# NU – Round 4 – Emory BW vs Kentucky DG

## 1AC

#### Same as Round 2

## 2AC

### Biz Con DA

#### Inequality reduces growth.

OECD 18. “HOW CAN COMPETITION CONTRIBUTE TO FAIRER SOCIETIES?” Organisation for Economic Cooperation and Development. 11-29-18. https://one.oecd.org/document/DAF/COMP/GF(2018)13/en/pdf

35. Growing **inequality reduces economic growth**. Financial hardship and credit market imperfections combine to **reduce people's ability to invest** in education and training, to change jobs, to learn new skills or start new businesses. Inequality harms the morale and the work effort of those who are left behind. It also leads to an **inefficient provision of public goods** that benefit the non-wealthy, like transportation and education even if they would foster overall economic growth. Growing inequality tilts public policy to favour the interests of the wealthy, which potentially creates a **vicious public policy cycle that could perpetuate inequality** and market power and threaten democracy. Inequality undermines the legitimacy of the social order, it lessens the sense that everyone has a fair opportunity and an equal voice, and finally many people would say inequality is objectionable morally. Put in utility terms, the marginal dollar may be more valuable socially if it is given to a struggling family to spend than to a wealthy one. There is a wealth transfer from the victims of market power to the firms exercising it. There are allocative efficiency losses and there is wasteful rent seeking as firms invest to create, obtain or preserve market power. Within the markets that are affected by market power, **innovation and productivity improvements slow.**

#### Investor fears high now---heightened enforcement and China---and COVID thumps.

Reuters 8-9-21. "Biden's antitrust crackdown fuels anxiety of merger investors". INQUIRER.net. https://usa.inquirer.net/79749/bidens-antitrust-crackdown-fuels-anxiety-of-merger-investors

U.S. President Joe Biden’s tougher regulatory stance on big corporate mergers has fueled a rise in investor bets on some deals not being completed, threatening to push the brakes on a record-setting dealmaking boom. Spreads between deal prices and the share prices of acquisition targets widened this week after the U.S. Federal Trade Commission said on Tuesday that a surge in mergers and acquisitions (M&A) would delay antitrust reviews, and that companies that did not wait for their outcome completed their deals at their own risk. On Wednesday, the Information reported that the U.S. Department of Justice was weighing a lawsuit to block UnitedHealth Group’s nearly $8 billion deal to acquire health care analytics and technology vendor Change Healthcare. Such a move would follow its lawsuit to block Aon’s $30 billion acquisition of Willis Towers Watson, which resulted in the insurance brokerages abandoning their deal last month. “The fact that spreads have widened is the understatement of the year,” said Roy Behren, managing member of Westchester Capital Management, which currently has $5.1 billion of assets under management, 85% of which is invested in merger arbitrage. The White House did not immediately respond to a request for a comment. Widened spreads include the proposed $33.6 billion deal between railroad operators Canadian National Railway and Kansas City Southern, as both companies await approval from the Surface Transportation Board. Shares of Kansas City are currently trading at $262 apiece, well below the agreed cash-and-stock deal of $325 per share. Other deals where spreads have increased include Zoom Video Communications’ nearly $15 billion all-stock deal for cloud-based call center operator Five9 Inc and medical device maker Thermo Fisher’s $17.4 billion buyout of contract researcher PPD Inc. Adding to the anxiety of merger investors are the escalating geopolitical tensions between China and the United States. China can thwart mergers of U.S. companies if they have a significant present in the country. The spread on semiconductor designer Advanced Micro Devices Inc’s $35 billion acquisition of Xilinx Inc has widened in recent days for that reason, investors said. “The climate of fear surrounding transactions that require Chinese approval is as difficult as I’ve seen in many, many years,” said Behren. It is not uncommon for M&A spreads to widen in times of uncertainty. They blew up dramatically in March 2020, when Wall Street fretted over the financial fallout of the coronavirus outbreak.

#### Wage increases benefit investment and growth.

James Manyika et al 18. James Manyika Jaana Remes, and Jan Mischke. “The U.S. Economy Is Suffering from Low Demand. Higher Wages Would Help” Harvard Business Review. 02-21-18. https://hbr.org/2018/02/the-u-s-economy-is-suffering-from-low-demand-higher-wages-would-help

To put it simply, when consumers have more to spend, they buy more sophisticated things. That’s good not just for consumers and producers, but **for the overall economy**, because making more sophisticated, higher-value things **makes everyone involve more productive**, and therefore helps **increase overall standards of living.** In addition, we found two other ways weak demand hurt productivity growth in the aftermath of the financial crisis: a reduction in economies of scale and weak investment. First, the economies of scale effect. In finance, productivity growth declined particularly in the United States, United Kingdom, and Spain due to contractions in lending volumes that banks were unable to fully offset with staff cuts due to the need for fixed labor (for example to support branch networks and IT infrastructure or to deal with existing loans and bad debt). The utilities sector, which has seen flattening demand growth due to both energy efficiency policies as well as a decline in economic activity during the crisis, was similarly not able to downsize labor due to the need for labor to support electricity distribution and the grid infrastructure, and here, too, productivity growth fell. Second, the effect of weak investment. We have found from our global surveys of businesses that almost half of companies that are increasing their investment budgets are doing so because of an increase in demand. **Demand is the single most important factor** driving corporate investment decisions. Investment, in turn, is critical for productivity growth, as it equips workers with more – and with more recent and innovative – equipment, software, and structures. But we have seen capital intensity growth fall to the lowest levels in post-WWII history. Weaker demand leads to weaker investment and creates a vicious cycle for productivity and income growth. Of course, the financial crisis is long since over, and the economy has recovered, at least by some measures. So what’s to worry about? Won’t demand return to pre-recession levels, and thereby increase productivity? Unfortunately, there is reason to believe that some of the drags on demand for goods and services may be **more structural than crises-related**. Slowing population growth means less rapid expansion of the pool of consumers. And **rising income inequality** is shifting purchasing power from those most likely to spend to those more likely to save. This is reflected in **slowing growth expectations in many markets**. For example, across our sectors and countries studied, in the decade from 1995 to 2004, growth in demand for goods and services averaged 4.6%, slowed to 2.3% in 2010 to 2014, and is forecast to slightly increase to 2.8% in 2014 to 2020. Today, there is concern about where the next wave of growth will come from. Some prominent economists worry that we may be stuck in a **vicious cycle of economic underperformance** for some time. Our analyses strongly suggest that **supporting sustained demand growth needs to be part of the answer**. Demand may deserve attention to help boost productivity growth not only during the recovery from the financial crisis but also in terms of longer-term structural leakages and their impact on productivity. Suitable tools for this longer-term situation include: focusing on productive investment as a fiscal priority, **growing the purchasing power of low-income consumers** with the highest propensity to consume, unlocking private business and residential investment, and supporting worker training and transition programs to ensure that periods of transition do not disrupt incomes.

#### Democratic backsliding turns business confidence.

Rebecca Henderson 21. The John and Natty McArthur University Professor at Harvard University, where she has a joint appointment at Harvard Business School in the general management and strategy units, and the author of the book. “Business Can’t Take Democracy for Granted” Harvard Business Review. 01-08-21. <https://hbr.org/2021/01/business-cant-take-democracy-for-granted>

For years, American business has **taken American institutions for granted**. It has assumed that someone else would ensure that democracy, the rule of law, and the kind of robust, respectful discourse that keeps societies healthy would simply survive — and that the role of business was to keep its head down and maximize profits in the meantime. But this week’s events have demonstrated that **we cannot take our democracy for granted**. Early polls suggest that as many as 45% of Republicans approve of the assault on the U.S. Capitol. If this result holds up, it would imply that millions of Americans see nothing wrong with attempting to overturn the results of an election by force. Democracy Is in Trouble. Business Must Help Fix It. Strengthening democracy is the only way to **ensure the survival of free-market capitalism.** Let’s be clear: This belief is a fundamental threat to the long-term health of our economy and to the strength of American business. As I’ve argued in the past, **American business needs American democracy.** Free markets cannot survive without the support of the kind of capable, accountable government that can set the rules of the game that keep markets genuinely free and fair. And only democracy can **ensure that governments are held accountable**, that they are viewed as legitimate, and that they don’t devolve into the rule of the many by the few and the kind of crony capitalism that we see emerging in so many parts of the world. No businessperson I know is a huge fan of government. I don’t care much for paying taxes myself. But as the pandemic has made **clear, strong government** — democratically accountable government, balanced by a free media and a thriving private sector — is the price we pay for **strong societies**. Without them, there’s far too little investment in public goods like public health, clean air and sensible anti-trust rules. Without them, the rich and the powerful end up in control of both the economy and the state, throttling the entrepreneurial energy and the innovation and experimentation that has made the American economy the envy of the world. We must not become Russia. Strengthening democracy is the only way to ensure the **widespread survival of free-market capitalism**, and with it the prosperity and opportunity that has changed the lives of billions of people. It’s also the only way to tackle the world’s biggest threats, from global warming to increasing inequality. And business has to play a leading role — now.

### Regs CP---2AC

#### Can’t solve inequality:

#### Antitrust is a pre-requisite to effective labor law. Anything else allows skirting damages and prevention of effective collective bargaining.

Marshall Steinbam 19. Professor of Law, University of Utah. “Antitrust, The Gig Economy, and Labor Market Power.” *Law and Contemporary Problems* 82(3): 61-64.

This paper sets out an important but under-appreciated aspect of the rise in labor market precarity and diminishing worker bargaining power: the erosion of antitrust laws restricting dominant firms’ ability to use vertical restraints to control and restrict both less powerful affiliates and the workers who work for them, and the concurrent use of antitrust against any attempt by those workers or independent businessmen or contractors to bargain collectively against such concentrations of power. In ascertaining the causes of contemporary inequality in wealth, income, and social status, especially with respect to the labor market, we cannot overlook the role that antitrust has played.

This contrasts with a recent Economic Policy Institute paper by Heidi Shierholz and Josh Bivens that treats the rise of employer power in labor markets, and the extent to which weakening antitrust has caused that phenomenon, as a less important cause of rising inequality and stagnant wages compared to the erosion of labor law and thus of collective bargaining.95 Their evidence for the contention that diminishing worker bargaining power matters more than concentrated employer bargaining power is that inequality within the distribution of labor income is a more significant cause of stagnating wages and the growing gap between median worker pay and average worker productivity than is the declining labor share of national income, which is of more recent vintage than either of the first two economic trends.

But we cannot map rising labor income inequality to worker bargaining power and labor law and the declining labor share of income to employer power and antitrust so neatly. As the analysis in Parts II and III show, income inequality is to a large extent caused by rising earnings inequality between firms, rather than between workers, reflecting employer power to set wages. This is the result of the legalization of business models like the fissured workplace that allow powerful employers to segregate workers from the profits they earn for their bosses. The point of Part II of this paper is that the fissured workplace is the product of both labor regulation and antitrust. Thus, increasing inequality of power between employers and workers cannot be coherently treated as two separate phenomena: rising employer power, and declining worker power.

That means the solution to unequal bargaining power is not necessarily or not entirely an antitrust solution, but antitrust must play a major part, since it implicates the business models available to the economy’s dominant firms. In particular, we should seek, through revived antitrust and labor regulations that both take account of how the economy actually works, and how power is exercised within it, to re-establish the sharp distinction embodied in Richfield Oil. Either workers are employees, in which case they can be controlled by their bosses, who in turn owe them statutory protections including the right to bargain collectively, or they are independent businesses, in which case they cannot be coerced by contract or by any other means. Proposals to extend and strengthen labor law tests for statutory employment to take account of gig economy technologies are crucial, but they will be ineffective so long as employers and lead firms retain the strong incentive to push workers outside their protection. The role of antitrust in that context is to create a significant cost to so doing: the potential for treble damages under antitrust liability should a lead firm be caught coordinating and directing the activities of its non-employee subsidiaries and contractors. That is the mechanism that would weigh against employers’ incentive to mis-classify.

Putting such an antitrust regime in place entails the abandonment of both the consumer welfare standard and, with it, the Chicago School’s jurisprudence of vertical restraints. Instead, any vertical restraint, price or non-price, should be a presumptive violation of the Sherman Act if it is imposed by a firm with market power. And antitrust’s definition of market power must, in turn, be expanded beyond the confined market-share-based Sherman Act jurisprudence to instead take account of the many ways economists have of testing for the existence of market power. Firms would be judged to have market power if they:

• Have the power to unilaterally raise prices for their customers or lower them for their suppliers, including workers;

• Wage- or price-discriminate among customers, suppliers, or workers;

• Unilaterally impose non-price, uncompensated contractual provisions on their counterparties, like non-compete agreements in labor contracts;

• Impede or control entry by would-be competitors; or

• Earn profits and/or make payments to their shareholders at a rate in excess of their market cost of capital.

All of these things are economic indicia of market power because they could not be done by any one or more firms acting in concert in the face of competition from rivals—therefore they should be legal indicia of market power as well.96

Drilling down on how the antitrust laws should target labor market monopsony in particular, not merely prohibit vertical restraints that enable fissured workplace-style business models, the antitrust authorities should bring a monopsonization suit against an online labor platform like Uber that fixes wages and imposes exclusivity on independent businesses, along the lines of Meyer v. Kalanick. If, as would be expected, that case would be adjudicated under the Rule of Reason, despite its economic equivalence to the FTC’s per se cases against professional organizations and unions of independent contractors, then Congress should streamline the Rule of Reason for labor monopsony. This should be done along the lines proposed by Ioana Marinescu and Eric Posner, setting out principles to guide market definition that are responsive to measured firm-level labor supply elasticities.97 In fact, if firms have the unilateral power to dictate wages without causing a significant share of their workforce to leave, then the proper market definition for a monopsonization case may be significantly smaller than the one those authors recommend as a baseline. The point of such a suit is to force Uber to choose one business model or another: either employ the drivers if Uber wants to fix their wages and monitor them on the job, or give up the price- setting and market coordination power that makes the platform such a value proposition for its investors. It cannot be allowed to do both. Meanwhile, workers themselves who are not statutory employees should be protected by antitrust’s labor exemption and should be permitted to bargain collectively. However, any such extension of the labor exemption must not also immunize the powerful employer against whom they would seek to bargain. And at the very least, both no-poaching clauses in franchising contracts and non-compete clauses in employment contracts should be illegal per se.98

Finally, analysis of labor market impact should be incorporated in the statutory prospective merger review process that federal agencies undertake as a matter of routine, in order to prevent the harmful accumulation of monopsony power in labor markets by merger. The current FTC Chairman, Joseph Simons, said as much in Congressional testimony in the fall of 2018,99 but to date there is no evidence that any such investigation has taken place. In the recent merger approval for Staples’s takeover of its supplier Essendant, the majority of the commission claimed that the merger would have a pro-competitive impact on input markets.100 Specifically, if the combined firm reduced the price it pays to manufacturer, it would in fact purchase more from them, not less, and hence that price reduction would not be an exercise of buyer power (the majority’s opinion says nothing about labor specifically as an input). But the idea that the volume of sales is dispositive about the anti-competitive exercise of monopsony power is not correct. Wilmers finds evidence that dominant retailers and manufacturers impose price reductions on the suppliers over whom they exercise market power, and those suppliers in turn pass those price reductions through to their workers in the form of lower wages.101 That is an exercise of monopsony power, but it might well be accompanied by greater sales volume from the supplier to the dominant customer.

Altogether, the thesis of this paper is that there is no way to confront the economy’s crisis of unequal bargaining power without confronting the role that antitrust has played in getting us there. Antitrust is not a substitute to any of the many other ways that policy ought to be extended to halt and reverse the economy-wide erosion of worker bargaining power behind rising inequality and wage stagnation. But strengthening it is a necessary condition for the success of many of those alternatives, notably, labor law reform and collective bargaining on the part of precariously employed gig economy workers.

#### Regs fail---prefer case-by-case enforcement.

Howard Shelanski 21. Professor of Law, Georgetown University; Partner, Davis Polk & Wardwell LLP. “Antitrust and Deregulation.” *Yale Law Journal* (127): 1951-1953. <https://www.yalelawjournal.org/pdf/Shelanski_kcn6n4k3.pdf>

A longstanding debate examines the comparative advantages of antitrust and regulation. The late Cornell economist Alfred Kahn, the architect of airline deregulation in the Carter Administration, wrote that “society’s choices are always between or among imperfect systems, but that, wherever it seems likely to be effective, even very imperfect competition is preferable to regulation.”117 Kahn does not address antitrust in that quotation, but it suggests that he would find antitrust law’s more targeted, case-by-case approach to governing competition to be preferable to regulation. Indeed, Kahn elsewhere wrote, while expressing his “belief in vigorous enforcement of the antitrust laws,” that “the antitrust laws are not just another form of regulation but an alternative to it—indeed, its very opposite.”118 Then-Judge Stephen Breyer has similarly stated that “antitrust is not another form of regulation. Antitrust is an alternative to regulation and, where feasible, a better alternative.”119

The comparisons that Breyer and Kahn made were, in context, mostly between antitrust and rate regulation, where the agency was trying to protect consumers from monopoly pricing.120 But some of these criticisms, including “high cost; ineffectiveness and waste; procedural unfairness, complexity, and delay; unresponsiveness to democratic control; and the inherent unpredictability of the end result,” apply to most kinds of regulation.121 Regulation might well be worthwhile despite those potential drawbacks, but certain attributes—ex post and case-by-case enforcement, judicial oversight with the government bearing the burden of proof—make antitrust enforcement less vulnerable to those critiques.

Regulation can also be comparatively slow to adapt to new market conditions, and that delay can affect an entire regulated industry.122 Antitrust authorities also might fail to foresee relevant market changes, but their actions typically affect only one discrete case and they generally have flexibility, as conditions change, to modify relevant consent decrees and decline to pursue similar investigations or sanctions.123 It is harder for government agencies to make changes to established regulatory programs,124 making regulation more likely than antitrust to outlast the problems it was implemented to solve. Regulation’s delayed adaptation to changing conditions can be costly,125 especially as markets transition to more competitive structures.126 As Michael Boudin, a former DOJ antitrust official (and later federal judge) put it, “regulation almost always will be very difficult to dislodge, even if it proves mistaken. Almost any regulatory regime will develop a constituency, armed with congressmen and self-interested bureaucrats . . . [and] become[] the foundation on which private arrangements are constructed, arrangements that cannot easily be discarded.”127

#### 4. Only the plan imposes harsh enough penalties.

Samuel Weinstein 19. Assistant Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. “Article: Financial Regulation in the (Receding) Shadow of Antitrust.” *Temple Law Review* (91): 487-491.

Even when sector regulators prioritize protecting competition, many lack the expertise and institutional mechanisms to do so effectively. Regulatory agencies might not employ investigatory and adjudicatory procedures sufficient to root out anticompetitive conduct. While courts must in many cases allow for exhaustive discovery, the same cannot be said for most agency proceedings. As a result, even those sector regulators that value protecting competition may not have the institutional systems necessary to follow through effectively.

The relative weakness of remedies typically available to regulatory agencies compounds these problems. Most agencies do not have access to remedies as stringent as an antitrust court's power to assign treble damages under the Sherman Act or to permanently enjoin anticompetitive conduct. The administrative record in Trinko showed that Verizon admitted it had violated its open-access commitments and voluntarily paid $ 3 million to the FCC and $ 10 [\*488] million to competitive local exchange carriers. While the Trinko opinion relied on these sanctions in part for its conclusion that the FCC's regulatory regime had fulfilled the antitrust function, the FCC Chairman subsequently told Congress that the Commission's maximum fine authority was in many instances "insufficient to punish and deter violations" that incumbent local exchange carriers like Verizon had committed with the aim of "slow[ing] the development of local competition." Among other measures, Chairman Powell recommended increasing the FCC's forfeiture authority against common carriers for single continuing violations of the Telecommunications Act from $ 1.2 million to "at least $ 10 million."

Agency capture is another explanation for regulators' relative weakness as competition enforcers. The literature on capture is well developed. There is a general scholarly consensus that the political nature of top agency jobs and the revolving door between agencies and the industries they oversee make sector regulators much more susceptible to industry pressure than antitrust courts. Studies have shown that capture may be a particular problem at the financial regulatory agencies. There is a steady flow of lawyers between the SEC and CFTC, on the one hand, and Wall Street firms and the law firms and lobbyists [\*489] that represent them on the other, which appears to affect outcomes of agency proceedings in some cases.

Objective measures of the relative competition-enforcement abilities of the antitrust agencies versus the sector regulators tend to confirm the supposition that sector regulators generally cannot be relied on to fulfill the antitrust function in regulated markets. The expert staffs of the antitrust agencies are far larger and more experienced than the competition staffs, if any, at the sector regulators. In recent years, the Antitrust Division typically has had between 340 and 400 attorneys and approximately 50 economists dedicated to competition enforcement, while the FTC's Bureau of Competition has had around 300 attorneys and support staff and approximately 50 antitrust economists. Some regulatory agencies, like the FCC, Federal Deposit Insurance Corporation (FDIC), and the Federal Reserve, have dedicated competition staff with specific expertise. The FCC has a Wireline Competition Bureau, which includes a Competition Policy Division. The FDIC, Federal Reserve, and the Office of the Comptroller of the Currency have staff dedicated to reviewing proposed bank mergers. Even at these agencies, however, the competition staff is smaller and more narrowly focused than the staffs of the Antitrust Division and FTC. [\*490] The comparison with the SEC and CFTC is starker. Neither agency has a dedicated competition division or group. And neither agency established such a body post-Credit Suisse, when it appeared the SEC and CFTC would have increased responsibility for competition matters, or in the wake of Dodd-Frank, which required the agencies to monitor and protect competition in the derivatives markets. This paucity of personnel resources is perhaps predictable given these agencies' bureaucratic cultures.

Considering this lack of experienced competition staff, it is unsurprising that the SEC and CFTC bring very few independent competition-related enforcement actions. While these agencies have collaborated with the [\*491] Department of Justice and other enforcement agencies on significant competition investigations, there is little evidence that they would bring such cases on their own. It seems clear that the financial services agencies are either unwilling or unable to "perform the antitrust function" as envisioned by the Supreme Court's case law balancing antitrust and regulation. This conclusion is troubling. It means that when courts apply Credit Suisse or Trinko to shift the responsibility for policing competition away from the expert antitrust agencies to regulatory bodies that are unprepared for the task, they are leaving some regulated markets, especially the financial markets, vulnerable to anticompetitive conduct.

#### 5. Regs can’t solve future problems.

Jon Sallet 18. Partner at Steptoe. Previously, he was General Counsel of the Federal Communications Commission and Deputy Assistant Attorney General at the Antitrust Division. Before the Federal Trade Commission. “Competition and Consumer Protection in the 21st Century”. https://www.ftc.gov/system/files/documents/public\_events/1415284/ftc\_hearings\_session\_5\_transcript\_11-1-18\_0.pdf

One, we will look at incipiency, actions that have not had the kind of competitive effect that he thought the Sherman Act examined. Secondly, because, he said, there will be new kinds of harm that we cannot anticipate. If we write a detailed list, we are going to miss some. So he wanted a standard that would evolve as economic issues as the facts evolved.

#### 9. Perm do both---that’s best.

Eric A. Posner 21. 8/13/21. Kirkland & Ellis Distinguished Service Professor at University of Chicago. How Antitrust Failed Workers. Oxford University Press, 2021.

The antitrust litigation gap has not been filled with other legal protections for workers. But even if those legal protections were introduced, a role remains for antitrust law. Labor markets, like product markets, are best for society when they are competitive. In part II, I propose ways for strengthening antitrust law so it can more adequately address labor monopsony.

#### 11. Perm do the CP---antitrust laws are regs.

Robinhood 20. Robinhood Financial LLC. “What are Antitrust Laws?”. 10-6-20. https://learn.robinhood.com/articles/4x5oCZOtg43uORfxEnxPRW/what-are-antitrust-laws/

Antitrust laws are regulations that aim to promote fair business competition in an open market and protect consumers by banning certain predatory practices.

### DOJ trade-off

#### The Capitol Riot cases thump- the DOJ has stretched its resources thin to even begin processing them

Josh **Gerstein and** Kyle **Cheney, 3/10/21**- Josh Gerstein is POLITICO’s Senior Legal Affairs Reporter. Gerstein covers the intersection of law and politics, including Special Counsel Robert Mueller’s investigation of President Donald Trump and his associates, as well as ensuing counter-investigations into the origins of the FBI’s initial inquiry into the Trump-Russia saga. While not a lawyer, Gerstein’s spent more time in courtrooms and more time reading legal pleadings than many members of the bar. Kyle Cheney is a Congress reporter for POLITICO Cheney joined the Congress team after covering the 2016 presidential election on POLITICO's politics team. He covered the Republican primary field with a focus on the national GOP, the Republican National Convention and the internal machinations of the party as it adjusted to the emergence of Donald Trump. Cheney came to POLITICO in June 2012 to cover health care and spent two years covering the implementation of the Affordable Care Act and its political implications. He also covered the 2014 midterms for POLITICO's Campaign Pro. He joined POLITICO after five years reporting on Massachusetts government and politics for the State House News Service, an independent wire service in Boston. Cheney, a New York native, graduated from Boston University in 2007 with a journalism degree after a semester as editor of BU’s independent student paper, The Daily Free Press. “Capitol riot cases strain court system.” POLITICO. March 10, 2021. https://www.politico.com/news/2021/03/10/capitol-riot-court-cases-475081

When a top federal judge in Washington, D.C., convened court on a recent morning in one of the hundreds of cases stemming from the storming of the Capitol, it was pitch black outside of prosecutor Adam Alexander’s windows. “What time is it in Alaska?” Chief U.S. District Court Judge Beryl Howell asked. “It is 5:03 a.m. in the morning,” the Anchorage-based assistant U.S. attorney replied cheerfully via Zoom. Although he was 3,300 miles away and dawn had yet to break, Alexander was on hand for the arraignment of James Mels, a Michigan man charged with breaching the Capitol in what he said was an attempt to protest certification of the presidential election results and share his copy of the Constitution with police. “Wow,” Howell said, acknowledging the unusual long-distance arrangement. Next time, she said, “plead your need for sleep and remind me you’re in Alaska.” The transcontinental hearing — with the prosecutor in Alaska, the defendant in Michigan and other participants in the D.C. area — underscored the extraordinary lengths to which the Justice Department and courts are going to prosecute and process hundreds of people accused of storming the Capitol on Jan. 6. With the D.C.-based team of federal prosecutors stretched thin, the Justice Department has called in a cavalry of far-flung reinforcements. A POLITICO review of the more than 250 (and climbing) cases related to the Capitol breach shows that federal prosecutors from Fort Lauderdale to Wichita to San Francisco have heeded that call. So far, over 30 cases are assigned to attorneys who appear to be outside the staff of the U.S. Attorney’s Office in Washington as it tackles what may be the most sprawling prosecution in U.S. history related to a single event. For context: the office’s 2021 criminal caseload includes fewer than 20 federal prosecutions that aren’t connected to the Capitol assault. The ever-expanding probe, which President Joe Biden’s incoming attorney general Merrick Garland has called his top immediate priority, has increasingly strained the justice system and required extraordinary measures to churn through a growing roster of cases. Dozens are simple trespassing cases, but others allege brutal assaults on Capitol police officers while a mob loyal to former President Donald Trump overran Congress and forced a delay in the formal counting of electoral votes. Hundreds more cases are expected to land on the docket in the next few weeks and months. The number of cases assigned to prosecutors outside the ranks of the D.C. U.S. Attorney’s office is modest but is growing steadily as more and more suspects are identified — typically from a combination of videos taken from social media, surveillance cameras or body-worn cameras and tips from the public. Some prosecutors, such as Kansas-based Mona Furst, New Orleans-based Brittany Reed and Massachusetts-based Lucy Sun, have been assigned to multiple cases. In the last week alone, San Francisco prosecutor April Loeb, Laredo prosecutor Graciela Lindberg and Utah prosecutor Jacob Strain have been added to new cases. “The Department is committed to ensuring all necessary resources are available to investigate and prosecute the cases related to the January 6th Capitol breach, including assigning additional prosecutors from other districts to assist,” a Justice Department spokesperson said. The review also revealed the extent to which prosecutors in the Washington, D.C., office of the U.S. attorney have been spread thin. Several, such as Christopher Berridge, Kevin Birney, Mary Dohrmann, Troy Edwards, Jr., Kimberly Paschall and Ahmed Baset, have been assigned seven or more Capitol riot cases. And prosecutors from across virtually every part of that office, from narcotics to violent crime to civil rights to national security, have been pulled into the mix. Notably, prosecutor Puja Bhatia, a D.C. homicide specialist, has been assigned to a single Capitol riot prosecution: Daniel Caldwell, who has been charged for allegedly assaulting police with a chemical irritant. It’s unclear if this assignment signals more serious charges to come in Caldwell’s case. The huge surge in cases stemming from the takeover of Congress two months ago has also put unprecedented pressures on the court Howell presides over, which sits at the foot of Capitol Hill, within view of the crime scene. The U.S. District Court in Washington typically has a moderate criminal caseload that lags behind big-city federal courts in places like Manhattan, South Florida and Los Angeles and far behind the busiest courts: those along the Mexican border that see thousands of cases charging undocumented immigrants with illegal entry. In all of last year, the D.C. federal court recorded 290 cases in its criminal docket for major crimes. So far this year, 199 such cases have been filed — nearly all of them against alleged Capitol rioters. The magistrate’s docket, which records less-serious cases and the early stages of many more serious ones, now stands at nearly 300. With almost nine months to go, it already outstrips the 261 filed last year. Cases are piling up How big will the wave of cases get? Officials estimate about 800 people entered the Capitol during the riot. All seem likely to face charges if the FBI can identify them, a task it makes progress on each week. And some people who clashed with police but never entered the building are also facing charges. The court has scrambled to respond to the onslaught. During the early weeks following the riot, when the daily court docket grew too long to process the incoming arrestees, one of the court’s three permanent magistrate judges was assigned to back up the magistrate on criminal duty for the month. Behind the scenes, the third magistrate judge has been working on the hundreds of search warrants, and similar Capitol riot prosecutors have requested social media and cell phone data.

#### DOJ cases take years and fail- cases against google thump and prove their resources are already being overstretched

Brent **Kendall and** Rob **Copeland, 20**20. Brent Kendall is a legal affairs reporter in the Washington bureau of The Wall Street Journal, where he covers the Justice Department, the Federal Trade Commission and the federal courts, including the Supreme Court. Rob Copeland is a reporter for The Wall Street Journal in Austin, Texas. “Justice Department Hits Google With Antitrust Lawsuit.” The Wall Street Journal. October 20, 2020. <https://www.wsj.com/articles/justice-department-to-file-long-awaited-antitrust-suit-against-google-11603195203>

The Justice Department filed a long-expected antitrust lawsuit alleging that Google uses anticompetitive tactics to preserve a monopoly for its flagship search engine and related advertising business, the most aggressive U.S. legal challenge to a company’s dominance in the tech sector in more than two decades. The case, filed Tuesday in federal court in Washington, D.C., alleged that the Alphabet Inc. unit maintains its status as gatekeeper to the internet through an unlawful web of exclusionary and interlocking business agreements that shut out competitors. The government alleged that Google uses billions of dollars collected from advertisements on its platform to pay for mobile-phone manufacturers, carriers and browsers, like Apple Inc.’s Safari, to maintain Google as their preset, default search engine, creating a self-reinforcing cycle of dominance. The upshot is that Google has pole position in search on hundreds of millions of devices in the U.S., with little opportunity for any other company to make inroads, the government said. “Google achieved some success in its early years, and no one begrudges that,” Deputy U.S. Attorney General Jeffrey Rosen said. “If the government does not enforce its antitrust laws to enable competition, we could lose the next wave of innovation. If that happens, Americans may never get to see the next Google.” Kent Walker, Google’s chief legal officer, said in a statement that the lawsuit was deeply flawed. “People use Google because they choose to—not because they’re forced to or because they can’t find alternatives,” he said. “Like countless other businesses, we pay to promote our services, just like a cereal brand might pay a supermarket to stock its products at the end of a row or on a shelf at eye level.” Justice Department to Sue Google for Alleged Anticompetitive Conduct Mr. Walker said that, if successful, the lawsuit would result in higher prices for consumers because Google would have to raise the cost of its mobile software and hardware. Google’s defense against critics of all stripes has long been rooted in the fact that its services are largely offered to consumers at little or no cost, undercutting the traditional antitrust argument centered on potential price harms to those who use a product. The challenge marks a new chapter in the history of Google, a company formed in a garage in a San Francisco suburb in 1998—the same year Microsoft Corp. was hit with a blockbuster government antitrust case accusing the software giant of unlawful monopolization. That case, which eventually resulted in a settlement, was the last similar government antitrust case against a major U.S. tech firm. The lawsuit follows a Justice Department investigation that has stretched more than a year, and it comes amid a broader examination of the handful of technology companies that play an outsize role in the U.S. economy and the daily lives of most people. A loss for Google could mean court-ordered changes to how it operates parts of its business, potentially creating new openings for rivals. The Justice Department’s lawsuit didn’t propose particular remedies, though one Justice Department official said nothing is off the table. The Mountain View, Calif., company, sitting on a $120 billion cash hoard, is unlikely to shrink from a legal fight. A victory for it could deal a huge blow to Washington’s overall scrutiny of big tech companies, potentially hobbling other investigations and enshrining Google’s business model after lawmakers and others challenged its market power. Such an outcome, however, might spur Congress to take legislative action against the company. Alphabet’s shares rose 1.4% in Nasdaq trading Tuesday. The case could take years to resolve, and the responsibility for managing the suit will fall to appointees of the winner of the Nov. 3 presidential election. Democratic presidential nominee Joe Biden declined to comment on the Google suit specifically, but said that “growing economic concentration and monopoly power in our nation today threatens our American values of competition, choice, and shared prosperity.“ Google’s billionaire co-founders Sergey Brin, left, and Larry Page, shown in 2008, gave up their management roles but remain in effective control of the company. “Our commitment to these values must compel us to do far more to ensure that excessive market power anywhere—across industries, from health care to agriculture to tech to banking and finance—is not hurting America’s families and workers,” Mr. Biden said Nearly all U.S. state attorneys general are separately investigating Google, while three other tech giants—Facebook Inc., Apple and Amazon.com Inc.—likewise face close antitrust scrutiny. In Washington, a bipartisan belief is emerging that the government should do more to police the behavior of top digital platforms that control widely used tools of communication and commerce. A group of 11 state attorneys general, all Republicans, have joined the Justice Department’s case. More could join later. Other states are still considering their own cases related to Google’s search practices, and a large group of states is considering a case challenging Google’s power in the digital advertising market. GOOGLE’S SEARCH DOMINANCE The Justice Department also continues to investigate Google’s ad-tech practices. Democrats on a House antitrust subcommittee in a report this month said the four tech giants wield monopoly power and recommended congressional action. The companies’ chief executives testified before the panel in July. In Europe, regulators have targeted the company with three antitrust complaints and fined it about $9 billion. The cases haven’t left a big imprint on Google’s businesses there. Google owns or controls search-distribution channels accounting for about 80% of search queries in the U.S., according to the lawsuit and third-party researchers. The government says that effectively leaves no room for competition, resulting in less choice and innovation for consumers, and less competitive prices for advertisers. Lawmakers of Both Parties Talk Antitrust Reform Rep. David Cicilline (D., R.I.) and Sen. Josh Hawley (R., Mo.) voice an interest in pursuing tighter antitrust enforcement in the tech sector at WSJ Tech Live 2020. Photos from left: Mandel Ngan/Associated Press; Stefani Reynolds/Press Pool The wide-ranging suit included details on alleged deliberations within Google aimed at avoiding antitrust scrutiny. The government quoted Google’s chief economist as telling employees, “We should be careful about what we say in both public and private.” The lawsuit in particular targeted arrangements under which Google’s search application is preloaded, and can’t be deleted, on mobile phones running its popular Android operating system. Google has expanded such agreements over the past year since the Justice Department probe began, the government said, but its complaint didn’t provide hard data about such tie-ups. Google CEO Sundar Pichai testified before Congress in July, in hearings where lawmakers pressed tech companies’ leaders on their business practices. Alphabet publicly discloses that it pays other companies to funnel in search traffic; analysts estimate that it pays Apple alone around $10 billion a year, another deal the government cited as one that has suppressed competition. Google started as a simple search engine aiming “to organize the world’s information.” But over time it has developed into a far broader conglomerate. Its flagship search engine handles more than 90% of global search requests, some billions a day, providing fodder for what has become a vast brokerage of digital advertising. Its YouTube unit is the world’s largest video platform, used by nearly three-quarters of U.S. adults. In 2012, the last time Google faced close antitrust scrutiny in the U.S., the search giant was already one of the largest publicly traded companies in the nation. Since then, its market value has roughly tripled to almost $1 trillion. The company enters this legal showdown under new leadership. Co-founders Larry Page and Sergey Brin, both billionaires, gave up their management roles last year, handing the reins solely to Sundar Pichai, a soft-spoken, India-born engineer. BIG TECH UNDER FIRE The Justice Department isn’t alone in scrutinizing tech giants’ market power. These are the other inquiries now under way: Federal Trade Commission: The agency has been examining Facebook’s acquisition strategy, including whether it bought platforms like WhatsApp and Instagram to stifle competition. People following the case believe the FTC is likely to file suit by the end of the year. State attorneys general: A group of state AGs led by Texas is investigating Google’s online advertising business and expected to file a separate antitrust case. Another group of AGs is reviewing Google’s search business. Still another, led by New York, is probing Facebook over antitrust concerns. Congress: After a lengthy investigation, House Democrats found that Amazon holds monopoly powers over its third-party sellers and that Apple exerts monopoly power through its App Store. Those findings and others targeting Facebook and Google could trigger legislation. Senate Republicans are separately moving to limit Section 230 of the Communications Decency Act, which gives online platforms a liability shield, saying the companies censor conservative views. Federal Communications Commission: The agency is reviewing a Trump administration request to reinterpret key parts of Section 230, for the same reasons cited by GOP senators. Tech companies are expected to challenge possible action on free-speech grounds. Google’s growth across a range of business lines over the years has expanded its pool of critics, with competitors and some customers complaining about its tactics. Specialized search providers like Yelp Inc. and Tripadvisor Inc. have long voiced such concerns to U.S. antitrust authorities, and newer upstarts like search-engine provider DuckDuckGo have spent time talking to the Justice Department. News Corp, owner of The Wall Street Journal, has complained to antitrust authorities at home and abroad about both Google’s search practices and its dominance in digital ads. Some Big Tech detractors have called to break up Google and other dominant companies. Courts have indicated such broad action should be a last resort. The outcome could have a considerable impact on the direction of U.S. antitrust law. The Sherman Act, which prohibits restraints of trade and attempted monopolization, is broadly worded, leaving courts wide latitude to interpret its parameters. Because litigated antitrust cases are rare, any one ruling could affect governing precedent for future cases. The tech sector has been a particular challenge for antitrust enforcers and the courts because the industry evolves so rapidly. Also, many products and services are offered free to consumers, who in a sense pay with the valuable personal data companies such as Google collect. The search company outmaneuvered the Federal Trade Commission nearly a decade ago. The FTC, which shares antitrust authority with the Justice Department, spent more than a year investigating Google but decided in early 2013 not to bring a case in response to complaints that the company engaged in “search bias” by favoring its own services and demoting rivals. Competition staff at the agency deemed the matter a close call, but said a case challenging Google’s search practices could be tough to win because of what they described as mixed motives within the company: a desire to both hobble rivals and advance quality products and services for consumers. The Justice Department’s case doesn’t focus on a search-bias theory. Google’s growth across a range of business lines has expanded its pool of critics. The company exhibited at the CES 2020 electronics show in Las Vegas in January. Google made a handful of voluntary commitments to address other FTC concerns. The resolution was widely panned by advocates of stronger antitrust enforcement and continues to be cited as a top failure. Google’s supporters say the FTC’s light touch was appropriate and didn’t burden the company as it continued to grow. The Justice Department’s current antitrust chief, Makan Delrahim, spent months negotiating with the FTC last year for jurisdiction to investigate Google this time around. He later recused himself in the case—Google was briefly a client years before while he was in private practice—as the department’s top brass moved to take charge. The lawsuit comes after internal tensions, with some department staffers questioning Attorney General William Barr’s push to bring a case as quickly as possible, the Journal has reported. They worried the department hadn’t yet built an airtight case and feared a rush to litigation could lead to a loss in court. They also worried Mr. Barr was driven by an interest in filing a case before the election. Other staff members were more comfortable moving ahead. Mr. Barr has pushed the Justice Department to move ahead on the belief that antitrust enforcers have been too slow and hesitant to take action, according to a person familiar with his thinking. He has taken an unusually hands-on role in several areas of the department’s work and repeatedly voiced interest in investigating tech-company dominance. Attorney General William Barr has pushed to bring an antitrust case against Google, in some cases taking an unusually hands-on role in preparations. If the Microsoft case from 20 years ago is any guide, Mr. Barr’s concern with speed could run up against the often slow pace of litigation. After a circuitous route through the court system, including one initial trial-court ruling that ordered a breakup, Microsoft reached a 2002 settlement with the government and changed some aspects of its commercial behavior but stayed intact. It remained under court supervision and subject to terms of its consent decree with the government until 2011. Antitrust experts have long debated whether the settlement was tough enough on Microsoft, though most observers believe the agreement opened up space for a new generation of competitors.

#### Teva case thumps and proves DOJ cases are compartmentalized

Bryan **Koenig, 7-26**- Bryan Koenig is a senior competition reporter at Law360. “Price-Fix 'Common Thread' Links Glenmark To Teva, DOJ Says.” Law360. July 26, 2021. <https://www.law360.com/articles/1406613/price-fix-common-thread-links-glenmark-to-teva-doj-says>

Law360 (July 26, 2021, 6:45 PM EDT) -- Glenmark cannot sever the criminal price-fixing case against it from the allegations brought against fellow generic drugmaker Teva, the U.S. Department of Justice told a Pennsylvania federal judge Friday, arguing that Glenmark's bid for separate proceedings ignores significant overlap in the charges against the companies. While Glenmark contends that a single cholesterol drug ties the charges against it to claims of a broader price-fixing conspiracy, with Teva in the center, the DOJ's Antitrust Division countered that despite separate alleged arrangements between the two drugmakers and others who've already cut deals with prosecutors, the arrangements also "share many features that make joinder proper." "All three conspiracies occurred simultaneously; involved some of the same co-conspirators and witnesses; were carried out through substantially similar means and methods; violated the same statute, Section 1 of the Sherman Antitrust Act; and had similar, yet discrete, objectives," the DOJ said. "The charged conspiracies thus have a clear 'transactional nexus' warranting joinder under [Federal Rules of Criminal Procedure] 8(b)." Glenmark and Teva are among several major drugmakers to face criminal price-fixing charges in the case, which has also seen parallel civil proceedings from state attorneys general and private plaintiffs that have ensnared virtually the entire generic drugs industry. In its criminal case, the DOJ says the price-fixing scheme has cost payors at least $200 million. But according to Glenmark, its defense would be prejudiced by keeping the sole count against it consolidated with the charges against Teva, because Glenmark's only involvement is alleged inflated pricing for cholesterol medication pravastatin. Teva, in contrast, faces additional allegations of criminal antitrust violations. The government's three-count indictment charged three separate and distinct conspiracies, alleging price-fixing of at least 10 different medications, Glenmark noted July 1 in moving to be severed from the rest of the case that doesn't relate to pravastatin. Teva is the only common thread in all three counts, the drugmaker said. On Friday however, the DOJ countered that in some instances where more than two firms marketed the same drug, "the conspiracies were mutually reinforcing." "Further, contrary to Glenmark's assertion, its role in the scheme was not limited to conspiring to increase the price of pravastatin. Count one specifically alleges a conspiracy affecting not only pravastatin, but also 'other generic drugs,'" the DOJ said. "Moreover, the United States anticipates that evidence will show that employees central to conspiracies charged in counts two and three were also involved in Glenmark and Teva's efforts to increase the price of adapalene and nabumetone." Additionally, some customers were victimized by "all of the charged conspiracies" and some witnesses and testimony will speak to more than one charge or conspiracy, according to the response brief. The DOJ acknowledged that count one focuses primarily on pravastatin while count two focuses "largely" on drugs sold by both Teva and Taro while count three similarly focuses principally on drugs sold by both Teva and Sandoz. "But certain evidence will establish a common thread among all three conspiracies," the DOJ said. Based on talks between the drugmakers "to ensure that the price increases were effective," the DOJ tracked price hikes Glenmark instated for several treatments, not just pravastatin. The DOJ further argued that pursuing the case against both drugmakers at the same time is more efficient and that even if there are concerns that the greater weight of evidence against Teva could also bias the jury against Glenmark, "any potential prejudice to Glenmark" could be "easily addressed through a limiting instruction." For all its talk of overlap, in asserting that Glenmark won't be prejudiced by the claims against it, the DOJ conversely argued that it "expects to present evidence at trial that Glenmark sold very few drugs affected by the conspiracies charged in counts two and three." "The United States expects to present evidence that customers approached the conspirators for prices and bids on specific products, at which point the conspirators either submitted or declined to submit bids consistent with the relevant conspiracy," the DOJ said. "Because Glenmark sold very few of the products relevant to counts two and three, the jury will be fully capable of compartmentalizing the evidence against Teva only." Representatives for Glenmark and the government did not immediately reply Monday to requests for comment. The DOJ is pushing for trial in January 2022. When Judge R. Barclay Surrick does set a date, it will be without input from the private plaintiffs and state enforcers in the multidistrict litigation; on July 14 the court rejected MDL plaintiffs' bid to participate in the criminal case as amicI in an effort to ensure speedy proceedings. Teva has said in court filings that it doesn't oppose Glenmark's bid to sever the charges. Teva's only position on the matter is that severance should be decided before a schedule is set. The allegations themselves haven't been the only question of overlap to churn up the case. In June, Morgan Lewis & Bockius LLP bowed out of representing Glenmark after a fight over disqualification with the DOJ springing from government concerns that the firm also represents Teva in the civil price-fixing litigation and that the criminal matter could be affected by divided loyalties.

#### Previous DoJ antitrust cases prove that issues are compartmentalized

Jay B. **Sykes,** 20**21**- Jay B. Sykes is a legislative attorney and is published/writes for the congressional research service. “The Facebook Antitrust Lawsuits and the Future of Merger Enforcement.” Congressional Research Service. February 16, 2021. <https://www.hsdl.org/?view&did=850625>

Refusals to Deal The plaintiffs’ allegations involving access to Facebook Platform get into different doctrinal territory. As a general matter, companies are free to choose their business partners and counterparties; there is no general duty to deal with rivals. But the Supreme Court has held that monopolists may have such a duty in certain limited circumstances. Specifically, the Court has concluded that dominant firms may violate the law when they terminate profitable courses of dealing with competitors while continuing to do business with other parties. The plaintiffs may be able to frame the restrictions on Facebook Platform—which allegedly excluded only rival app developers—in these terms. However, the Supreme Court has also described this requirement as being “at or near the outer boundary” of monopolization law. And Facebook can defeat such a claim by establishing a procompetitive justification for the restrictions (i.e., the protection of Congressional Research Service 4 intellectual property from infringement by competitors). It’s difficult to say which side has the better case without more evidence. Monopoly Broth As noted, the FTC and state AGs have three principal targets: Facebook’s Instagram acquisition, its WhatsApp purchase, and its policies governing Facebook Platform. All three are packaged together in a monopolization claim. This bundling of the plaintiffs’ allegations raises the question of how the court will assess Facebook’s separate actions. One option would involve an independent evaluation of each one in more or less compartmentalized fashion. Another would entail a broader inquiry into the combined effect of Facebook’s conduct on the competitive landscape. The case law doesn’t offer a definitive map here. Some decisions take the latter approach and evaluate the “synergistic effect” of the defendant’s challenged behaviors. In the words of one court: “[i]t is the mix of various ingredients . . . in a monopoly broth that produces the unsavory flavor.” However, other judges have been more skeptical of the notion that different types of independently lawful conduct can add up to illegal monopolization. The court’s resolution of this question may therefore have ripples beyond the Facebook lawsuits. The plaintiffs’ possible reliance on a “monopoly broth” theory also dovetails with an issue that has generated discussion within the antitrust bar. Recently, regulators and practitioners have floated the possibility that monopolization doctrine may be a better vehicle than the Clayton Antitrust Act for unwinding serial acquisitions by a dominant firm. There are potential advantages and disadvantages to both approaches. Under Section 7 of the Clayton Act—which prohibits acquisitions that may “substantially lessen” competition and can be used to reverse consummated transactions—plaintiffs need not prove that a defendant has monopoly power. However, Clayton Act plaintiffs challenging a series of acquisitions face the risk that no single deal will be deemed sufficiently objectionable when considered in isolation. In such cases, monopolization law—which offers the possibility of “monopoly broth” or “course of conduct” liability—may furnish regulators with a more promising litigation strategy (provided, of course, that they can establish monopoly power). The Facebook lawsuits may be test cases for this theory: while the FTC has limited itself to a monopolization claim, the state AGs have alleged both monopolization and violations of the Clayton Act. Issues for Congress The Facebook litigation will likely take several years to play out. But commentators have proposed several steps Congress could take in the interim to address perceived deficiencies in the merger-review regime. Changes to Potential Competition Doctrine. Some analysts have advocated changing the legal standards governing acquisitions of potential competitors, like Facebook’s purchase of WhatsApp. Under current law, plaintiffs face fairly demanding evidentiary hurdles to establish that a target company poses a competitive threat to an acquirer when the firms do not operate in the same market. The precise formulations here vary. One court has required plaintiffs to establish that a target “would likely” enter the acquirer’s market but for the merger and that entry would have a “substantial likelihood” of deconcentrating the market. Another has demanded “clear proof” of entry but for the acquisition. Members of Congress of both parties have endorsed lowering these burdens to make it easier for regulators to block mergers of potential rivals. Heightened Scrutiny of Big Tech Acquisitions. Other commentators have proposed rules directed specifically at Big Tech firms. One option would involve shifting the burden of proof to defendants in mergers involving dominant tech platforms—that is, requiring Big Tech firms to establish that their proposed acquisitions do not harm competition. (One recently introduced bill—the Competition and Antitrust Law Enforcement Reform Act—would do just that for certain categories of mergers involving large firms in any sector of the economy.) Congress could also lower the size thresholds that trigger pre- merger review by the antitrust agencies for deals involving large tech companies. While both the Instagram and WhatsApp deals were reviewed, observers have supported such changes as prophylactic measures to prevent future anticompetitive transactions that might otherwise slip under the radar. Finally, others have gone further and supported categorical bans on acquisitions by Big Tech platforms.

#### Due to previous SEP case failures, the DOJ isn’t trusted and can’t properly handle cases- set a dangerous precedent

Jay **Jurata and** Emily **Luken, 8-24**- John "Jay" Jurata is a partner and leader of the antitrust and competition group at Orrick Herrington & Sutcliffe LLP. Emily N. Luken is a managing associate at the firm. “DOJ Should Withdraw Improper Intervention In SEP Cases.” Law360. August 24, 2021. <https://www.law360.com/articles/1415348/doj-should-withdraw-improper-intervention-in-sep-cases>

Law360 (August 24, 2021, 5:14 PM EDT) -- During the Trump administration, the Antitrust Division of the U.S. Department of Justice forcefully advocated against the application of competition law to disputes involving standard-essential patents subject to a commitment to license on fair, reasonable and nondiscriminatory terms. Spearheaded by former Assistant Attorney General for Antitrust Makan Delrahim, the prior DOJ pursued an aggressive campaign to advance its "New Madison" approach. This approach argued, among other things, that antitrust law was not an appropriate vehicle through which to address an SEP holder's breach of FRAND. The prior DOJ's advocacy campaign included intervening in multiple district court cases under Title 28 of the U.S. Code, Section 517, which permits "any officer of the Department of Justice ... to attend to the interests of the United States in a suit pending in a court of the United States." The DOJ's intervention in many of these cases was an abuse of process under Section 517 because the cases involved disputes between private, highly sophisticated parties, and there was no obvious government interest. Prior to the last administration, the DOJ — both the Antitrust Division and the agency as a whole — historically did not use its authority under Section 517 to intervene in disputes of this nature. Because the prior administration's use of Section 517 was improper, the current DOJ should withdraw all statements of interest filed by the previous administration in cases that are still pending.[1] Prior to 2017, the DOJ submitted approximately 130 statements in cases in which there was a clear government interest and/or the district court explicitly solicited the statements. Examples of such submissions pursuant to Section 517 include: Disputes involving the potential immunity of foreign officials;[2] Other cases implicating foreign affairs and national security concerns;[3] Cases involving election and voter rights;[4] Cases involving other civil rights;[5] Qui tam actions brought under the False Claims Acts;[6] Cases presenting questions of constitutional and administrative law;[7] Cases in which the government was a defendant;[8] Cases involving a government program, property or platform;[9] and Civil actions with parallel pending criminal proceedings.[10] Each of these situations involves disputes in which there was an obvious government interest. Delrahim turned those norms and precedents on their head when he took the helm of the Antitrust Division in 2017. He was explicit in his intention to break with prior practice and intervene in district court cases to advance the New Madison policy approach. In a 2018 speech, he touted the Division's "recent effort to expand our amicus program to increase our participation in private litigation not only in the Supreme Court, but at the district ... courts as well."[11] He specifically mentioned "issues involving the interface between antitrust an IP" as those "attracting our interest as an amicus."[12] As a result of these efforts, the DOJ intervened through Section 517 at the district court level in multiple cases. These included Continental Automotive Systems Inc. v. Avanci LLC in the U.S. District Court for the Northern District of Texas in 2020,[13] Lenovo (United States) Inc. v. IPCom GmbH & Co. in the U.S. District Court for the Northern District of California in 2019,[14] and Intel Corp. v. Fortress Investment Group LLC in the Northern District of California in 2020.[15] The DOJ also filed a notice of intent to file a statement of interest in U-Blox AG v. InterDigital Inc. in the U.S. District Court for the Southern District of California in 2019[16] but did not file a statement after the plaintiffs agreed to withdraw reliance on their antitrust claim solely for purposes of their request for a temporary restraining order. Again, these interventions were a departure from historical norms because these cases were private disputes between highly sophisticated parties in which there was no obvious government interest. These interventions in furtherance of the New Madison approach also establish a dangerous precedent enabling the DOJ to insert itself in any case involving any issue. The absence of any limiting principle frustrates the purpose of Section 517, which is to "attend to the interests of the United States." The current DOJ should withdraw these inappropriately filed statements of interest in pending cases because they never should have been filed. This includes the appeal of Continental v. Avanci in the U.S. Court of Appeals for the Fifth Circuit, in which the DOJ took the welcome step of writing to the appellate court to emphasize that it did not file any submission at the appellate level "expressing its current views of the antitrust issues raised by this case" even though Avanci and its co-defendants repeatedly cited the district court statement of interest in their appellate brief. Although this letter is certainly a positive development, the current DOJ should eliminate any remaining uncertainty by explicitly withdrawing the previously filed statement of interest. In addition to being inappropriate because they were inconsistent with the underlying purpose of Section 517 and historical DOJ practice, the statements of interest filed by the prior DOJ's Antitrust Division may not reflect the views on the merits of the current DOJ. In each of the prior submissions, the DOJ argued the central thesis of the New Madison position: that an SEP-holder's breach of a FRAND obligation does not violate antitrust law. Notably, this position conflicts with numerous well-reasoned cases[17] and sound economics. Competition law absolutely should apply to breaches of FRAND. The FRAND commitment preserves and protect the benefits of ex ante competition between technologies — both patented and public domain — that occurs before the standard is set. The breach of a FRAND commitment may eliminate that benefit by harming consumers through higher prices, lower output, and/or reduced innovation.

### Politics DA---2AC

#### Reconciliation blocks infrastructure- won’t be ready in time

Sahil Kapur, 9-13-2021, "Senate back to jampacked to-do list in key stretch for Biden agenda," NBC News, https://www.nbcnews.com/politics/congress/senate-returns-jampacked-do-list-biden-s-agenda-faces-crucial-n1279000

House Democrats have set a soft deadline of Sept. 27 to vote on the Senate-passed infrastructure bill, but its prospects of passage may hinge on the larger bill's readiness, because progressives have threatened to vote it down otherwise.

House committees are racing to mark up their parts of the bill. But they may not be done in time.

"There's no way we can get this done by the 27th if we do our job. There's so much differences that we have here," Sen. Joe Manchin, D-W.Va., a vital swing vote on the multitrillion-dollar bill, said Sunday on CNN's "State of the Union."

#### Abortion and Afghanistan thump

Jordain Carney, 9-7-2021, "Democrats stare down nightmare September," TheHill, https://thehill.com/homenews/senate/570825-democrats-stare-down-nightmare-september

Congress’s long to-do list has only expanded over the break following the botched Afghanistan withdrawal and a Supreme Court decision allowing a Texas law that bans abortions after six weeks to remain in place.

Lawmakers, including Democrats, are vowing to grill administration officials over the Afghanistan exit, where the administration was caught off guard by the Taliban’s quick rise and overestimated both the Afghan government and military.

Though Democrats largely agree with Biden’s ultimate endgame, withdrawing U.S. military forces, the president has found little cover from Democratic lawmakers over his handling of the exit.

“The U.S. Senate Armed Services Committee should quickly begin investigating the rapid collapse of the Afghan government and forces after two decades of American investment of resources and troops, and why we were unable to better anticipate it,” Sen. Tammy Duckworth (D-Ill.) said in a statement.

Pelosi, meanwhile, added the abortion fight to the House agenda after the Supreme Court decision.

“Upon our return, the House will bring up Congresswoman Judy Chu’s Women’s Health Protection Act to enshrine into law reproductive health care for all women across America,” Pelosi said, referring to legislation that would codify Roe v. Wade.

The Senate Judiciary Committee has also vowed that it will hold a hearing on the Supreme Court’s “shadow docket,” which the justices have increasingly used to issue decisions on weighty cases on an emergency basis.

But the fight could also reignite Democratic tensions. The same bill has only 48 Democratic supporters in the Senate, where progressives are renewing their calls to nix the filibuster and expand the Supreme Court.

#### Debt ceiling thumps

Victor Reklaitis, 9-11-2021, "Debt limit, social spending, infrastructure battles loom in ‘uniquely frenetic period’ for Congress," MarketWatch, https://www.marketwatch.com/story/debt-limit-social-spending-infrastructure-battles-loom-in-uniquely-frenetic-period-for-congress-11631045095

“The debt ceiling always gets raised, but this time will be nerve-wracking, amid threats of a government shut-down,” he added. “Can massive infrastructure bills win passage in this climate? A major haircut will be required, which could force angry House progressives to oppose infrastructure spending rather than accept pared-back bills.”

#### Nothing will pass, tons of thumpers, and Biden’s PC is sapped

Anita Kumar and Christopher Cadelago, 9-7-2021, Senior Editor, Standards & Ethics for POLITICO; White House correspondent. "Abortion fight adds to Biden’s growing policy backlog," POLITICO, <https://www.politico.com/news/2021/09/07/abortion-fight-biden-policy-510003>

Biden and his fellow Democrats are currently trying to come up with a $ 3.5 trillion reconciliation program that would fund paid time off, child care and education, as well as climate change initiatives. They are also pushing a $1 trillion bipartisan infrastructure bill to fix crumbling roads, bridges and sewers. The hope is that if Democrats push through these reforms, they can build momentum for other agenda items and the midterms beyond.

“When you look at what has been accomplished so far and what is almost inevitably going to happen in reconciliation, it’s a huge accomplishment,” said Democratic strategist Adrienne Elrod, who worked on Biden’s campaign. “Once we get past reconciliation, then I think some of the other top priorities that the president has consistently talked about from the election campaign until now… will come to the fore.”

But whatever momentum there was for reconciliation and infrastructure bills, it has been dashed in recent weeks. Biden faces the lowest approval ratings of his presidency so far, following the botched troop withdrawal from Afghanistan. The calendar also plays against the party. Congress is already engrossed in passing Biden’s two main spending bills and will soon have to grapple with efforts to maintain government funding and increase the federal borrowing limit. And by the end of the year, members of Congress will turn their attention to the campaign – first the midterms, then the next presidential race.

With the closing of legislative windows, the angst in many corners of the progressive ecosystem has grown stronger.

#### Biden has no PC

Jennifer Oliver O'Connell, 9-10-2021, "Joe Biden Has Zero Political Capital, so Grandpa Stompy Foot Has to Work," redstate, https://redstate.com/jenniferoo/2021/09/10/joe-biden-has-zero-political-capital-so-grandpa-stompy-foot-has-to-work-n440971

You see, Joe Biden has no political capital left. Absolutely none. Zero, Zip, Nada.

Depending upon what poll you look at, his approval rating is hovering between 36 and 45 percent. After this stink bomb thrown into the manhole of the sewer that is Afghanistan, it’s doubtful it will improve.

#### PC is fake.

Roberts 20 [David Roberts, writer about energy and climate change @ Vox. 12-1-2020, "Joe Biden should do everything at once," Vox, accessed 7-12-2021, https://www.vox.com/policy-and-politics/21724758/biden-transition-trump-polarized-climate-change-health-immigration] //BY \*\*\*edited for gendered language

Two-party partisan politics really is a zero-sum game

The theme of these stories is that Democrats relied on clever sequencing over and over again, imagining some amount of political capital (“credibility”) that they could ~~husband~~ [gather] and spend strategically to get assistance across the aisle, at every juncture underestimating the ferocity and unanimity of Republican opposition. They kept behaving as though they would find good-faith negotiating partners, as though they were still in the postwar American era of relatively low (or at least manageable) polarization.

What too few of them realized was that they were already in a new era of near-total polarization, with the population sorted into like-minded enclaves, a bifurcated media ecosystem nurturing stacked (and diametrically opposed) “mega-identities,” and voters motivated primarily by “negative partisanship,” which is to say, hatred of the other side.

A fully polarized two-party system really is a zero-sum game. Any victories or gains by one side come at the other side’s expense, even if the victory secures shared goals. The rational course for the party out of power is to fight with full intensity against everything, always, and that’s what Republicans did under Obama. With scarcely any exceptions, from 2010 through 2020, they pushed in every case for maximal partisan advantage, no matter the stakes or possible cost.

### T Increasing

#### Counter interp---increase means greater---doesn’t require preexisting.

Reinhardt 05. Circuit Judge. "Reynolds v. Hartford Fin. Services Group, 426 F.3d 1020". No Publication. 10-3-2005. https://casetext.com/case/reynolds-v-hartford-fin-services-group

Specifically, we must decide whether charging a higher price for initial insurance than the insured would otherwise have been charged because of information in a consumer credit report constitutes an "increase in any charge" within the meaning of FCRA. First, we examine the definitions of "increase" and "charge." Hartford Fire contends that, limited to their ordinary definitions, these words apply only when a consumer has previously been charged for insurance and that charge has thereafter been increased by the insurer. The phrase, "has previously been charged," as used by Hartford, refers not only to a rate that the consumer has previously paid for insurance but also to a rate that the consumer has previously been quoted, even if that rate was increased before the consumer made any payment. Reynolds disagrees, asserting that, under the ordinary definition of the term, an increase in a charge also occurs whenever an insurer charges a higher rate than it would otherwise have charged because of any factor — such as adverse credit information, age, or driving record — regardless of whether the customer was previously charged some other rate. According to Reynolds, he was charged an increased rate because of his credit rating when he was compelled to pay a rate higher than the premium rate because he failed to obtain a high insurance score. Thus, he argues, the definitions of "increase" and "charge" encompass the insurance companies' practice. Reynolds is correct.

"Increase" means to make something greater. See, e.g., OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The action, process, or fact of becoming or making greater; augmentation, growth, enlargement, extension."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) (defining "increase" as "growth, enlargement, etc[.]"). "Charge" means the price demanded for goods or services. See, e.g., OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The price required or demanded for service rendered, or (less usually) for goods supplied."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("[T]he cost or price of an article, service, etc."). Nothing in the definition of these words implies that the term "increase in any charge for" should be limited to cases in which a company raises the rate that an individual has previously been charged.

While no court has considered whether an increase requires a previous charge within the meaning of FCRA, the Sixth Circuit has employed the term "increase" in an analogous circumstance, stating, "An increase in the base price of an automobile that is not charged to a cash customer, but is charged to a credit customer, solely because he is a credit customer, triggers [the Truth in Lending Act's] disclosure requirements." Cornist v. B.J.T. Auto Sales, Inc., 272 F.3d 322, 327 (6th Cir. 2001). Defined in this manner, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price.

#### Reasonability---substantially is used because competing interps create a race to the bottom.

3 James Thomas 68. Professor of Law, Tulsa University School of Law. “Conglomerate Merger Syndrome--A Comparison: Congressional Policy with Enforcement Policy” https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1167&context=fac\_pub

. Substantial: As with the word "competition," Congress did not provide an explicit definition of the term "substantial." Responding to this apparent deficiency520

---FOOTNOTE 520 STARTS, MID-SENTENCE---

520. This outward deficiency comes from the strict judicial construction that has prevailed in the field of antitrust. Think of the consequences of Congress providing a definition to the word "substantial." Any definition can act in a restrictive manner. The fact that no definition was provided is indicative of the desire to formulate a broad, unrestricted prohibition.

---FOOTNOTE 520 ENDS, SENTENCE CONTINUES---

in the statute, lawyers have hastened to fasten a quantitative test to this word. In order to measure substantiality, lawyers have insisted on the measurement of the relevant geographical and product market.52' From the formulation of market boundaries, the next legal step was to find or measure a substantial lessening of competition within that market. In each case, courts were called upon to measure abstract statutory terms. I might say, however, that this abstractness comes from a general misunderstanding of the correct way to read a statute. Though Congress used these general and abstract terms for the purpose of avoiding a restrictive interpretation, courts have effectively narrowed the application of the prohibition.

### Subjective---2AC/1AR

#### Its subjective.

Roger Leroy Miller 08. PhD Economics @ Chicago. Glenco Economics Today and Tomorrow. <https://en.calameo.com/read/00082521404f02355b178>

Because the language of the Sherman Act was so vague, a new law was passed in 1914 to sharpen its antitrust provisions. The Clayton Act prohibited or limited a number of very specific business practices that lessened competition substantially. The Clayton Act, however, does not state what the term substantially means. As a result, it is up to the federal courts and agencies to make a subjective decision as to whether the merging of two corporations would substantially lessen competition.

### Advantage CP

### States CP --- 2AC

#### State labor actions get pre-empted under the NLRA---thousands of empirics.

Moshe Marvit 17. attorney and fellow at the Century Foundation, and co-author with Richard D. Kahlenberg of Why Labor Organizing Should Be a Civil Right: Rebuilding a Middle-Class Democracy by Enhancing Worker Voice. “The Way Forward for Labor Is Through the States.” The American Prospect. 9/1/2017. <https://prospect.org/labor/way-forward-labor-states/>

While reforms to federal law have been blocked by Congress, states and cities have faced a different hurdle: the courts. Starting in 1959, **the Supreme Court has written into the National Labor Relations Act (NLRA) a continually expanding preemption doctrine that prevents states and cities from passing laws that touch upon anything related to labor**, involve the interpretation of a collective bargaining agreement, or even involve issues that the courts believe Congress intended to leave to the free play of market forces. Congress can, and often does, expressly preempt states from passing laws that fall within a defined scope. Neither the NLRA nor its extensive legislative history, however, contains any mention of preemption: Congress did not expressly preempt states from acting. **In instances where Congress has not expressly preempted states from acting, state laws that actually conflict with federal laws are still preempted**. However, neither the NLRA nor its legislative history show any consensus that Congress meant to push states and cities from making laws that advanced, and do not conflict with, the pro-collective-bargaining policies of the NLRA. And yet, as Harvard Law Professor Ben Sachs has pointed out, the Supreme Court has not employed the typical typologies of preemption at all when dealing with labor law. Rather, it has created a preemption doctrine [that] is among the broadest and most robust in federal law. In most other areas of worker protection, from minimum wage to antidiscrimination laws, the federal government has set the floor under which states and cities may not go, but they can and often do raise the ceiling by increasing state or local minimum wage or including additional protected categories such as sexual orientation to existing protections. Indeed, the evolution of many of the nation's employment and civil rights protections began at the state level and trickled up to the federal government. It is only in the area of workers' labor rights that states and cities are powerless to act and that, solely as the result of judicial decisions. The Supreme Court's preemption doctrine started with the 1959 case, San Diego Building Trades v. Garmon, where the employer got a state court injunction against the union for picketing. The Supreme Court should have held that the picketing that the union was engaged in was a protected right under federal labor law, and therefore the state could not pass a law that conflicts with that right. Instead, the Court went further and held that Congress gave the National Labor Relations Board primary agency jurisdiction, and so when something is arguably protected or prohibited by the NLRA, then only the Board can act. Furthermore, only the Board can answer the initial question of whether conduct is arguably under the Board’s jurisdiction. The Supreme Court then doubled down on its preemption doctrine in the 1976 case, Machinists v. Wisconsin Employment Relations Commission. In the Machinist case, an employer brought an unfair labor practice charge against union workers who engaged in concerted refusal to work overtime during contract negotiations. The NLRB dismissed the charge because it held that the work refusal was not prohibited under the NLRA, so the employer brought a state court action against the union. In response, the Supreme Court expanded its earlier Garmon preemption to hold that Congress intended that certain conduct be left unregulated and left to be controlled by the free play of economic forces. Though the union in the Machinists case benefitted from the Court’s expansion of federal preemption, the decision has led to states and cities being almost absolutely prohibited from passing laws that promote unionization and collective bargaining. These Court decisions, and **thousands of lower court decisions that have followed the precedent in overturning state and local laws,** rely on three types of specious and archaic reasons that deserve challenge and reconsideration. First, the Court has repeatedly shown a strong reliance on the state of the economy and labor force during the time when these decisions were issued. In the Machinists case, the Court described how it experimented with various types of preemption before settling on the broad form begun by Garmon, stating, as it was, in short, experience, not pure logic, which initially taught that each of these methods sacrificed important federal interests in a uniform law of labor relations. The experience the Court referred to was that of the late 1940s and 1950s, when union membership was at its peak. Whatever balance between labor and management that may have existed then has since eroded. Second, the Court has long interpreted the statute to require a uniform labor law across the country, and yet, labor law has become in many ways a crazy quilt, varying from region to region, from state to state, and from one president to the next. The NLRB has become a highly politicized agency, with its decisions swinging wildly every time a new president appoints new members and a general counsel. Cases that proceed through the National Labor Relations Board are often appealed to federal courts, and different federal circuits often come to opposite conclusions, meaning that the laws in different states effectively differ though it is the courts, not state or local governments, that create those differences. Further, the expansion of state right to work laws, as well as a variety of state public sector labor laws have also undermined any goal of national uniformity in labor law. Lastly, the Court's determination that Congress intended to leave a wide variety of conduct to the free play of economic forces has, in the words of NYU Law Professor Cynthia Estlund, done what Congress did not do in the NLRA, or even with the Taft-Hartley Act: It has granted to employers a federal right to use their economic power against unions. The Congress that passed the NLRA may have intended to ensure a balance between employer and union power, but there is no indication that it intended employers to be able to use the Act to evade any regulation in broad areas through a laissez faire argument. The result of this judicially created broad preemption has been to limit state and local experimentation in line with what Justice Brandeis described as laboratories of democracy with labor laws that advance the stated purpose of federal labor law. However, since states and cities cannot act in the field of labor law, all discussions of federal labor law reform are purely theoretical and lack any empirical basis for their possible effects. Numerous labor law scholars have written critically over the years of the rationale for such broad preemption, as well as the effects it has had on workers' ability to organize. Recently, Lewis & Clark Law Professor Henry Drummonds came up with a list of ten potential reforms that would advance the pro-collective bargaining mission of the NLRA if states could be able to pass such reforms under normal preemption rules. These include allowing states to: increase damages for violating workers' labor rights so the penalties are in line with those for other forms of workplace discrimination; experiment with restrictions on permanent replacement of striking workers and on the use of employer lockouts; experiment with â€œcard checkâ€ recognition of the union; provide equal access to union advocates as well as employers during a campaign for unions; and require arbitration if an impasse arises in the bargaining over a first contract. **The one and only major state labor reform since** the **1935** enactment of the NLRA has had a profound effect on the division of wealth and power in the United States. That, of course, **was the provision of the 1947 Taft-Hartley Act enabling states to pass right to work laws.** Allowing states and cities to create local rules that promote unionization and collective bargaining that are tailored to local needs and local industries could prove just as significant in the opposite direction.

#### The DOJ and FTC undermine states.

The Open Markets Institute and Service Employees International Union 19. “How the Antitrust Agencies Can Help—Instead of Hurt—Workers”. https://www.justice.gov/atr/page/file/1217856/download

The DOJ and the FTC have largely failed American workers today by allowing a concentration crisis in scores of industries to weaken competition for labor. Instead of actively policing mergers for harms to workers, they have let employer-side concentration reach very high levels. Troublingly, when the FTC and DOJ have acted against practices in labor markets, the two agencies often have used antitrust laws to either undermine efforts by employees and states to challenge abusive behavior by employers or actually targeted efforts by workers or professional to work together. The FTC, for instance, has filed numerous complaints against workers for engaging in collective bargaining and other joint action. Furthermore, the FTC has campaigned against state and local occupational licensing rules that can enhance the bargaining power and earnings of workers, professionals, and independent entrepreneurs. The DOJ meanwhile has endorsed legal standards that would empower franchisees to collude against workers.

The DOJ’s and FTC’s general inactivity against employers and activity against workers reinforce and deepen inequality between the individual and the corporation. The agencies should reorient their enforcement priorities and focus on protecting workers from employers rather than on interfering with the basic rights of workers, professionals, and independent entrepreneurs to organize.2

#### Even with fiat, states lack enforcement mechanisms and administrative infrastructures to protect workers’ rights.

Bourree Lam 17. former staff writer at The Atlantic. She was previously the editor of Freakonomics.com. “Will States Take Up the Mantle of Worker Protection?” The Atlantic. 1/17/2017. <https://www.theatlantic.com/business/archive/2017/01/worker-protection-schneiderman/513182/>

But it’s not as though states took a backseat during the Obama administration. Some states took on an increased role in handling wage and labor practices, with a growing number of have passed their own minimum wage and paid-leave laws. Seven states—California, Connecticut, Massachusetts, Oregon, Vermont, and most recently Arizona and Washington—now have laws requiring paid sick leave. Minimum wage went up in 21 states and 22 cities at the start of this year. For labor advocates, the concern about this approach is what happens to people in states that are less adamant about enforcement. While workers in states that have been active on these issues in the past—such as California, Connecticut, Illinois, and Massachusetts to name a few—will likely continue to be protected by their state agencies, states without established resources in place will **have a harder time stepping up in the same way**. In Georgia, for example, there is no state-level enforcement process, and wage claims are **filed directly to the Department of Labor**. “It’s far from ideal, if this ends up happening,” says Tsedeye Gebreselassie, an attorney at the National Employment Law Project. “The way that this should be done is that the federal Department of Labor remains an effective recourse for workers whose rights have been violated, not just on minimum wage but all the federal laws that the Department of Labor enforces. But then you also have states there too as another avenue through which workers can recover their unpaid wages.” Additionally, though states can play a key role on some employment issues, there are workplace issues that **require federal enforcement**. "States can play a tremendously important role in combating wage theft, but in other critical areas, like workplace safety and health or workers' right to organize, states may have a harder time filling in the gap because they are often preempted by federal law from directly enforcing these laws," says Gerstein. “To me, there’s no question that it’s federalism from below,” says Janice Fine, an associate professor and labor expert at Rutgers University’s School of Management and Labor Relations. Fine has been studying how states and localities think about enforcement, and while she’s concerned about states with less enforcement, she’s found that there can be see creative solutions. She cites the example of the Fair Food Standards Council in Florida, a labor group which won over companies on fair work conditions and now acts as a private enforcement agency to protect farmers on health, safety and wage issues, as well as the work of the Workers Defense Project in Texas, which has notably pushed through a bill that makes it easier for police departments across Texas to arrest employers engaging in wage theft. A state-by-state approach means that worker protection becomes less an American project, and more a feature of the particular place one lives. And for workers who don’t live in the states that will fill in where the federal government leaves off, that could mean many American workers not getting paid what they’re owed.

#### Can’t solve international coop---the DOJ and FTC are key to American antitrust’s global solvency.

Garza et. al. 07. Chair of the Antitrust Modernization Commission, a bi-partisan blue ribbon commission created by Congress to advise Congress and the President on the state of U.S. Antitrust law enforcement and former DOJ Antitrust Deputy Assistant Attorney General for Regulatory Affairs. “Antitrust Modernization Commission: Report and Recommendations: Chapter 2,” p. 216-217. Antitrust Modernization Commission. 2/4/2007. https://govinfo.library.unt.edu/amc/report\_recommendation/chapter2.pdf

The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have made extensive efforts to improve cooperation between the United States and other nations’ antitrust enforcers.26 Both U.S. antitrust agencies “enjoy [a] strong cooperative relationship[] with a large and increasing number of foreign enforcement agencies, enabling close cooperation on cases, coordination on international antitrust policy, and provision of technical assistance to new agencies around the world.”27 Whereas U.S. requests for cooperation previously took up to a year to be processed,28 today antitrust agencies worldwide have a “pick up the phone” approach toward sharing information and assisting each other in their antitrust enforcement efforts.29 This high degree of cooperation has facilitated convergence of both procedural and substantive aspects of antitrust law.

The efforts of the U.S. antitrust agencies have been advanced in part through their participation in two organizations, the OECD and the ICN.30 The OECD was created in 1961 to expand free trade and improve development in member countries.31 As part of these efforts, it created a Competition Law and Policy Committee that provides a variety of means for countries to share their best practices regarding antitrust and competition policy.32 The ICN, in comparison, is relatively new, but has a more broad-based membership. It was created after ICPAC called for the creation of a “Global Competition Initiative” to address antitrust enforcement in a growing globalized economy.33 Membership in the ICN has increased from fourteen jurisdictions when it began in 200134 to ninety-seven members from eighty-five jurisdictions in 2007.35

The ICN and OECD have promulgated “best practices” on merger reviews and cartel investigations and continue to work on convergence of substantive and procedural law.36 For example, the ICN is currently undertaking a study of unilateral conduct standards with the goal of developing a consensus on the objectives and legal and economic bases of enforcement regarding unilateral conduct.37 The ICN in the past has developed principles of best practices regarding merger notification regimes, with the objective of highlighting the importance of transparency and clarity in each jurisdiction’s rules regarding filing requirements and review.38 Overall, through their efforts, these institutions have had a meaningful influence in “promoting convergence in antitrust enforcement”39 and have contributed to the “significant recent progress in reducing conflicts by increasing cooperation, information sharing, and networking.”40 Indeed, their successes are reflected at least in part by the fact that the vast majority of international investigations are conducted without incident.41

## 1AR

### Reg Neg

#### Doesn’t solve democracy

Michael Herz, 20. Arthur Kaplan Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. "Fraudulent Malattributed Comments in Agency Rulemaking." *Cardozo Law Review* 42.1 (2020): 1-67.

In any event, concerns over real voices being drowned out misunderstands the nature and goals of the notice-and-comment process. The misconception is common and fostered in part by government agencies themselves. But misconception it is. The mistake is in thinking that the point of the comment process is to “let every voice be heard.”77 One problem with conceiving this as the goal is that it is self-defeating. The more successful agencies are in getting individuals to submit comments in broadly consequential or controversial rulemakings, the less any individual submitter’s “voice” will get through. This is a universal truth about the Internet—everyone can speak, which means it is very hard to be heard. As the editor-in-chief of the Huffington Post observed in explaining the decision to shut down the publication’s longstanding platform for unpaid, “citizen journalists,” unfiltered platforms devolve into “cacophonous, messy, hard-to-hear places where voices get drowned out and where the loudest shouting voice prevails.”78 More importantly, the goal is not to hear individual voices. Rather, it is to ensure that the agency is fully informed. Repetitive comments are not helpful; empty statements of a bottom-line are not helpful. Suppose the Fish and Wildlife Service proposes to list a species as endangered. Say (unrealistically) that it only gets one hundred comments. No problem of swamping or drowning out here. Fifty of the comments are from experts of one sort or another; fifty are from lay-persons who express a clear view—some pro, some con—regarding the listing but do not include any information or argument. When the final rule comes out, the preamble will not mention or respond to those latter fifty comments because they included nothing to respond to. Were the “voices” of those fifty “heard”? Literally, yes. But they made no contribution to the rulemaking and had no effect on its outcome. This was not because they were drowned out. Ignoring empty and/or duplicative comments is not nefarious, though it is sometimes perceived that way. The government analytics firm FiscalNote has studied FCC rulemaking notices and created what it calls a “gravitas score” to predict how much attention a comment will get from the agency. Reportedly, it “found that often, only comments that include a serious legal argument or are affiliated with some known entity like a big business or academic institution, make their way in” to the preamble of the final rule.79 The implication is that the agency pays attention only to big shots. But, of course, the mere fact that comments from “a big business or academic institution” earn replies does not prove that it is the identity of the commenter that is the causal explanation. It seems more likely that the identity of the commenter and the preambular response are both related to a third, important, and legitimate factor: the substance of the comment.80

#### Delay

Kevin Hartnett Jr., 21. J.D. Candidate, University at Buffalo School of Law; Editor-In-Chief, Buffalo Law Review. "An Approach to Improving Judicial Review of the APA's" Good Cause" Exception to Notice-and-Comment Rulemaking." *Buffalo Law Review* 68 (2020): 1561-1596.

5. Despite the widely recognized public benefits associated with notice-and comment, see, e.g., Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 680 (6th Cir. 2005) (explaining that public participation in informal rulemaking is meant to generate "the wisest rules" possible); Michael Asimow, Interim-Final Rules: Making Haste Slowly, 51 ADMIN. L. REV. 703, 707-08 (1999) ("Public input provides valuable information to rulemaking agencies at low cost to the agencies. Rules adopted with public participation are likely to be more effective and less costly to administer than rules written without such participation. They contain fewer mistakes. They are more likely to deal with unexpected and unique applications or exceptional situations."); Ernest Gellhorn, Public Participation in Administrative Proceedings, 81 YALE L.J. 359, 369 (1972) (expressing the "axiomatic" need for public participation in a process that is so similar to the legislative process); Ellen R. Jordan, The Administrative Procedure Act's "Good Cause" Exemption, 36 ADMIN. L. REV. 113, 116-17 (1984) (arguing that public participation in rulemaking makes the apparent lack of political accountability of agency administrators more palatable); Alan B. Morrison, The Administrative Procedure Act: A Living and Responsive Law, 72 VA. L. REV. 253, 255 (1986) (explaining that the informal rulemaking process promotes efficiency, fairness, and an overall "more rationally coherent rule"), it is also well known that notice and-comment can be quite burdensome, costly, and **time-consuming**. See Jordan, supra, at 118 (suggesting that in some situations the value of **public participation may be outweighed by the need for efficiency**); Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 DUKE L.J. 1385, 1397 (1992) (asserting that subjects of progressive social regulation and their trade associations have "fiercely resisted the rulemaking process, seeking to **lard it up** with procedural, structural, and analytical trappings that have the predictable effect of **slowing down** the agency"); Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 ADMIN. L. REV. 59, 60 (1995) (noting various studies that bolster the complaints of administrative law scholars that agency rulemaking has become ossified). As a result, agencies often try to take advantage of exceptions to notice-and-comment when they are available.

### PTX DA

#### Will fail when it goes back to the Senate- GOP wants to make dems fight

Jessica Lombardo, 9-14-2021, associate editor, "When it Comes to Infrastructure Funding: "There is No Plan B"," For Construction Pros, https://www.forconstructionpros.com/infrastructure/article/21710743/when-it-comes-to-infrastructure-funding-there-is-no-plan-b

Strong Forces Oppose IIJA

Still, if the bill passes in the House, it will need to pass again in the Senate before it can be signed by Biden. In the Senate where the bipartisan legislation was crafted, support for the bill is also waning due to Democratic tactics.

"Progressive Democrats in the House have said they will not support the infrastructure bill unless the Senate passes the broader infrastructure initiative," Jay Hansen, executive vice president of advocacy at the National Asphalt Pavement Association said during a member briefing. "This gives Republicans the argument of, well, if we support the Infrastructure Investment and Jobs Act, then we're clearing the way for this $3.5 trillion bill,"

#### Manchin and House progressives fighting over reconciliation- blocks infrastructure

Andrew Solender, 9-12-2021, "Tensions Erupt As Manchin Slams AOC, Warns ‘America Will Recoil’ At Progressives’ Infrastructure Threats," Forbes, https://www.forbes.com/sites/andrewsolender/2021/09/12/tensions-erupt-as-manchin-slams-aoc-warns-america-will-recoil-at-progressives-infrastructure-threats/?sh=1692bd83b7fb

Sen. Joe Manchin (D-W.Va.) on Sunday tore into progressives amid an ongoing conflict over various spending bills, warning of political backlash against House progressives if they sink a bipartisan infrastructure bill and labeling allegations from Rep. Alexandria Ocasio-Cortez (D-N.Y.) about his ties with oil lobbyists as “totally false.”

Manchin warned in a CNN interview that if progressives kill the $1.2 trillion infrastructure bill, they will have to tell constituents, “I don’t care about the roads and bridges, you don’t need it,” adding, “If they play politics with the needs of America… America will recoil.”

The moderate West Virginia senator repeatedly said in the interview he opposes $3.5 trillion in social spending as part of Democrats’ budget reconciliation bill, a key demand of progressives in the House who say they are willing to vote down the infrastructure bill.

Manchin refused to give an alternative figure, but floated $1 trillion or $1.5 trillion as possible viable alternatives, figures that would be unlikely to satiate the dozens of progressives demanding “robust” reconciliation spending.

#### Won’t pass- no progressive support, policy disagreements

BURGESS EVERETT and HEATHER CAYGLE, 9-12-2021, "Dems hurtle toward a new fiscal cliff," POLITICO, https://www.politico.com/news/2021/09/12/dems-toil-to-avoid-default-shutdown-in-pivotal-fall-511158

Progressives have vowed not to support the Senate's infrastructure bill during an expected vote on Sept. 27 unless the much larger social policy legislation is also teed up for a vote.

Democrats publicly insist they’re on track to vote for the up to $3.5 trillion bill in the House later this month. But senior Democratic aides are already privately predicting that timeline is likely to slip several weeks as House leaders continue to face off with Senate Democrats and the White House over major policy disagreements.

And, as they face those internal challenges, a major partisan confrontation with Republicans awaits on the debt.

#### No momentum, tons of thumpers

Anita Kumar, 9-7-2021, "Abortion fight adds to Biden’s growing policy backlog," POLITICO, https://www.politico.com/news/2021/09/07/abortion-fight-biden-policy-510003

But whatever momentum existed for the reconciliation and infrastructure bills has become zapped in recent weeks. Biden faces the lowest approval ratings of his presidency so far, following the botched withdrawal of troops from Afghanistan. The calendar is working against the party too. Congress is already consumed with passing Biden’s two major spending bills and soon will need to tackle efforts to keep the government funded and raise the federal borrowing limit. And by the end of the year, members of Congress will turn their attention to campaigning — first the midterms and then the next presidential race.

#### Won’t pass- moderate and progressive dems have growing disagreements that derail

Jessica Lombardo, 9-14-2021, associate editor, "When it Comes to Infrastructure Funding: "There is No Plan B"," For Construction Pros, https://www.forconstructionpros.com/infrastructure/article/21710743/when-it-comes-to-infrastructure-funding-there-is-no-plan-b

The Infrastructure Investment & Jobs Act (IIJA) is at a crucial turning point in Washington. The $1.2 trillion bipartisan legislation represents a once a lifetime opportunity to make transformative to invest in our failing roads, bridges, waterways and more, but it's fate is uncertain.

Currently, the outcome of the bill rests in the hands of the U.S. House of Representatives. When they return to work on Monday, September 20th, the lawmakers will have substantial work to do to get the legislation passed.

That's because progressive Democrats are insisting the IIJA be tied to a larger $3.5 trillion budget reconciliation bill which is facing massive backlash from both Republicans and Democrats.

Tomorrow, 9/15, is the deadline set by Senate Majority Leader Charles Schumer (D-NY) to have all the pieces of reconciliation ready to go from the House. But it’s hard to imagine Democrats going full speed ahead considering the barriers in place. Large divisions are building among moderate Democrats and progressives over the party’s two-part infrastructure strategy.

#### No infrastructure without reconciliation bill

Jordain Carney, 9-7-2021, "Democrats stare down nightmare September," TheHill, <https://thehill.com/homenews/senate/570825-democrats-stare-down-nightmare-september>

Sen. Kyrsten Sinema (D-Ariz.) has also warned repeatedly that she doesn’t support a $3.5 trillion top-line figure.

Both Sinema and Manchin have urged the House to move the $1 trillion bipartisan bill separately.

But any push to go below $3.5 trillion, or delay the timeline for passing the bill, is a nonstarter for progressives, who quickly rejected Manchin's suggestion.

Senate Budget Committee Chairman Bernie Sanders (I-Vt.) called rebuilding the country’s physical infrastructure “important” but said making improvements to health care, education and combating climate change was “more important.”

“No infrastructure bill without the $3.5 trillion reconciliation bill,” he said.

Outside groups are also urging activists and progressive lawmakers to steel themselves for a heated fight with their own party over the $3.5 trillion package.

#### 2AC 2 - Afghanistan thumps- literally everyone is mad at Biden

Catie Edmondson, 8-16-2021, "Lawmakers Unite in Bipartisan Fury Over Afghanistan Withdrawal," New York Times, https://www.nytimes.com/2021/08/16/us/politics/afghanistan-withdrawal-congress.html

Moderate Democrats are furious at the Biden administration for what they see as terrible planning for the evacuation of Americans and their allies. Liberal Democrats who have long sought to end military engagements around the world grumble that the images out of Kabul are damaging their cause.

And Republicans who months ago cheered for former President Donald J. Trump’s even faster timetable to end U.S. military involvement in the nation’s longest war have shoved their previous encouragements aside to accuse President Biden of humiliating the nation.

If Mr. Biden hoped to find cover from politicians in both parties who had reached a broad consensus around withdrawal, he is finding little so far.

Confronted with images of panic-stricken Afghans mobbing Kabul’s airport and inundated with requests from Afghans seeking refuge, some Democrats by Monday were openly attacking their president’s performance.

#### Debt ceiling thumps

Peter Cohn, 9-7-2021, "Ida could be catalyst for debt ceiling deal," Roll Call, https://www.rollcall.com/2021/09/07/dollars-and-sense-ida-could-be-catalyst-for-debt-ceiling-deal/

But past isn’t always prologue, and Congress is more evenly split than perhaps at any time in the past century. A messy fiscal cliff this fall could upend Democrats’ plans for the biggest social safety net expansion and tax increases since the 1960s. For Republicans, that could be a fight worth having.