finding that to "the extent [non-integrated] interline competitors are eliminated by vertical integration . . ., a welfare loss to shippers will result; if interline competition is promoted, there will be a welfare gain"). Further, these effects can be compounded when multiple vertically

integrated firms operate in a concentrated market, because they can engage in parallel exclusionary conduct against non-integrated competitors. C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 Yale L.J. 1182, 1249 (2013).

The two forms of exclusion work as follows. In an input-foreclosure strategy, a vertically integrated firm seeks to impair competition in a downstream market. Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 Antitrust L.J. 527, 540 (2013). When a downstream firm acquires an upstream firm with market power, the competitive threat from input foreclosure is high. *See id.* By raising the price of the input or withholding it entirely from rivals, the vertically integrated firm can use its power in the upstream market to raise costs to non-integrated downstream rivals and weaken and exclude them from the market. Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986). The vertically integrated firm can thereby reduce competitive pressures in the downstream market from both existing and emerging rivals and protect and enhance its market power. *See, e.g.*, Jonathan B. Baker et al., *The Year in Economics at the FCC, 2010-11: Protecting Competition Online*, 37 Rev. Indus. Org. 279, 305–06 (2010) (examining effects of vertical integration between DirecTV and News Corp.'s content on programming fees and finding that "[a]verage monthly prices and the percentage price increase were both higher during periods of vertical integration"); Justine S. Hastings & Richard J. Gilbert, *Market Power, Vertical Integration and the Wholesale*

Price of Gasoline, 53 J. Indus. Econ. 469, 490 (2005) ("This empirical analysis demonstrates that mergers in the gasoline industry that increase the extent of vertical integration may lead to an increase in wholesale prices as a consequence of the incentive to raise rivals' costs.").

In a customer-foreclosure strategy, by contrast, a vertically integrated firm seeks to impair competition in an upstream market. It does so by reducing demand for the output of non-integrated upstream firms. Steven C. Salop & Daniel P. Culley, *Revising the U.S. Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, 4 J. Antitrust Enforcement 1, 17, 23 (2015). By depressing the sales of non-integrated upstream firms, the vertically integrated firm can use its buyer power in the downstream market to weaken and exclude rivals in the upstream market and reduce competition in that market.

The threat of customer foreclosure is particularly acute in the market for video-programming distribution. History shows that distributors who have been permitted to integrate into the (upstream) market for content ownership have favored content from affiliates over content from rivals. *See e.g.*, Chipty, *Vertical Integration, Market Foreclosure, and Consumer Welfare,* 91 Am. Econ. Rev. at 433–40. That is particularly so when a vertically integrated distributor owns premium content. *See id.* at 450 ("Vertical integration between cable operators and premium program services results in the exclusion of rival services. Premium operators offer fewer premium

services. They also offer fewer basic services; in particular, they exclude the basic movie service, AMC, which most directly rivals their own premium movie services."); *see also* Salop, *Invigorating Vertical Merger Enforcement*, 127 Yale L.J. at 1976 ("In the Comcast-Time Warner Cable proposed merger, one concern was that an [online video distributor's] failure to obtain distribution on either Comcast or Time Warner Cable would reduce its likelihood of survival. This lack of entry could increase the market power of the cable distributors.").

A vertically integrated firm can also use its power over non-integrated upstream firms to hurt non-integrated downstream rivals. Specifically, it can pressure non-integrated upstream rivals to raise the prices they charge to the firm's non-integrated downstream rivals. *See* Salop & Culley, *Revising the U.S. Vertical Merger Guidelines,* 4 J. Antitrust Enforcement at 23 ("[T]he downstream division of the merged firm might threaten to refuse to purchase in order to induce the independent input suppliers to raise prices to or withhold inputs from the merged firm's downstream rivals."). This strategy can hobble downstream competitors and allow the vertically integrated firm to protect and enhance its power in the downstream market.

Collusion. In addition to creating a serious risk of exclusion, a vertical merger can also increase the likelihood of collusion between direct competitors, such as price fixing. This increased threat of collusion arises through two primary mechanisms: the elimination of aggressive rivals and the sharing of sensitive cost and price

information. Jonathan B. Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis*, 25 Antitrust 36 (2010).

First, by merging with either an upstream or a downstream "maverick" firm, the integrated entity can remove a potential source of weakness in a collusive arrangement in the relevant market. Maverick firms are more likely to defy rules and conventions established by competitors that aim to create and preserve collusive arrangements. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 2.1.5 (2010) (defining a maverick as "a firm that plays a disruptive role in the market to the benefit of customers"). The removal of a maverick firm through a vertical merger can reduce barriers to collusive behavior between rivals and help facilitate that behavior. *See* Salop, *Invigorating Vertical Merger Enforcement*, 127 Yale L.J. at 1978 ("In a market where the upstream merging firm has been a maverick seller, whose behavior deterred input market coordination, a vertical merger similarly might eliminate this incentive and facilitate coordination in selling to rivals of its downstream division.").

Second, a vertical merger may allow sensitive information to be passed between firms, which can facilitate price coordination. For instance, a vertically integrated firm may be able to acquire a downstream rival's cost and price information through an upstream affiliate that serves as a supplier to the rival. *See* Baker, *Exclusion as a Core Competition Concern*, 78 Antitrust L.J. at 541.

Eliminating potential competitors. Vertical mergers can also eliminate potential new entrants to markets, removing a source of new competition that could lower prices, improve product quality, and enhance innovation. *See* Salop, *Invigorating Vertical Merger Enforcement*, 127 Yale L.J. at 1976. For instance, an upstream firm may be best positioned to enter and compete in a downstream market. By acquiring or merging with the upstream firm, the downstream rival can eliminate this potential competitive threat. When one of the merging parties has acted as a maverick, the loss of potential competition can be especially harmful, as was the case in the merger of LiveNation and Ticketmaster. *See id.* ("The LiveNation-Ticketmaster merger provides a useful illustration. Both merging firms had substantial market power in their respective markets—large concert venues and ticketing services, respectively. LiveNation was entering the ticketing market but then merged with Ticketmaster. While the [government's] consent decree required divestiture of ticketing technologies, the ticketing market lost its most powerful future competitor."); Riordan & Salop, *Evaluating Vertical Mergers*, 63 Antitrust L.J. at 542.

Non-economic harms. The potential harms of vertical integration are even more serious in the news-media and information markets because they are not purely economic. Vertical mergers in these markets also threaten the vitality of our democracy: Vertically integrated distributors can use their gatekeeper power to keep out non-integrated reporters, producers, and creators of news and entertainment and

cause major political harms. This exclusionary conduct can reduce freedom of speech and diversity of thought, subverting the goals of the First Amendment and hindering the open, vigorous debate that is so essential in a democratic society. *See Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."); *id.* at 28 (Frankfurter, J., concurring) ("A free press is indispensable to the workings of our democratic society. The business of the press, and therefore the business of the Associated Press, is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect."); *Hawaii v. Gannett Pacific Corp.*, 99 F. Supp.2d 1241, 1253–54 (D. Haw. 1999), *aff'd*, 203 F.3d 832 (9th Cir. 1999) ("[N]o monetary amount will be able to compensate for the loss of the Star-Bulletin's editorial and reportorial voice, the elimination of a significant forum for the airing of ideas and thoughts, the elimination of an important source of democratic expression, and the removal of a significant facet by which news is disseminated in the community.").

To address these concerns in television, the Federal Communications Commission's former Financial Interest and Syndication (or Fin Syn) Rules established partial vertical separation between television networks and content ownership. Seeking to limit "the excessive power of the three major broadcasting networks in the financing, development and syndication of television programming" and "promote diversity of programming sources and distributors," Fin Syn Rules prohibited major networks from owning primetime programming and airing syndicated programming in which they had a financial stake. *Report and Order in re Evaluation of the Syndication and Financial Interest Rules*, 56 Fed. Reg. 26,242 (1991).

II. The Clayton Act prohibits all mergers that pose a reasonable threat to competition.

To prevent these and other competitive harms, Congress enacted the Clayton Act—a prophylactic statute that prohibits all mergers (including vertical mergers) that pose a reasonable threat to competition. *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962). When Congress amended the Act in 1950, it broadened the scope of the law's anti-merger provisions and expressly prohibited vertical mergers that *may* reduce competition. Rudolph J.R. Peritz, *Competition Policy in America: History, Rhetoric, Law* 198 (1996). Although the government has not litigated a vertical merger to judgment since the 1970s, *Fruehauf Corp. v. FTC*, 603 F.2d 345 (2d Cir. 1979), the federal antitrust agencies have continued to take the competitive threat from vertical mergers seriously. From 1994 to 2015, they brought and settled enforcement actions

against 48 vertical mergers that created a threat to competition. Salop & Culley, *Revising the U.S. Vertical Merger Guidelines,* 4 J. Antitrust Enforcement at 3.

In enacting the Clayton Act, Congress made a conscious decision to stop anticompetitive mergers *before* they could reduce competition and inflict harm on the public. Under the statute's incipiency standard, the government and other plaintiffs seeking to enjoin anticompetitive mergers do not have to wait until a merger has actually reduced competition or demonstrate a certainty of competitive harm in the future. As we will explain, plaintiffs need only show that a merger presents a *reasonable threat* of substantially lessening competition. Once they have made this showing, they have established that the merger is illegal, and the merging parties are not entitled to justify the merger on efficiency grounds.

A. The Clayton Act is a prophylactic statute that prevents competitive harms.

The Clayton Act aims to stop anticompetitive mergers (and other anticompetitive practices) before they work their harm. Section 7 of the Act prohibits mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Congress's inclusion of the words "may be" reveals a conscious decision to enact a prophylactic antitrust statute. Unlike the Sherman Act (the first federal antitrust statute), the Clayton Act prevents anticompetitive mergers and business practices before they harm competition, not after the fact. As one observer noted shortly after the Act was amended in 1950: Congress wanted "to

arrest the growth of market power before it reaches the point at which the Sherman Act would come into play." Phil C. Neal, *The Clayton Act and the Transamerica Case*, 5 Stan. L. Rev. 179, 203 (1953).

The debates in Congress leading up to the passage of the Clayton Act and its amendments make clear that the law's principal drafters were committed to preventing the potential loss of competition from corporate mergers. The Senate Judiciary Report in 1914 stated that the Clayton Act is intended "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." Sen. Rep. No. 698, 63d Cong., 2d Sess. 1 (1914). The debates preceding the 1950 amendments also reflected this theme of prevention. According to the Senate Committee Report, "[t]he intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." S. Rep. No. 1775, 81st Cong., 2d Sess. 4 (1950). One member of Congress stressed the importance of prevention, stating that once a firm has acquired monopoly power it may be difficult to restore competition. 95 Cong. Rec. 11,493 (1949) (remarks of Rep. Yates).[3]

The Supreme Court has recognized and given effect to the Clayton Act's incipiency standard. The Court's decision in *Brown Shoe*, 370 U.S. at 294, offered a

[3] For a review of the legislative history of the Clayton Act and its 1950 amendments, see Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65, 126–41 (1982).

careful examination of the Act's purposes. The Court reviewed the legislative history and noted that the Act is intended to "arrest[] mergers at a time when the trend to a lessening of competition in a line of commerce [is] still in its incipiency." *Id.* at 317. Congress "sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum." *Id.* at 317–18.

Since *Brown Shoe*, the Supreme Court has repeatedly reaffirmed the Clayton Act's incipiency standard and its core objective of preventing competitive harms from mergers. In *United States v. Philadelphia National Bank*, for example, the Court reiterated that Section 7 was "intended to arrest anticompetitive tendencies in their incipiency." 374 U.S. 321, 362 (1963). A few years later, the Clayton Act's incipiency standard was so well established that both the majority opinion and Justice Stewart's dissent in *United States v. Von's Grocery Co.* recognized it. 384 U.S. 270, 276 (1966); *see id.* at 284 (Stewart, J., dissenting) ("The concept of arresting restraints of trade in their 'incipiency' was not an innovation of the 1950 amendment. The notion of incipiency was part of the report on the original Clayton Act by the Senate Committee in the Judiciary in 1914, and it was reiterated in the Senate report in 1950."). The next year, the Court noted emphatically that, under Section 7, "there is certainly *no* requirement that the anticompetitive power manifest itself in anticompetitive action." *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967) (emphasis added). Then, a decade after that, the Court once again recognized that the Clayton Act is "a prophylactic

measure, intended primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977).[4]

B. The government satisfies its burden under the Clayton Act if it shows that a merger creates a reasonable probability of a substantial lessening of competition.

Given the Clayton Act's incipiency standard, the government and other plaintiffs in merger cases face a lower burden than plaintiffs in Sherman Act cases. *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 170–71 (1964). Plaintiffs are required to show only a reasonable probability of a substantial lessening of competition.[5] This standard ensures that anticompetitive mergers are interdicted in their incipiency, as Congress intended. And in merger cases under the Clayton Act (and antitrust cases in general), cognizable anticompetitive effects include not only higher short-term prices but also reduced choice, innovation, and quality. *See United States v. Anthem, Inc.*, 855

---

[4] The Department of Justice and Federal Trade Commission have recognized the incipiency standard in their Horizontal Merger Guidelines. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 1 (2010) ("[T]hese Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.").

[5] Indeed, even under the Sherman Act, plaintiffs need not show a certainty of competitive harm from a challenged practice to establish a violation. As this Court has recognized, requiring certainty of harm would undermine the purpose of the Sherman Act. *See United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (per curiam) ("[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will—particularly in industries marked by rapid technological advance and frequent paradigm shifts.").

F.3d 345, 366 (D.C. Cir. 2017) (rejecting notion that consumer prices are "the sole focus of antitrust law"); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 829 (6th Cir. 2011) ("[W]e examine the effect of Realcomp's restrictions on consumer choice[.]"); *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1339 (11th Cir. 2010) ("Actual anticompetitive effects include, but are not limited to, reduction of output, increase in price, or deterioration in quality.").

To establish that a merger violates the Clayton Act, plaintiffs are required to establish only a reasonable probability of a substantial reduction of competition from the merger. The Supreme Court has explicitly tied this burden to the Clayton Act's incipiency standard. *See United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957). The Court has held that the plaintiff establishes a Clayton Act violation when it shows a "reasonable likelihood of a substantial lessening of competition in the relevant market." *Penn-Olin*, 378 U.S. at 171. In a related vein, the Court has stated that Section 7 "can deal only with probabilities, not with certainties" and that imposing any higher legal standard on plaintiffs would frustrate "the congressional policy of thwarting [anticompetitive] practices in their incipiency." *Procter & Gamble*, 386 U.S. at 577. Accordingly, plaintiffs in merger cases do *not* have to satisfy any "definite quantitative or qualitative tests." *Brown Shoe*, 370 U.S. at 321; *see also Von's Grocery*, 384 U.S. at 285 (Stewart, J., dissenting) ("The legislative history leaves no doubt that the applicable standard for measuring the substantiality of the effect of a merger on

competition was that of a 'reasonable probability' of lessening competition."); *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (citation omitted) ("Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect may be substantially to lessen competition.").

This Court has recognized and applied the reasonable-probability standard in merger cases. In *United States v. Baker Hughes Inc.*, authored by then-Judge Thomas, this Court recognized the reasonable-probability standard, observing that "Section 7 involves probabilities, not certainties or possibilities." 908 F.2d 981, 984 (D.C. Cir. 1990). This Court has subsequently affirmed the reasonable-probability standard in merger challenges under the Clayton Act. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1042 (D.C. Cir. 2008) (Tatel, J., concurring).

This Court's reasonable-probability standard is consistent with the standard that other courts of appeals apply in deciding merger cases under the Clayton Act. In the Sixth Circuit, "[t]he government can satisfy its burden by establishing a reasonable probability of substantial anticompetitive effects." *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 858 (6th Cir. 2005). The Seventh Circuit has held that "Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an

appreciable danger of such consequences in the future." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986) (Posner, J.). *See also Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (7th Cir. 2008). The Eleventh Circuit has similarly stressed that "the Clayton Act is about probabilities and not certainties." *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1215 (11th Cir. 2012). Other courts of appeals also apply a probabilistic standard. *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016); *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015).

Once the government has established that a merger is illegal, the merging parties are not entitled to invoke an efficiencies defense.[6] The Supreme Court long ago addressed the question of whether an efficiencies defense exists—and answered it in clear terms for the lower courts. In a trio of merger decisions, the Court held that merging corporations *cannot* raise an efficiencies defense because Congress chose to preserve structurally competitive markets, even at the expense of possible attainment of economies of scale and other efficiencies through mergers and acquisitions. *See Brown Shoe*, 370 U.S. at 344 ("Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."); *Philadelphia*

---

[6] While implicitly recognizing this defense in *H.J. Heinz*, 246 F.3d at 720–21, this Court has recently questioned whether an efficiencies defense is available under the Clayton Act. *See Anthem*, 855 F.3d at 353 ("Despite, however, widespread acceptance of the potential benefit of efficiencies as an economic matter, . . ., it is not at all clear that they offer a viable legal defense to illegality under Section 7.").

Nat'l Bank, 374 U.S. at 371 ("We are clear . . . that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial."); *Procter & Gamble*, 386 U.S. at 580 ("Possible economies cannot be used as a defense to illegality.").

CONCLUSION

The United States has established that AT&T's acquisition of Time Warner is a violation of the Clayton Act. Moreover, AT&T is not entitled to invoke an efficiencies defense under the Clayton Act. Accordingly, this Court should reverse and vacate the decision of the district court and permanently enjoin AT&T's acquisition of Time Warner.

Respectfully submitted,

/s/ Jonathan E. Taylor
JONATHAN E. TAYLOR
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
(202) 888-7792 (fax)
jon@guptawessler.com

SANDEEP VAHEESAN
OPEN MARKETS INSTITUTE
1440 G Street, NW
Washington, DC 20005

August 13, 2018

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(g)(1)

I certify that my word processing program, Microsoft Word, counted 4,880 words in the foregoing brief, exclusive of the portions excluded by Rule 32(g)(1).

/s/ Jonathan E. Taylor
Jonathan E. Taylor

CERTIFICATE OF SERVICE

I certify that on August 13, 2018, I electronically filed the foregoing amicus brief with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Jonathan E. Taylor
Jonathan E. Taylor