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**STORMING THE CONCENTRATION CASTLE:
ANTITRUST LESSONS FROM THE PRINCESS BRIDE**
*Remarks of Commissioner Rebecca Kelly Slaughter
As Prepared for Delivery*

Greg Lastowka Memorial Lecture
Rutgers Law School
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Introduction

Thank you to Professor Carrier and Rutgers Law School for hosting us and inviting me to deliver the Greg Lastowka Memorial Lecture. Professor Lastowka was a beloved member of the Rutgers faculty and all-around wonderful human being who was taken from our world far too soon in 2015. I did not have the privilege of knowing him personally, but I do know him as an accomplished scholar in cutting edge areas of the law. The names of two of his best-known articles, *The Laws of the Virtual Worlds*, written in 2004, and *Virtual Justice: The New Laws of Online Worlds*, written in 2010, say it all. He researched and explored novel issues surrounding virtual property and avatar rights and the potential legal challenges that could arise in online spaces; all before smartphones, tablets, and other now-ubiquitous technology came to market. He was a trailblazer in cyberlaw. He explored its intersection with intellectual property law, and specifically trademark law,¹ issues with which the FTC specifically grappled in its antitrust case against 1-800 Contacts.²

The rich legacy Professor Lastowka left behind makes it an enormous privilege to be chosen to deliver today's lecture. I will attempt to honor his trailblazing by treading some new ground of my own regarding antitrust law, which, like cyberlaw, has roared awake recently. Today, I am going to share my views about how competition enforcers, like the Federal Trade Commission, can best meet this historic moment and perhaps channel some of Professor Lastowka's cutting edge approach to our 20th Century antitrust statutes, as well as, I hope, his sense of humor.

I want to begin by grounding our conversation in a cultural trope that is frequently applied to antitrust law: the 1987 cinematic classic, the Princess Bride. Let me sum up. No; it is too complicated. Let me explain.

Perhaps not everyone watched the Princess Bride and thought of antitrust law, though everyone *should* watch the Princess Bride; if you haven't, you're 35 years behind and it's time to catch up. For the few among you who did not enjoy the movie, apologies in advance because we are about

¹ See, e.g., Greg Lastowka, *Google's Law*, Duke Science, Technology & Innovation Paper No. 26, <https://ssrn.com/abstract=1017536>.

² *1-800 Contacts, Inc. v. FTC*, 1 F.4th 102, 109 (2d. Cir. 2021).

to go deep into it. And for both of you in the audience who don't (yet) know the story, it is the tale of a farm boy, Westley, who leaves his true love, Buttercup, to seek his fortune. After he has been gone for five years, Buttercup is betrothed, against her will, to the evil Prince Humperdink. Westley disguises himself as the Man in Black and sets out to rescue Buttercup from her impending nuptials. Along his quest he aligns himself with Inigo Montoya, a Spanish swordsman, who has a vendetta against Humperdink's top lieutenant for killing his father, and a giant, Fezzik, who is loyal to Inigo.

Towards the climax of the movie, our triumvirate of good guys are preparing to storm Humperdink's castle, rescue the princess and avenge the death of the Inigo's father at the hands of Humperdink's lieutenant, Count Rugen. They take stock of the task ahead, assessing what they have to do, and what liabilities and assets they have in the fight before them.

And *that* is what reminds me of this moment in antitrust law, and how I would like to use my time this afternoon: to describe what I see as the task before us, assess our liabilities, and explore the full panoply of assets we have to accomplish our mission. And specifically, I want to discuss some statutory tools that have been sitting in front of us unutilized for far too long.

The Task Ahead:

As Westley revives from being mostly dead, Inigo lays out the task ahead. He explains that “all we have to do is get in, break up the wedding, steal the princess, and make our escape. After I kill Count Rugen.” Westley astutely observes, “That doesn't leave much time for dilly-dallying.” As antitrust enforcers, we also have a mighty task before us. It is clear that we have a concentration and competition problem in many industries throughout our economy. With fewer choices and slower innovation, consumers and workers are squeezed while firms extract high profits with little risk of competitive forces disrupting the status quo.

As the 20th Century came to a close, companies unleashed a merger wave that continues unabated to this day. By one assessment, the number of mergers consummated each year between 1985 and 2017 in the US rose from approximately 2,000 to 15,000.³ And the subset of mergers that companies were legally obligated to report to the FTC and Department of Justice's Antitrust Division has expanded at similarly staggering rates.⁴ In fiscal year 2021, for example, approximately 3,600 transactions were reported to the FTC and DOJ. That's about 87% more than the average number of transactions reported over the prior five years,⁵ and two and a half times more than the approximately 1,400 that were filed a decade earlier.⁶ Meanwhile, the number of employees at the FTC to review all those filings remained effectively flat.

³ *United States - M&A Statistics*, Institute for Mergers, Acquisitions, and Alliances (IMAA), <https://imaa-institute.org/mergers-and-acquisitions-statistics/united-states-ma-statistics/> (detailed in the chart titled “Mergers & Acquisitions United States of America”).

⁴ See Concurring Statement of Commissioner Rebeca Kelly Slaughter Joined by Chair Lina M. Khan Regarding the 2022 Revised Clayton Act Thresholds, Fed. Trade Comm'n (January 24, 2022), https://www.ftc.gov/system/files/documents/public_statements/1600207/p859910hsrthresholdskhanslaughterstatement_0.pdf.

⁵ *Id.* at 2.

⁶ Fed. Trade Comm'n Bureau of Competition & U.S. Dep't of Just. Antitrust Division, Hart-Scott-Rodino Annual Report: Fiscal Year 2011—Section 7A of the Clayton Act, The Hart-Scott-Rodino Antitrust Improvements Act of

A large body of evidence shows that concentration levels within industry sectors is high and has continued to rise over time. We can fairly debate individual studies and how they inform antitrust policy, but the weight of this empirical evidence cannot be ignored. One study of approximately 900 industry sectors concluded that market concentration increased by 75% between 1997 and 2012.⁷ And within those sectors, the market share of the top four firms increased by over 25%.⁸

Far from leading to increased efficiency, as some commenters claim, these high rates of market concentration have led to increased market power among fewer firms in myriad industries. Indeed, this enhanced market power has been characterized by significant rises in markups and profit margins but notable decreases in output and productivity growth.⁹

Digital markets are a key concern—and I'll address them further in my remarks this afternoon—but the scourge of market power reaches far beyond Big Tech. We have all felt the impact of market power in our daily lives, from cellphones and broadband to healthcare and pharmaceuticals to the food in our refrigerators, and beyond.¹⁰

There is no doubt that high market concentration and the unchallenged market power of dominant companies in our economy inflict serious harms on competition, consumer choice, product quality, innovation, and workers. These distortions heighten exclusionary barriers that small and nascent businesses face, as dominant firms have constructed moats around the suppliers and customers these rivals need to grow.¹¹ Because they are insulated from the threat of losing customers to rivals, dominant firms also degrade products and services, and have strong disincentives to invest in assets or R&D.¹²

1976 (Thirty-Fourth Annual Report), https://www.ftc.gov/sites/default/files/documents/reports_annual/34th-report-fy2011/2011hsrreport_0.pdf.

⁷ Adil Abdela & Marshall Steinbaum, *The United States Has a Concentration Problem: Reviewing Concentration Estimates in Antitrust Markets, 2000-Present*, Roosevelt Inst. 1 (Sept. 2018), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-US-market-concentration-problem-brief-201809.pdf>.

⁸ *Id.*

⁹ See Federico J Diez, Daniel Leigh & Suchanan Tambunlertchai, *Global Market Power and Its Macroeconomic Implications*, IMF Working Papers 16 (2018), <https://doi.org/10.5089/9781484361672.001>; Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are US Industries Becoming More Concentrated?*, 23 Rev. of Fin. 697, 734 (2019), <https://doi.org/10.1093/rof/rfz007>.

¹⁰ For example, in 2015, two companies controlled 78% of the corn seed industry. *America's Concentration Crisis: Corn Seed*, Open Markets Institute, <https://concentrationcrisis.openmarketsinstitute.org/industry/corn-seed/> (last visited Mar. 30, 2022). In 2017, the two dominant companies in the dry cat food industry had 80% market share combined. *America's Concentration Crisis: Dry Cat Food*, Open Markets Institute, <https://concentrationcrisis.openmarketsinstitute.org/industry/dry-cat-food/> (last visited Mar. 30, 2022). In 2018, three firms controlled the entire market for washer-dryer machine manufacturing, with one firm having 58% market share. *America's Concentration Crisis: Washer & Dryer Manufacturing*, Open Markets Institute, <https://concentrationcrisis.openmarketsinstitute.org/industry/washer-dryer-manufacturing/> (last visited Mar. 30, 2022). And 2018 figures in the baby formula industry showed that the four largest firms controlled 89% of the market, with the leading firm possessing 40% market share. *America's Concentration Crisis: Baby Formula*, Open Markets Institute, <https://concentrationcrisis.openmarketsinstitute.org/industry/baby-formula/> (last visited Mar. 30, 2022).

¹¹ See, e.g., Abdela & Steinbaum, *supra* note 7, at 8.

¹² Marc Jarsulic, Ethan Gurwitz, Kate Bahn, and Andy Green, *Reviving Antitrust: Why Our Economy Needs a Progressive Competition Policy*, Ctr. for Am. Progress (2016), [https://americanprogress.org/wp-content/uploads/2016/06/RevivingAntitrust.pdf?_ga=2.95880025.412842226.1648695694-871211913.1648695693](https://americanprogress.org/wp-content/uploads/2016/06/RevivingAntitrust.pdf?_ga=2.95880025.412842226.1648695694-871211913.1648695693;);

Within supply chains, incumbents exploit their positions as gatekeepers to dictate commercial terms and to extract concessions to which their business partners would not otherwise agree under competitive market conditions.¹³ And, in labor markets, these forces deprive workers of the competitive process for their employment, stagnate wages, and inhibit their mobility, for example, through the proliferation of non-compete clauses in employment contracts, and anti-poaching provisions in franchise agreements.¹⁴

So, bringing us back to the Princess Bride, we need to storm the castle. And we don't have a lot of time for dilly-dallying.

The Liabilities:

In hatching the plan to rescue Princess Buttercup, the first thing the Man in Black does is ask for an accounting of liabilities. Inigo reports that they face a castle that has but one gate, guarded by 60 men, while they are a team of only three (one of whom is just recently mostly dead, though a quick healer).

That analogy resonates. Competition authorities—including the FTC, the DOJ, and our state counterparts—are vastly outmatched by the parties we investigate and against whom we litigate. As I mentioned, our staffing and funding levels have remained relatively flat while our workload (as measured by the number of merger filings and levels of concentration in the economy) has grown dramatically.

And on top of that, we are grossly outnumbered on each specific case we bring. It is not uncommon for there to be a dozen or more attorneys representing the parties we investigate for every one FTC-er. Our entire annual budget in 2021, for all of our operations—including all of our consumer protection work, as well as competition—was \$351M. That is an unfathomable amount of money to me. But I did the math, and that is approximately how much profit Facebook, a company we are currently suing for antitrust violations, makes every single day and a half.

But the David-versus-Goliath feel of our work is not our only liability. The courts have substantially tied our hands as well. Right now, there is a challenge before the Supreme Court to our authority to litigate cases using the administrative process Congress designed for the agency. And over the last several decades, antitrust enforcers have been hamstrung by court decision

Germán Gutiérrez & Thomas Philippon, *Investment-Less Growth: An Empirical Investigation*, Brookings Papers on Economic Activity (2017), <https://www.brookings.edu/wp-content/uploads/2018/02/gutierreztextfal7bpea.pdf>.

¹³ Staff of Subcomm. on Antitrust, Com. and Admin. L. of the H. Comm. on the Judiciary, *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations* 39–40 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

¹⁴ Remarks of Commissioner Rebecca Kelly Slaughter, New Decade, New Resolve to Protect and Promote Competitive Markets for Workers, Fed. Trade Comm'n (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561475/slaughter_-_noncompete_clauses_workshop_remarks_1-9-20.pdf; José Azar, Ioana Marinescu & Marshall I. Steinbaum, *Labor Market Concentration* (2019), https://www.nber.org/system/files/working_papers/w24147/w24147.pdf; Arindrajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards*, 63 *Indus. & Lab. Rels. Rev.* 287 (2010).

after court decision that take limited views of the antitrust statutes and, I think, betray congressional intent.¹⁵ This body of jurisprudence is so permissive that it incentivizes companies to continue proposing anticompetitive mergers and engaging in anticompetitive conduct.

Many of these decisions require congressional action to correct, and I think the agencies should be candid with Congress about how antitrust laws could be improved to help us more effectively and efficiently prevent and stop anticompetitive mergers and conduct. I could give a whole lecture on potential changes to the antitrust laws, but, as enforcers, we cannot simply sit by and wait for Congress to send reinforcements in either money or authority. We need to assess the assets we have today, and how we can more vigorously enforce antitrust law within its existing statutory confines.

The Known Assets:

Back at the castle gate, the Man in Black asks Inigo to catalogue the assets available to save Princess Buttercup. Inigo proudly declares, “Your brains, Fezzik’s strength, and my steel.” Westley’s response? “That’s it? Impossible.” He knows immediately that, as valuable as these skills are, they are not enough to get the job done.

Like the team in the Princess Bride, we have some important assets that are really valuable and that we know how to use. Among these are our dedicated, creative, and expert staff who have figured out how to investigate, litigate, and win certain types of cases with enormous effect. Some highlights of effective enforcement include our hospital merger program. In the last two years, we have brought four challenges to proposed hospital mergers;¹⁶ two of those abandoned in the face of Commission challenge,¹⁷ and two litigated.¹⁸ We just had an important Third

¹⁵ See, e.g., *FTC v. Qualcomm, Inc.*, 969 F.3d 974, 986 (2020); *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018); *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021); *Verizon Commc’ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 129 S. Ct. 1109 (2009); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019); *United States v. Sabre Corp.*, 452 F. Supp. 3d 97 (D. Del.), vacated as moot, No. 20-1767, 2020 WL 4915824 (3d Cir. 2020).

¹⁶ *In re Thomas Jefferson University*, FTC.gov, <https://www.ftc.gov/legal-library/browse/cases-proceedings/181-0128-thomas-jefferson-university-matter> (last visited Mar. 30, 2022); *In re Methodist Le Bonheur Healthcare*, FTC.gov, <https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0189-methodist-le-bonheur-healthcare-matter> (last visited Mar. 30, 2022); *In re Hackensack Meridian Health, Inc. and Englewood Healthcare Foundation*, FTC.gov, <https://www.ftc.gov/legal-library/browse/cases-proceedings/2010044-hackensack-meridian-health-inc-englewood-healthcare-foundation-matter> (last visited Mar. 30, 2022); *In re Lifespan/CNE*, FTC.gov, <https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0031-lifespancne-matter> (last visited Mar. 30, 2022).

¹⁷ *In re Methodist Le Bonheur Healthcare*, FTC.gov, <https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0189-methodist-le-bonheur-healthcare-matter> (last visited March 30, 2022); *In re Lifespan/CNE*, FTC.gov, <https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0031-lifespancne-matter> (last visited Mar. 30, 2022).

¹⁸ *In re Thomas Jefferson University*, FTC.gov, <https://www.ftc.gov/legal-library/browse/cases-proceedings/181-0128-thomas-jefferson-university-matter> (last visited Mar. 30, 2022); *In re Hackensack Meridian Health, Inc. and Englewood Healthcare Foundation*, FTC.gov, <https://www.ftc.gov/legal-library/browse/cases-proceedings/2010044-hackensack-meridian-health-inc-englewood-healthcare-foundation-matter> (last visited March 30, 2022).

Circuit victory in one of them last week. And there was an additional case in which the hospitals abandoned their merger before the Commission voted.¹⁹

In the pharma space, we have gotten really good at identifying and requiring divestitures of product and pipeline product overlaps in pharmaceutical mergers. Our staff has also pioneered successful litigation against illegal pharmaceutical settlements in which brand companies pay to keep generic competitors out of the market. And I'm extraordinarily proud of our team's trial victory against "pharma bro" Martin Shkreli earlier this year for his anticompetitive price hikes on the vital drug Daraprim.

Moving beyond healthcare, I'm proud to note that in the last year, while the commission has been at a 2-2 deadlock, we brought three full-on challenges to vertical mergers, resulting in two abandonments.²⁰ Three years ago, when I dissented on what I felt was an inadequate settlement of a vertical merger case,²¹ many would have found even a single vertical challenge, much less three, to be entirely inconceivable.

And, of course, we've filed a landmark case against Facebook.²² We also challenged multiple nascent competition acquisitions in commercial goods like razors.²³ There is much work to be proud of out of each of our competition shops.

But sadly, this work is not enough. For each of these examples I've touted, I could add a caveat: additional counts we could have pleaded or mergers we didn't challenge, or theories we could have pursued. Even our Facebook case can have the feel of a land war in Asia—it is going to take years to even get to trial, much less win. And the fact remains that the merger wave and consolidation continue notwithstanding the valiant efforts of our staff. It is clear that these assets we've been using alone are not enough to fight back against the tides of monopoly power.

The Hidden Assets:

¹⁹ Press Release, Fed. Trade Comm'n, *Following Federal Trade Commission Staff Recommendation to Challenge Transaction, Two Health Care Systems in Central Georgia Abandon Proposed Merger: Federal Trade Commission Votes to Close Investigation of Atrium Health Navicent, Inc. and Houston Healthcare System, Inc.* (Mar. 3, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/03/following-federal-trade-commission-staff-recommendation-challenge-transaction-two-health-care>.

²⁰ See Fenwick & West LLP, *Historic Shift by the FTC on Vertical Merger Review, with More to Come*, JD Supra (Feb. 23, 2022), <https://www.jdsupra.com/legalnews/historic-shift-by-the-ftc-on-vertical-9261667/> (listing FTC's challenges to vertical transactions by Illumina, Nvidia, and Lockheed Martin).

²¹ See, e.g., *Dissenting Statement of Commissioner Rebecca Kelly Slaughter In the Matter of Fresenius Medical Care /NxStage*, Fed. Trade Comm'n (Feb. 19, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455740/171_0227_fresenius-nxstage_slaughter_statement_2-19-19.pdf; *Dissenting Statement of Commissioner Rebecca Kelly Slaughter In the Matter of Sycamore Partners, Staples, and Essendant*, Fed. Trade Comm'n (Jan. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1448321/181_0180_staples_essendant_slaughter_statement.pdf.

²² Bobby Allyn, *Judge Allows Federal Trade Commission's Latest Suit Against Facebook to Move Forward*, NPR (Jan. 11, 2022, 5:10 PM), <https://www.npr.org/2022/01/11/1072169787/judge-allows-federal-trade-commissions-latest-suit-against-facebook-to-move-forw>.

²³ See, e.g., Press Release, Fed. Trade Comm'n, *FTC Sues to Block Procter & Gamble's Acquisition of Billie, Inc.* (Dec. 8, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-block-procter-gambles-acquisition-billie-inc>; Compl., In re Illumina, Inc., No. 9387 (F.T.C. filed Dec. 17, 2019), https://www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf.

So back to the Princess Bride: Daunted by the limitations of their personal skills, however impressive, the Man in Black wishes for a wheelbarrow and a cloak of flames to help plan their castle assault. And, lo-and-behold, they have access to both; they just hadn't been thinking of them as assets.

Similarly, I think we can scrutinize our own toolbox and identify assets available to us that have gone overlooked. This has very much been the approach of the Biden Administration. Last year, President Biden called on all Federal agencies to take a whole of government approach to addressing the current lack of competition and the harms that Americans face as a result.²⁴ It is important to marshal all facets of government in tackling these problems because competition is implicated by policies across the government, not just in the competition agencies. For example, the FCC recently initiated a rulemaking that would affirmatively open up competition for broadband in apartment buildings.²⁵

The FTC, given its explicit remit to address unfair methods of competition, has a particular role to play in the assault on monopoly, and we have some specific tools in our own toolbox that we can dust off. Some of these include (1) our authority under Section 5 of the FTC Act to block unfair methods of competition that may not fall squarely within other antitrust statutes; (2) our authority to pass rules under Section 5 to prohibit unfair methods of competition; (3) a cross-agency approach to competition and consumer protection questions; (4) underutilized language in Section 7 of the Clayton Act to block proposed acquisitions that would tend to create a monopoly; and (5) merger guidelines that can be revised to better reflect market realities and improve agency approach. I will touch on each of the first three briefly, but I think they have been well covered in other fora, so I will really spend the meat of my time on Section 7 before turning briefly to the merger guidelines to conclude.

Section 5 of the FTC Act prohibits unfair methods of competition; this has long been understood to encompass all mergers and conduct that would independently violate the Clayton and Sherman Acts, but it also goes beyond those statutes. Last summer, the FTC voted to rescind its prior Section 5 statement that, in the opinion of the majority of the Commission (including myself), did not accurately reflect the text, structure or history of Section 5. I won't rehash those arguments here, but I will commend to your attention the Commission statement on Section 5.²⁶ Congress intended Section 5 of the FTC Act to apply to market-power abuses that are not captured by the Sherman or Clayton Acts, and we should use this legal authority more frequently on a standalone basis, such as to go after the anticompetitive use of market power that might not rise to the level of gaining or maintaining monopoly power.²⁷

²⁴ Executive Order 14036, *Promoting Competition in the American Economy*, 86 Fed. Reg. 36987 (July 14, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf>.

²⁵ Press Release, Fed. Trade Comm'n, *FCC Acts to Increase Broadband Competition in Apartment Buildings* (Feb. 15, 2022), <https://www.fcc.gov/document/fcc-acts-increase-broadband-competition-apartment-buildings-0>.

²⁶ *Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act*, Fed. Trade Comm'n (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf.

²⁷ See Jonathan Sallet, *The Federal Trade Commission, Unilateral Conduct, and "Unfair Method of Competition,"* in Albert A. Foer, *Liber Amicorum: A Consumer Voice in the Antitrust Arena* 327 (Nicolas Charbit & Sonia Ahmad eds., 2020).

I also won't belabor the question of competition rulemaking today; much ink has been spilled on it, including very articulately by our Chair and former Commissioner Chopra.²⁸ I will only add that I share their understanding of the statutory delegation of rulemaking authority,²⁹ and agree that there are certain types of anticompetitive activity that are difficult to litigate on a case-by-case basis; in these areas the markets would benefit from clear, transparent ex ante rules. I would put at the top of the list the scourge of noncompete clauses that limit labor mobility and prohibit workers from benefitting from competition for their labor.

One of the structural advantages the FTC has over our counterparts in other jurisdictions that handle exclusively competition or consumer protection is that we do both. The issues are connected; monopoly power allows companies to hurt their users, and sometimes firms try to get or keep a competitive edge by taking advantage of their consumers. The connection between competition and consumer protection is particularly acute, though also complicated, in digital markets. Historically, however, we have treated these missions as entirely distinct. There was little contact between our competition and consumer protection staff, and when I got to the agency I was shocked to find we would frequently have the same company under investigation at the same time on both sides of the house with no conversation between the teams to identify any connections between the cases. We are already well in the process of fixing this, and I look forward to our continuing to build a whole-of-agency approach to our work.

Section 7

The heart of merger enforcement, Section 7 of the Clayton Act, prohibits mergers and acquisitions whose effect “may be substantially to lessen competition, or tend to create a monopoly.”³⁰ For those who follow antitrust litigation and jurisprudence, the substantial lessening of competition prong is very familiar; it has been the primary analytical framework that we use to challenge mergers.³¹ Our cases define markets that are most relevant to the merger and seek to prove whether the effects of the merger may be to substantially lessen competition. Less familiar is the “tend to create a monopoly” language. I believe this prong is useful to effectuate Congress’s clear desire to arrest monopolies in their incipency when it enacted the Clayton Act.

Giving full meaning to statutory text is part of our duty to faithfully execute the laws Congress has passed and fulfill our mission. I will explain why I believe the “tend to create a monopoly”

²⁸ Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. Chi. L. Rev. 357 (2020), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6181&context=uclrev>.

²⁹ 15 U.S.C. § 46(g) (authorizing the Commission “to make rules and regulations for the purpose of carrying out the provisions of this subchapter”). I have written and spoken many times about reinvigorating our rulemaking efforts in consumer protection. See Remarks of Commissioner Rebecca Kelly Slaughter, Algorithms and Economic Justice, UCLA School of Law (Jan. 24, 2020), https://www.ftc.gov/system/files/documents/public_statements/1564883/remarks_of_commissioner_rebecca_kelly_slaughter_on_algorithmic_and_economic_justice_01-24-2020.pdf.

³⁰ 15 U.S.C. § 18.

³¹ In the last several years there have been important cases at both FTC and DOJ that also challenged mergers on the grounds that they violated Section 2 of the Sherman Act. See, e.g., Compl., *In re Illumina, Inc.*, No. 9387 (F.T.C. filed December 17, 2019), https://www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf; Compl., *United States v. Visa Inc.*, 4:20-CV-07810 (N.D. Cal. Filed Nov. 5, 2020), <https://www.justice.gov/opa/press-release/file/1334726/download>. But the vast bulk of our merger enforcement work has always leaned on the question of whether a given merger may be to substantially to lessen competition.

language may proscribe different mergers than those prohibited by “substantially lessen competition,” and then talk about what sort of cases I believe that text covers.

While there is little recent caselaw on whether a merger violates the “tend to create monopoly” test, that does not mean this part of the statutory text has no legal force. Indeed, one fundamental rule of statutory interpretation is the rule against surplusage: As the Supreme Court instructed in *Hibbs v. Winn*, “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”³² Here, the importance of that instruction is amplified by the use of the conjunction “or” rather than “and” between “substantially lessen” and “tend to create a monopoly”; “or” suggests that the two phrases are not merely duplicative of each other.³³ Despite the lack of recent jurisprudence around “tend to create a monopoly,” canons of statutory interpretation require that antitrust agencies, like courts, give full effect to this Clayton Act prong.

Statutory interpretation always starts with the statutory text.³⁴ The Clayton Act does not expressly define the phrase “tend to create a monopoly.” However, the phrase’s key words—tend and monopoly— have natural language definitions. So, like courts, we can refer to dictionaries for guidance when interpreting statutory language.³⁵

Black’s Law Dictionary defines “tend” as “to serve, contribute, or conduce in some degree or way.” That dictionary defines “monopoly” as “the market condition existing when only one economic entity produces a particular product or a particular service.” Taken together, under a plain language interpretation, a proposed merger would violate the “tend to create a monopoly” test of Section 7 if the effect of the merger contributes to shifting market conditions away from competition involving multiple firms towards an eventual state where fewer and fewer firms provide a particular product or service over time.³⁶

The history of the Clayton Act also supports this reading. The congressional record of the original Clayton Act of 1914 reveals that legislators intended that the Act prohibit attempts at economic concentration before they grew into actual monopolizations that would be prohibited by the Sherman Act. As noted by the Supreme Court, the Senate Report accompanying the original legislation provided that the Act’s goal is to “reach incipient monopolies and trade restraints outside the scope of the Sherman Act.”³⁷ According to the accompanying House Report, the purpose was “to arrest the creation of trusts, conspiracies, and monopolies in their

³² 542 U.S. 88, 101 (2004).

³³ *Loughrin v. United States*, 573 U.S. 351, 357 (2014) (explaining that the “ordinary use [of or] is almost always disjunctive, that is, the words it connects are to be given separate meanings.” (quoting *United States v. Woods*, 571 U.S. 31, 46 (2013))).

³⁴ *Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021).

³⁵ *Id.*

³⁶ A trend towards the creation of a monopoly does not literally require that one firm controls a market. Instead, the analytical lens frequently used determines whether a few firms control significant shares of a market, even if individual market shares are less than 50%. See e.g., *Monopoly Defined*, Fed. Trade Comm’n, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined> (explaining, “[c]ourts do not require a literal monopoly before applying rules for single firm conduct; that term is used as shorthand for a firm with significant and durable market power — that is, the long term ability to raise price or exclude competitors.”).

³⁷ *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 n.32 (1962) (citing S. Rep No. 698 (1914)).

incipiency and before consummation.”³⁸ The House also insisted that substantially lessening competition should not be the only ground for a Section 7 violation, because a merger or acquisition may result in “no lessening of competition, but the tendency might be to create monopoly or restrain trade or commerce.”³⁹

In 1950, Congress amended Section 7 of the Clayton Act to broaden the scope of mergers and acquisitions covered by the statute, but reaffirmed its original goal. For example, the Senate Report accompanying the 1950 amendment explained that the amended Section 7 “would not apply to the mere possibility but only to the reasonable probability of the proscribed effect,” which is the substantial lessening of competition or tendency to create a monopoly.⁴⁰ The accompanying House Report further explained that Section 7 would target mergers and acquisitions that “have a cumulative effect” toward achieving restraints of trade, which the Sherman Act would otherwise prohibit if such restraints were achieved in one step. This would allow the government to intervene “in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition,” even if the competition does not “create a monopoly, or constitute an attempt to monopolize.”⁴¹

Congress’s intention to broaden the Clayton Act through the 1950 amendments was understood by antitrust commentators as well. Citing the same legislative history, contemporary antitrust observers understood that acquisitions that directly resulted in sufficiently concentrated control of a market would already be prohibited by the Sherman Act.⁴² The Clayton Act focused on a different path, when a “series of acquisitions” would achieve the same concentration of control.⁴³ Such a series could consist of a range of actions that could collectively reach the end result prohibited by the Sherman Act, although none would likely be sufficient alone to violate the Sherman Act.⁴⁴ The legislative history makes clear that Congress intended for the Clayton Act to eliminate the ability of market participants to achieve indirectly, through a series of mergers or acquisitions, the level of market control that could not be achieved in one distinct merger or acquisition.

And in the wake of the 1950 Amendment to Section 7 of the Clayton Act, courts also recognized that Congress intended the “tend to create a monopoly” text to be employed as a tool to stop in

³⁸ Richard M. Steuer, *Incipiency*, 31 *Loyola Consumer Law Review* 155, 160 (2019) (citing S. Rep. No. 698 (1914) (emphasis added)), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3285895.

³⁹ *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 591–92 & n.9 (1957) (citing 51 Cong. Rec. 16002).

⁴⁰ Steuer, *supra* note 38, at 164 (citing S. Rep. No. 1775, 81st Cong., 2d Sess. 4–5 (1950)).

⁴¹ *Id.* (citing H.R. Rep. 1191 81st Cong., 2d Sess. 12–13 (1950) (emphasis added)).

⁴² Brack P. McAllister, *Where the Effect May Be to Substantially Lessen Competition or Tend to Create a Monopoly*, 3 A.B.A. ANTITRUST SECTION 124, 144 (1953) (citing H.R. Rep. 1191 81st Cong., 2d Sess. 12–13 (1950)).

⁴³ *Id.* (citing H.R. Rep. 1191 81st Cong., 2d Sess. 12–13 (1950)).

⁴⁴ The House Report explicitly listed the following actions:

elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.

their incipency mergers that threatened to enhance the market power of a few firms. For example, eight years after the amendment, the district court in *United States v. Bethlehem Steel Corp.* enjoined Bethlehem Steel, the second largest firm in the iron and steel industry from acquiring Youngstown Sheet & Tube Company.⁴⁵ The court found it significant that Bethlehem Steel had grown from possessing 6.3% of industry ingot capacity to 16.3% over the course of 38 years largely through a series of mergers and acquisitions.⁴⁶ The court then found that,

Adding 5% to Bethlehem's 16% of industry capacity would not only intensify the existing concentration in the industry as a whole but would increase unduly the concentrated power in the Big 2 as against the reduced number of an already severely limited group. . . . It is clearly the kind of further concentration in an oligopoly framework that Congress was concerned with. 'Tend to create a monopoly' clearly includes aggravation of an existing oligopoly situation.⁴⁷

So, what types of mergers today might be covered by the “tend to create a monopoly” test? I can think of at least three categories of cases to which this language might apply: serial acquisitions, adjacent market or conglomerate acquisitions, and acquisitions that plan to take assets out of a market. And to be clear: many of these types of cases may *also* be barred by the substantially lessen competition prong; I am not suggesting that language would be inapplicable to these patterns. But I do think these types of cases are especially well suited to consideration under “tend to create a monopoly.”

A common thread across the dominant firms that now control many industries is a history of aggregating significant market share over time by acquiring a series of smaller rivals, some of whom may have posed nascent or future competitive threats. Three totally distinct examples of this phenomenon across the economy are digital, dialysis services, and eyewear markets.

Both the FTC⁴⁸ and the US House Antitrust Subcommittee⁴⁹ have studied the ways in which small, serial acquisitions contributed to the dominance of tech giants. Both of these studies

⁴⁵ 168 F. Supp. 576 (S.D. N.Y. 1958). The court found that the relevant markets were controlled by an oligopoly: United States Steel led with 30% share of ingot capacity, Bethlehem Steel possessed 16.3%, Republic Steel had 8.3% and a long tail of rivals all had 5% or less market share. *Id.* at 604.

⁴⁶ *Id.* at 606.

⁴⁷ *Id.* at 607.

⁴⁸ Fed. Trade Comm'n, *Non-HSR Reported Acquisitions by Select Technology Platforms* (Sept. 2021), <https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf>. The FTC studied acquisitions and transactions completed by Alphabet, Amazon, Apple, Facebook and Microsoft between 2010-2019. It found that these tech firms completed 616 non reportable transactions valued above \$1 million, in addition to 101 Hiring Events and 91 Patent Acquisitions, as well as an additional 60 transactions valued below \$1 million and 160 financial investments. Most of the individual transactions were small, with 65% valued between \$1 million and \$25 million. A significant number of the acquired firms were nascent, with approximately 40% of them having been in business for five years or less. And over 75% of the transactions imposed non-compete terms on founders and key employees of the acquired firms. *Id.*

⁴⁹ In 2020, the US House Subcommittee on Antitrust, Commercial and Administrative Law issued a report based on its bipartisan investigation into competition in digital markets. The Report revealed that the Big 4 tech companies amassed significant market power in multiple digital markets by engaging in a series of acquisitions since 1998. For Amazon, the number was 111 acquisitions, 123 by Apple, 105 by Facebook and 268 acquisitions by Google.

documented the ways in which large tech giants got large in part by executing hundreds of small mergers, gobbling up rivals, potential rivals, or new products in adjacent markets, as well as assuming the talent of competing executives and entrepreneurs.

But this problem is not cabined to tech; there is strong evidence that small, serial acquisitions are a driver of market power problems in American sectors outside of digital markets. The dialysis industry, for example, is also afflicted. One study observed that 4,000 acquisitions of kidney dialysis centers were proposed between 1997 and 2017.⁵⁰ As a result, the dialysis industry consolidated significantly over the last two decades. In 1997, two firms controlled 31% of dialysis centers nationwide; by 2016 two firms controlled 77% of those facilities.⁵¹ And by 2018, their combined market share increased to 92%.⁵²

The retail eyewear industry is also a worrying example of how serial acquisitions enable the exercise of market power. One study has shown that the three largest firms in that industry possessed a combined 61% market share with one dominant firm controlling 40% of the US market.⁵³ That firm's path to market power in the U.S. began with its purchase of the parent company for LensCrafters in 1995.⁵⁴ Since then it has gone on to acquire myriad other eyeglass retail stores, as well as frame brands, a leading vision benefit provider, and the largest maker of prescription lenses and contacts.⁵⁵ One commenter aptly captured the scope of the dominant

Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations, supra note 13. See also, Chris Alcantara et al., *How Big Tech got so big: Hundreds of acquisitions*, Wash. Post (Apr. 21, 2021), <https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions/>. According to the House Report:

“[S]ignificant and durable market power is due to several factors, including a high volume of acquisitions by the dominant platforms. . . . In some cases, a dominant firm evidently acquired nascent or potential competitors to neutralize a competitive threat or to maintain and expand the firm's dominance. In other cases, a dominant firm acquired smaller companies to shut them down or discontinue underlying products entirely—transactions aptly described as ‘killer acquisitions.’”

Id.

⁵⁰ Thomas Wallman, *How to Get Away with Merger: Stealth Consolidation and its Effects on Us Healthcare* (Nat'l Bureau of Econ. Rsch., Working Paper No.27274), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3615470; Greg Ip, *How ‘Stealth’ Consolidation Is Undermining Competition*, WSJ (June 19, 2019), <https://www.wsj.com/articles/how-stealth-consolidation-is-undermining-competition-11560954936>. Approximately 50% triggered the pre-merger notification thresholds, and the FTC required divestitures to resolve competition concerns in 265 of the 2,000 proposed deals that got reported. And of the remaining 2,000 proposed transactions that were too small to require pre-consummation notice, divestitures were required in only 3 instances. *Id.*

⁵¹ *Id.*

⁵² Open Markets Institute Report, *America's Concentration Crisis*, Dialysis Centers (Jun. 2019), <https://concentrationcrisis.openmarketsinstitute.org/industry/dialysis-centers/>.

⁵³ Open Markets Institute Report, *America's Concentration Crisis* (June 2019), <https://concentrationcrisis.openmarketsinstitute.org/>.

⁵⁴ Funding Universe, *Luxottica SpA History*, <https://www.luxottica.com/en/about-us/our-history?page=3>.

⁵⁵ The retail acquisitions have included: Sunglass Hut in 2001; and Pearl Vision, Target Optical and Sears Optical in 2004; and Glasses.com in 2014. Its frame branding includes the acquisition of Ray-Ban in 1999, Oakley in 2007, and 18 licensing agreements entered into between 1988 and 2017 to manufacture eyewear under such designer brands as Chanel, Coach, Versace and Dolce & Gabbana. *Id.* In 1999, the company launched EyeMed Vision Care, a leading vision benefits provider. *Id.*; <https://eyemed.com/en-us/about-us>. And, in 2018, the firm merged with the world's leading maker of prescription glasses and contact lenses. Luxottica, *A Fascinating History, An Unstoppable Journey, A Future to be Built Day by Day*, https://www.luxottica.com/sites/luxottica.com/modules/tt_luxhistory/pdf/Luxottica_History_ENG_WEB_10_2.pdf

eyewear retailer’s market power: Just imagine, “[y]ou go into a LensCrafters retail outlet, where the salesperson shows you [this firm’s] frames under various names, and then the company pays itself [for the lenses it also owns] when you use your EyeMed insurance.”⁵⁶

In each of these industries, many of these acquisitions were too small to be noticed under HSR. But even if they had been noticed, they might not have triggered antitrust attention under the “substantially lessen” prong of Section 7. But it cannot be that the law allows a company to acquire and maintain monopoly power using a death-by-a-thousand-mergers strategy. I believe we should look at the competitive backdrop of an industry under “substantially lessen,” but I also believe this is where “tend to create a monopoly” can come in: to allow us to capture and enjoin mergers that contribute to shifting market conditions away from atomistic competition to monopoly control.

The second type of case where the “tend to create a monopoly” language of the Clayton Act could apply is adjacent market or conglomerate mergers. By this I mean cases where a company develops market dominance by acquiring companies to which it has no existing vertical or horizontal relationship. These acquisitions can facilitate a firm’s ability to foreclose or exclude competition in the future by locking its users into its own ecosystem. In this way, adjacent acquisitions “tend to create a monopoly”—they contribute to the consolidation of market share among fewer and fewer firms over time—even if it is not apparent that the effect of each acquisition may be to substantially lessen competition.⁵⁷

Google is an example of a dominant firm that has used adjacent acquisitions to enhance and entrench its market power. From modest beginnings as a mere search engine in 1998, Google’s popular web browser, email, map, and meeting software are used by billions of people today. Google expanded its ecosystem beyond search through multiple acquisitions in markets such as publishing, editing, images, video, office tools, AI, and cloud computing.⁵⁸ However, the source of nearly all of Google’s profits now comes from advertising. Google first broke into the advertising world with its acquisition of the digital marketing technology services provider DoubleClick in 2008⁵⁹ and has grown to be the most dominant player in online advertisement. According to eMarketer, it has a 37% share of the \$130 billion U.S. digital ad industry, and close to 80% of U.S. search ads.⁶⁰ The scope and scale of the ecosystem that Google has built today is

⁵⁶ David Lazarus, *Why are glasses so expensive? The eyewear industry prefers to keep that blurry*, L.A. Times (Jan. 22, 2019), <https://www.latimes.com/business/lazarus/la-fi-lazarus-why-are-eyeglasses-so-expensive-20190122-story.html>.

⁵⁷ Adjacent market or conglomerate market mergers may also tend to “substantially lessen competition,” under Section 7 of the Clayton Act even if a subset of these mergers are better enjoined using other standards like the “tend to create a monopoly” text.

⁵⁸ Examples of these acquisitions include: Blogger and Genius Labs, two publishing companies, in 2003; Picassa, the image organizing and editing platform, in 2004; YouTube, the world largest video-hosting service as well as office tools start-ups Writely and 2Web Tech in 2006; artificial intelligence companies Neven Vision in 2007 and DeepMind in 2014; and cloud computing companies Xively in 2018 and Alooma. Chris Alcantara et al, *How Big Tech got so big: Hundreds of acquisitions*, Wash. Post (Apr. 21, 2021), <https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions/>.

⁵⁹ *Id.*

⁶⁰ Patience Haggin, Kara Dapena, *Google’s Ad Dominance Explained in Three Charts*, Wash. Post (June 17, 2019), <https://www.wsj.com/articles/why-googles-advertising-dominance-is-drawing-antitrust-scrutiny-11560763800>.

breathhtaking, but is driven in no small part by scores of acquisitions it made since 1998 in markets adjacent to its search engine roots.

The final type of acquisition I want to talk about is one where the acquiring party intends to degrade or remove its target from the market. In particular, I'm thinking about acquisitions by private equity firms in which the goal of the merger is for the acquirer to extract value from its target not by operating the asset and competing, but by executing a roll-up strategy. Driven by a singular goal of extracting outsized financial returns for themselves and their investors, this strategy typically entails loading up the acquired company with unsustainable debt and selling its real estate and other component parts.

This is not something our current antitrust theories contemplate; we assume a profit-maximizing goal which is realized by competing, not by exiting the market. But imagine a duopolistic market in which a PE firm buys one of two existing competitors in a debt-financed transaction. The acquired firm goes bankrupt, the PE owner sells its component parts and exits the investment having made a profit, and the defunct firm is no longer competing. The effect of that transaction is to create a monopoly in the market, even though the merger of the PE firm and the target does not, by itself, substantially lessen competition because the PE firm was not previously competing in that market.

An example of the increased market concentration and harm to consumers that PE roll-up strategies cause can be found in the retail grocery industry. Between 2015 and 2018, for example, seven major US grocery chains filed for bankruptcy and all did so *after* private equity firms acquired them *and because* the firms executed roll-up strategies.⁶¹ Southeastern Grocers is one of these seven retail chains. Southeastern consists of the BI-LO, Fresco y Más, Harveys and Winn-Dixie brands. Using high levels of debt, PE firm, Lone Star, acquired BI-LO in 2005 and drove the company into debt by 2009.⁶² After BI-LO emerged from bankruptcy, Lone Star saddled the company with more debt to pay itself. For example, Lone Star used \$458 million of a \$475 million loan to pay dividends.⁶³ Lone Star also kicked its roll-up strategy into high gear by using debt financing to acquire Winn Dixie in 2012, and Harveys, Sweetbay, Reids and Piggly Wiggly stores in 2013.⁶⁴ Driven by Lone Star's thirst for outsized returns and unsustainable debt payments the chains now owed, Lone Star sold a distribution center for \$100 million and used a "sale/leaseback" maneuver to sell numerous stores for \$45 million and required these stores to pay rent moving forward on the property they used to own.⁶⁵ And Lone Star extracted \$980 million in dividends from the Southeastern chains between 2011 and 2018.⁶⁶ Unsurprisingly, Southeastern filed for bankruptcy in 2018.⁶⁷ In order to exit bankruptcy, Southeastern closed 94 stores and fired 2,000 workers in its surviving stores.⁶⁸

⁶¹ See Eileen Applebaum and Rosemary Batt, *Private Equity Pillage: Grocery Stores and Workers at Risk*, The American Prospect, (Oct. 26, 2018), <https://prospect.org/power/private-equity-pillage-grocery-stores-workers-risk/>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

This kind of strategy *tends to create monopolies* in the remaining market, and we should be able to prevent them.

I think it's important to take a step back and think about the fact that we're talking about groceries here, something real people absolutely need to survive. Food is not a luxury good. The effect of grocery stores being driven out of business is harm not only to store employees, but also to the customers who depend on the stores, resulting in very real problems such as food deserts. Marginalized communities in particular are often impacted acutely. So, I know I've spent much time today being deep in the weeds, geeking out on the minutiae of antitrust law. But we can never lose sight of the real-world impact of how we choose to pursue our mission.

With all of this groundwork, I want to turn to the final tool in our toolbox: the merger guidelines, which are not formal rules, but set forth the framework, methodology, and enforcement policies that guide our review of proposed mergers. This is not a new tool for the agencies, but it is one that could be substantially updated in order to give more accurate effect to our current statutory framework. The FTC and Department of Justice's Antitrust Division are already in the process of revising our joint merger guidelines. On January 18, both agencies issued to the public a request for information as part of the revision exercise. The RFI expressly tells the public that the review is being undertaken to ensure that our merger guidelines "(1) reflect current learning about competition based on modern market realities, and (2) faithfully track the statutory text, legislative history and established case law around merger enforcement."⁶⁹

And in that vein, one of the first sets of questions in the RFI goes to the heart of the concerns I've discussed this evening about the rise of market power abuse despite the best efforts of our talented staff and the need to reimagine our historically underutilized tools. It asks, "Do the guidelines reflect any additional competitive concerns reflected in the [Clayton Act's] prohibition against mergers that "may ... tend to create a monopoly"? Is this statutory language directed at preventing monopolies in their incipiency such as through serial acquisitions, including rollups? How should the guidelines address a merger that may tend to create a monopoly? How should the guidelines analyze whether there is a "trend toward concentration in the industry," and what impact should such a trend have on the analysis of an individual transaction?"⁷⁰

The current deadline for public comments to the merger guidelines revision RFI is April 21, 2022. You are well-positioned to tell us about abuses of market power in industries that are near and dear to you, especially when those abuses are in their incipiency. So, I encourage you and everyone to submit comments. Doing so will help us strengthen our enforcement of the antitrust laws to meet the challenges of modern market realities.

The Fairytale Ending:

⁶⁹ U.S. Dep't of Justice & Fed. Trade Comm'n, *Request for Information on Merger Enforcement* (Jan.18, 2022) <https://www.regulations.gov/docket/FTC-2022-0003/document>.

⁷⁰ *Id.* (citing *United States v. Microsoft Corp.*, 253 F. 3d 34, 79 (D.C. Cir. 2001) (finding that Java and Netscape constituted nascent competitive threats)).

I'll conclude this lengthy tale by coming back to the Princess Bride. Though the escapade is not without (substantial) setbacks and surprises, the Man in Black, Inigo, Fezzik, and Princess Buttercup do manage against all odds to best Prince Humperdink, kill Count Rugen, and escape. To get to that happy ending, they need to stay persistent, think creatively, and work with relentless determination.

Over the nearly four years I have been a commissioner at the Federal Trade Commission, I have been working to do just that—and I think it's a perfect place for such an endeavor. I have enormous gratitude for the hard work that our dedicated and talented staff have done and all that they have accomplished. And I also appreciate what I have heard over and over from them and from my predecessors: the FTC is special because it is an institution that is committed to self-reflection and that has a strong willingness to adapt to changing market realities in order to tackle tough problems. In fact, these concepts were at the very heart of the creation of the FTC. Congress was unhappy with the status quo in 1914. Antitrust law and the Department of Justice were not sufficiently tackling the market power problems of the day. And as a result, Congress established the FTC to further protect consumers and promote competition in the face of anticompetitive, deceptive and unfair businesses practices.

We have a mighty task ahead. And we may be outmatched. But notwithstanding the challenge, the battle is worth fighting, with every asset at our disposal.

Thank you for your time today. And have a wonderful rest of your afternoon.