# Neg Doc – Round 2 Texas

## Mergers DA

### Mergers DA 1NC

#### The plan’s antitrust expansion cascades, chilling even beneficial mergers.

Eakin ’21 [Dr. Douglas; 2021; Ph.D. in Economics from Princeton University, President of the American Action Forum, and B.A. in Economics and Mathematics from Denison University; American Action Forum – The Daily Dish, “Losing Focus on Antitrust,” https://www.americanactionforum.org/daily-dish/losing-focus-on-antitrust/]

It is troubling, then, that Senator Amy Klobuchar introduced the Competition and Antitrust Law Enforcement Reform Act (CALERA), the first significant bill regarding potential changes to antitrust law in the 117th Congress. As AAF’s Jennifer Huddleston points out, most of the attention around competition is usually focused on Big Tech and the notion of a “kill zone” that allows Big Tech companies to gobble up competitors before they can rise to challenge the dominance of giants. Unfortunately, the kill zone is a fiction and the significant, deleterious changes in CALERA would apply economy-wide.

Among CALERA’s proposed changes are three important and troublesome aspects. The first is removing the need for enforcers to define the market in which a company is accused of acting anti-competitively. To the non-lawyer, this change is baffling. In absence of identifying the goal, how can enforcement authorities identify the impact that behavior has on competition for that goal? Competition is for something – a gold medal, a promotion, or the sale of a good or service. Identifying the market defines the goal, so leaving out any definition of the market leaves undefined the nature of the competition. This definition is often a critical point of debate in current antitrust cases, so eliminating the need for it gives enforcers a substantial advantage over firms.

The second change is to weaken the consumer welfare standard. Specifically, per Huddleston, “it would change the government’s requirement from proving that a merger would substantially lessen competition (and thereby reduce consumer options) to showing only that a merger would ‘create an appreciable risk of materially lessening competition.’” This is like changing the legal standard from “beyond reasonable doubt” to “beyond all doubt”; after all, there is always a risk of something. As a result, the regulatory cost for any merger would rise significantly, likely deterring even beneficial ones.

Finally, CALERA would change the burden of proof in analyzing the competitive impacts of mergers and acquisitions. This is literally a simple as switching from “innocent until proven guilty” to “guilty until you can prove you are innocent.” Not only does this again make beneficial mergers more difficult, but such a change flies in the face of the entire American legal tradition.

Why should one care about these changes? One can’t do the needed rigorous analysis of competitive behavior without a definition of the market; this change would allow decisions based on all sorts of ancillary considerations. The latter two are particularly harmful in markets (such as the technology or pharmaceutical sectors) where it is often difficult for anyone to predict where rapid changes may fundamentally change the market itself and where the role of mergers and acquisitions is misunderstood. This is a risk under the current standards, but under the proposed changes it could lead to a chilling effect or bureaucratic denial of mergers that would actually benefit consumers.

#### It sets precedent that guts defense innovation.

Goure ’21 [Dan; October 29; Vice President of the Lexington Institute, served in the Pentagon during the George H.W. Administration, Ph.D. and taught at Johns Hopkins and Georgetown Universities and the National War College; National Interest, “Could Antitrust Legislation Threaten National Security?,” https://nationalinterest.org/blog/reboot/could-antitrust-legislation-threaten-national-security-195407]

There is a real danger in allowing the FTC to set the kinds of limits on vertical mergers that it is seeking in the case of Illumina and Grail. Not only could this impair the ability of the medical system to detect cancers more easily, but it could also set a dangerous precedent for vertical mergers in the defense, aerospace, and other sectors.

The defense and aerospace sector is in the midst of overlapping structural and technological revolutions. The Department of Defense (DoD), with strong Congressional support, is pushing defense companies to be more innovative. The military services have also taken up the mantra of calling for faster change and greater innovation. Emblematic of this drive was the first strategic message to his service by the Air Force Chief of Staff General C.Q. Brown titled [“Accelerate Change or Lose.”](https://www.af.mil/Portals/1/documents/csaf/CSAF_22/CSAF_22_Strategic_Approach_Accelerate_Change_or_Lose_31_Aug_2020.pdf)

The change to which he is referring will be comprehensive: organizational, operational, and technological. The DoD is supporting this effort to move faster and be more innovative by adopting new ways of contracting with the private sector, and by creating special funds to help small, innovative companies enter the defense market.

An important tool that contributes to the private sector being more innovative and accelerating change is mergers and acquisitions. In response to the trend of reduced defense spending, as well as reductions in the number of major programs, the defense and aerospace sector has been in a continuous state of consolidation since the end of the Cold War.

In addition, until the recent drive toward shortening acquisition timelines, major programs often took fifteen years or more to go from initial design to full-rate production. Scale and financial resources were also important for the ability of defense companies to survive changes in national security priorities or decisions to cancel major acquisition programs. Therefore, small and mid-sized firms often found it extremely difficult to thrive in the defense and aerospace sector. As a result of these factors, the number of major prime contractors has shrunk to, at best, [two or three companies](https://www.pogo.org/analysis/2019/08/the-incredibly-shrinking-defense-industry/) in each defense subsector.

Mergers and acquisitions will continue to be an important tool for defense and aerospace companies in accelerating change, improving their performance, reducing costs, and providing the rapid innovation demanded by the Pentagon. Recent examples include the merger of L3 and Harris; the merger between Raytheon and United Technologies; the acquisition of Sanders Electronics from Lockheed Martin by BAE Systems; the acquisition of OrbitalATK by Northrop Grumman; and finally, the proposed acquisition of Aerojet Rocketdyne by Lockheed Martin.

But where mergers and acquisitions may be particularly significant is in bringing unique products to bear on critical defense problems. The acquisition of small and mid-sized companies (particularly those without a foothold in the defense sector) by larger firms is an important way of providing them with the access to customers, financial and human resources, and management support required to enter and survive in the defense market.

Over the past several years, the Federal Trade Commission (FTC) has pursued several misguided antitrust investigations and suits. One of these was against [Qualcomm](https://www.realcleardefense.com/articles/2019/11/22/the_ftcs_suit_against_qualcomm_is_a_serious_threat_to_national_security_114864.html), despite senior DoD officials warning that this would harm national security. The recurring theme in these actions is the need to reign in corporations based on size or market presence. This reflects a growing sentiment at the FTC that corporate success as reflected in size or dominant performance is suspect. As a recent [Wall Street Journal editorial](https://www.wsj.com/articles/unfortunately-big-is-bad-is-back-11622995107) observed, the premise of the new approach is that “big is bad.”

#### Nuclear war.

Greenwalt ’19 [William; April 2019; Senior Fellow at the Atlantic Council within the Snowcroft Center for Strategy and Security, former Deputy Undersecretary of Defense for Industrial Policy in the U.S. Pentagon; Atlantic Council, “Leveraging the National Technology Industrial Base to Address Great-power Competition: The Imperative to Integrate Industrial Capabilities of Close Allies,” p. 6-7]

The Compelling Case for a Robust Implementation of the NTIB

Three large trends argue for the need to use greater NTIB integration as a means of addressing US national security needs. The first is a return of great-power competition in a form vastly different from the Cold War competition with the Soviet Union. The second is the US military allowing its technological dominance, gained during the so-called “second offset” of technology developed in the 1970s and visibly displayed in the first Gulf War, to atrophy.5 The United States and its allies appear to be at risk of suffering a reverse “offset”—for example, through Chinese and Russian development of hypersonic missiles. The final trend is that the current export-control system, also established in the 1970s and designed to protect that technological dominance, is now a threat to US national security, as it severely constrains US technological advancement while doing little to hold back great-power adversaries.

The Rise of Great-Power Competition

The United States faces a new threat environment that has not been seen since the height of the Cold War. In fact, this threat is more dangerous and complicated, with a resurgent military and nuclear power in Russia, an emerging superpower in China, and medium-sized powers such as Iran and North Korea growing their military and nuclear capabilities. The 2018 National Security Strategy and National Defense Strategy documents are unlike those of the recent past, which were severely budget-constrained and primarily focused on antiterrorism operations. US strategy now significantly recognizes the current threat, and outlines the new challenges facing the United States in an emerging era of great-power competition.

Strategy documents are one thing; doing what is necessary to implement a strategy is something else. A significant effort will be required to mobilize and sufficiently prepare for any major great-power conflict.

Still, the primary purpose of US and allied military and foreign policy over the past seventy years has been to prevent any such conflict. During the recent decades of US and allied hegemony, it could be argued that a significant lesson from the Cold War has been forgotten: that military capability is required not just to fight a war, but to prevent it. If US and allied military capability cannot respond to current challenges quickly enough, a potential great-power adversary may no longer feel sufficiently deterred from taking steps that could bring about conflict. So, technological and doctrinal innovation is as critical for deterrence as it is for warfighting.

### Defense---Impact---2NC

#### It deters nuclear strikes from Russia and China.

Pifer ’21 [Steven; January 22; Fellow at the Robert Bosch Academy in Berlin; The Hill, “As defense spending comes under fire, don't make nuclear war more likely,” <https://thehill.com/opinion/national-security/535388-as-defense-spending-comes-under-fire-dont-make-nuclear-war-more>]

During the Cold War, a Soviet “bolt from the blue” – a massive nuclear first strike aimed at destroying the bulk of U.S. strategic forces before they could launch – was a major driver of U.S. nuclear force planning. Today, the most likely scenario for a U.S. nuclear conflict with Russia (or China) begins with a regional conventional war. The fewer fighters, warships and tanks that the U.S. military has, the weaker its ability to deter that conventional conflict from breaking out.

Once conventional war with a nuclear-armed adversary begins, nuclear arms can come into play in two ways. In the first scenario, U.S. and allied forces begin to lose, and the president must face the agonizing choice of using nuclear weapons first. U.S. first use of nuclear arms would open a Pandora’s box of unpredictable and catastrophic consequences. The other side could well retaliate at the nuclear level, raising the possibility of an escalatory cycle leading to disaster.

During the 1960s, 1970s and 1980s, NATO had little confidence in its ability to defeat a Soviet and Warsaw Pact attack at the conventional level. It thus planned explicitly for [deliberate escalation](https://www.jstor.org/stable/20081541?seq=1) to the nuclear level, but no one was comfortable with that prospect.

In the second scenario, U.S. and allied conventional forces hold out, and the other side attempts to upset the chessboard by escalating to the nuclear level. The president then would face the choice of whether to retaliate with nuclear weapons.

The best answer to these potential dilemmas is to have sufficiently robust conventional forces such that the adversary is dissuaded from attacking in the first place. Fortunately, conventional force balances today differ greatly from during the Cold War.  NATO’s overall conventional military strength compares well with that of Russia, though the Russian military enjoys a [regional advantage](https://carnegieendowment.org/2017/03/13/new-nato-russia-military-balance-implications-for-european-security-pub-68222) in the Baltic Sea region. Russia is modernizing its conventional capabilities, so the United States and NATO need to ensure that they are not caught short, just as Washington and its Asian allies have to ensure that China does not out-pace them.

#### Turns global cooperation - Collapse causes disease, terrorism, and EMP attacks---extinction.

Helprin ’15 [Mark; January 15; Senior Fellow of the Claremont Institute for the Study of Statesmanship and Political Philosophy; National Review, “Indefensible Defense,” https://www.nationalreview.com/2015/06/indefensible-defense/]

Continual warfare in the Middle East, a nuclear Iran, electromagnetic-pulse weapons, emerging pathogens, and terrorism involving weapons of mass destruction variously threaten the United States, some with catastrophe on a scale we have not experienced since the Civil War. Nevertheless, these are phenomena that bloom and fade, and that, with redirection and augmentation of resources we possess, we are equipped to face, given the wit and will to do so. But underlying the surface chaos that dominates the news cycle are the currents that lead to world war. In governance by tweet, these are insufficiently addressed for being insufficiently immediate. And yet, more than anything else, how we approach the strength of the American military, the nuclear calculus, China, and Russia will determine the security, prosperity, honor, and at long range even the sovereignty and existence of this country. THE AMERICAN WAY OF WAR Upon our will to provide for defense, all else rests. Without it, even the most brilliant innovations and trenchant strategies will not suffice. In one form or another, the American way of war and of the deterrence of war has always been reliance on surplus. Even as we barely survived the winter of Valley Forge, we enjoyed immense and forgiving strategic depth, the 3,000-mile barrier of the Atlantic, and the great forests that would later give birth to the Navy. In the Civil War, the North’s burgeoning industrial and demographic powers meshed with the infancy of America’s technological ascendance to presage superiority in mass industrial — and then scientific — 20th-century warfare. The way we fight is that we do not stint. Subtract the monumental preparations, cripple the defense industrial base, and we will fail to deter wars that we will then go on to lose.

#### It's instant, based on perception of decline.

Spencer ’2 [Jack; 2000; Research Fellow in Nuclear Energy Policy at The Heritage Foundation's Roe Institute for Economic Policy Studies; Heritage, “The Facts About Military Readiness,” [http://www.heritage.org/Research/Reports/2000/09/BG1394-The-Facts-About-Military-Readiness](http://www.heritage.org/Research/Reports/2000/09/BG1394-The-Facts-About-Military-Readiness))]

Military readiness is vital because declines in America's military readiness signal to the rest of the world that the United States is not prepared to defend its interests. Therefore, potentially hostile nations will be more likely to lash out against American allies and interests, inevitably leading to U.S. involvement in combat. A high state of military readiness is more likely to deter potentially hostile nations from acting aggressively in regions of vital national interest, thereby preserving peace.

### Link---2NC

#### 1 – Legally, antitrust is economy-wide – there’s no way to limit the plan’s scope AND risk-averse firms and lawyers think it’ll be applied, chilling investment.

Thomas Nachbar 19, Professor of Law at the University of Virginia School of Law, JD from the University of Chicago Law School, AB in History and Economics from the University of Illinois, “Book Review: Heroes and Villains of Antitrust”, The Antitrust Source, 18-6 Antitrust Src. 1, June 2019, Lexis

That regulatory skepticism had a particular salience for antitrust law, which itself is designed to maintain a particular balance between private and government action in markets. n53 Since Adam Smith, the argument of so-called free-market intellectuals has not been that markets are perfect but rather that they are comparatively better at solving problems than governments. Part of the argument is that, in most cases, market forces will drive a firm that has adopted an inefficient practice to shift to a more efficient one, lest it lose more business than it gains from the practice. But if antitrust law outlawed a practice, there is no potential for the market to correct--the practice once outlawed would remain outlawed. n54 And because antitrust law applies to all industries, a practice outlawed for one firm or industry would be outlawed for all firms in all industries, or be interpreted as such by risk-averse firms and their risk-averse lawyers--not to mention the treble damages that the liable antitrust defendant would have to pay.

[FOOTNOTE] n55 See Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 284 (2007) ("In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007) ("It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.") Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)). [END FOOTNOTE]

#### 2 – Abruptness – the surprise nature of the plan generates uncertainty that disrupts business planning.

Abbott ’21 [Alden; February 2021; Senior Research Fellow at the Mercatus Center of George Mason University, J.D. from Harvard Law School and M.A. in Economics from Georgetown University; Concurrences, “Competition Policy Challenges for a New U.S. Administration: Is the Past Prologue?” <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en>]

12. But recent suggestions put forth in an October 2020 House Judiciary Subcommittee on Antitrust majority report (HJSMR) [[12](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb12)] and in a November 2020 report by the Washington Center for Equitable Growth (WCEGR) [[13](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb13)] (coauthored by various prominent critics of Trump administration antitrust enforcement who served in the Obama administration) would go far beyond application of existing antitrust law to big digital platforms. In particular, the HJSMR proposes taking a highly regulatory approach to digital platforms, including imposing “[s]tructural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business.” [[14](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb14)] The WCEGR also endorses the use of rulemaking (and, in particular, FTC rulemaking) to tackle significant problems of competition. [[15](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb15)] Rushing into rulemakings on platforms (especially without a clear showing of market failure) poses major risks, however, including, in particular, the creation of disincentives to invest in platform-specific innovation; and the interference with potential efficiency-seeking transactions by platform operators and suppliers of complements (in light of inevitable government second-guessing of platform-related business decision-making). The JBA antitrust team may wish to keep such potential costs in mind in setting competition policy vis-à-vis digital platforms.

13. To address the perceived growth and abuse of market power that are said to afflict the American economy, the HJSMR and WCEGR have also proposed to amend and thereby “toughen” the core antitrust statutes, to alter burdens of proof in litigation, and to bestow a substantial increase in resources on federal antitrust enforcers. [[16](https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#nb16)] The problem of scarce agency resources has long been highlighted by enforcement agency leadership, and certainly merits attention. The call for dramatic systemic change in antitrust enforcement norms, however, should be approached cautiously, with a jaundiced eye. In our common-law-based antitrust system, a major disruption to long-familiar statutory schemes would generate major uncertainty regarding antitrust enforcement principles and substantially disrupt business planning for an indeterminate amount of time. Many welfare-enhancing transactions could be sacrificed. The harm to consumer and producer welfare due to lost socially beneficial business initiatives would be hard (if not impossible) to measure, but nonetheless real. It is certainly possible that such losses would outweigh (perhaps substantially) whatever welfare gains might flow from statutory enforcement “reform.” In other words, it should not casually be assumed that “more and different” antitrust would be an unalloyed benefit. As in all other areas of law enforcement, likely costs as well as purported benefits should be central to the antitrust public policy calculus. (Costs would include, of course, the likelihood and magnitude of “false positives” under the new enforcement regime, not just the reduction in socially beneficial transactions.)

#### 3 – Uncertainty – the plan introduces the possibility that antitrust law will be reapplied, chilling investment from risk-averse firms.

Okuliar ’20 [Alexander; December 8; J.D. from Vanderbilt University Law School, B.S. in Economics and B.A. in History from The Wharton School of the University of Pennsylvania; U.S. Department of Justice, “Promoting Predictability and Transparency in Antitrust Enforcement and Standards Essential Patents,” https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-okuliar-delivers-remarks-telecommunications-industry]

The Importance of Predictability and Transparency to Antitrust Enforcement

Good afternoon. It’s a pleasure to join you today, thank you for the invitation. I’d like to begin with some prepared remarks addressing the importance of predictability and transparency to antitrust enforcement, particularly as it relates to standards-essential patents, give an overview of the Division’s recent activity in this space, and then turn to some questions.

Antitrust law can be a very powerful tool to promote economic dynamism and innovation. It establishes important rules regarding how firms may operate in marketplaces across the economy. Firms, in turn, rely on these rules when making all sorts of strategic decisions, from day-to-day concerns to overall operating plans, from pricing or discounting strategies to long-term growth strategies.

For any economy to realize meaningful long-term growth, firms (and consumers) must have confidence in the underlying legal rules governing their existence and behavior. Starting and growing a company is often expensive and risky. Maintaining a business is also costly, and firms are constantly assessing their ongoing viability and potential for growth. Confidence in the basic legal system is, of course, critical. Confidence in specialized regulatory regimes is likewise important. Firms are more likely to engage in costly R&D, and in the kind of expensive, time-consuming experimentation that innovation tends to require, when they are confident they will be rewarded for these investments—that, for example, antitrust laws will not change in the interim between investment and return in a way that deprives the firm from being able to recoup and benefit from its investments.

This innovation and dynamic competition are critical to our modern economy. So the more that we, as enforcers, can do to ensure the basic competition law rules of the road are clear and predictable, the more we can help to preserve competition and to spur economic growth. Not only do firms benefit from this, but so, too, do consumers. They are the beneficiaries of the increased R&D and innovation that can thrive in a reliable regulatory and enforcement regime. Moreover, clear and foreseeable enforcement empowers consumers, who can then more readily understand when unlawful conduct may be occurring, and be better-positioned to identify violations and to protect themselves and others.

Predictability and transparency in antitrust enforcement are important across markets and industries, but are often particularly important at the intersection of antitrust and intellectual property. Both competition and IP laws seek to foster long-term innovation and dynamic competition—which, again, depend on firms continuing to engage in risky and costly efforts today in the hopes of achieving rewards tomorrow. This is true for owners of various IP rights, including standards-essential patent holders.

#### 4 – Follow on – the plan creates the fear of future unrelated AND politicized amendments

Gregory E. Neppl 19, Partner at Foley and Lardner LLP, JD from Duke University School of Law, BA from Duke University, “Antitrust Enforcement “Reform” as a Political Issue: The Good, the Bad, and the Ugly”, 11/7/2019, https://www.foley.com/en/insights/publications/2019/11/antitrust-enforcement-reform-political-issue

New Merger Guidelines

New merger guidelines that reflect non-competition considerations (such as job security) would modify the consumer welfare standard discussed above and, in the absence of new statutory authority, likely contravene Section 7 of the Clayton Act as currently drafted. One problem with such “new guidelines” – unhinged from “competition” or “competitive effects” – is that successive administrations might amend (or reinterpret) such guidelines in response to whatever political issue du jour allowed that administration to win political power. While antitrust enforcement is not free of politics currently (i.e., the President does nominate the Assistant Attorney General (Antitrust Division), appoint the FTC Chairperson, and nominate FTC commissioners when openings arise, and the House and Senate subcommittees with antitrust enforcement oversight regularly hold hearings on high-profile mergers), both DOJ and FTC have a respectable history of pursuing enforcement efforts generally free from partisan politics. The issuance of new merger guidelines that reflect non-competition considerations may open the door to regular amendments to the guidelines and increase the likelihood that partisan politics could replace factual and economic analysis in merger evaluations. Such an outcome would not promote business confidence. Moreover, “bright-line” merger guidelines – setting caps for vertical mergers, horizontal mergers, and total market share – would ignore the fact that vertical foreclosure risks and “market power” are in practice not so easily quantifiable. The agencies already employ market share screens (such as HHI) to identify those mergers more likely to require close scrutiny. Bright-line caps, however, would necessarily threaten certain mergers that are competitively neutral, or even pro-competitive, through resulting efficiencies and synergies.

#### 1. PRECEDENT---abrupt shifts in any area ripple. It’s all interlinked because antitrust is underwritten by generalist common law.

Rogerson ’20 [William and Howard Shelanski; 2020; Professor of Economics at Northwestern University, Ph.D. in Social Sciences from the California Institute of Technology; Professor of Law at Georgetown University, Ph.D. in Economics and J.D. from the University of California, Berkeley; University of Pennsylvania Law Review, “Antitrust Enforcement, Regulation, and Digital Platforms,” vol. 168]

A second attribute of the American adjudicatory process for antitrust is stability. While antitrust doctrine has occasionally swerved abruptly over the past century, the common-law process through which antitrust law has developed usually provides clear notice that a change is coming. As a recent example, the Supreme Court's shift in LeeginCreative Leather Products, Inc. v. PSKS. Inc. 25from per se liability to a rule of reason for resale price maintenance likely caught few observers by surprise. 26

Antitrust adjudication's stability, like its suitability for fact-dependent situations, is potentially double-edged. Antitrust jurisprudence can be slow to adjust to changes in economic learning or changes in the underlying economy that alter the effects of a particular kind of business conduct. For [\*1919] example, nearly thirty years ago the Supreme Court in Brooke Group v. Brown & Williamson Tobacco Corp. 27required that plaintiffs claiming predatory pricing show not only prices below some measure of incremental cost, but also that the defendant could recoup its losses. 28No plaintiff has prevailed in a predatory pricing case in a U.S. federal court since. 29That outcome might not be of concern were it the case that the Supreme Court's test accurately captures the incidence of predatory pricing. 30Economic research demonstrates, however, that predatory conduct does occur and does not depend on either below-cost pricing or recoupment. 31Predation is just one area in which court-made doctrine appears out of step with relevant economic facts and knowledge. To be sure, other forces could accelerate the common-law process of doctrinal development. For example, Congress could legislate changes to the scope, presumptions, and other parameters of antitrust law in ways that would immediately alter precedent and bind the courts going forward. 32 In practice, however, such intervention is rare and unlikely, making significant lags in doctrine a reality of antitrust adjudication in the courts.

C. Market-Driven Case Selection

In the United States, most adjudicative bodies do not select the cases that come before them. To be sure, courts have jurisdictional limitations that prevent them from hearing certain kinds of cases, and doctrines exist that allow courts to reject weak or poorly conceived complaints. Beyond those mechanisms, however, independent parties decide when and whether to pursue litigation as method of relief. One potential virtue of this separation between decisionmaking and case selection is that the market can drive the focus of judicial attention. Assuming the most widespread and most troublesome anticompetitive conduct will receive the greatest investment of litigation resources, that conduct will in turn receive the most adjudication and doctrinal development.

[\*1920] Unfortunately, the separation between adjudication and case selection will not necessarily lead to an efficient match between judicial attention and the most pressing antitrust violations. In practice, even conduct that is clearly prohibited can persist when offenders think detection is difficult; one only has to look at the consistently high number of civil and criminal price fixing cases that wind up in court, even though that conduct has clearly been illegal per se for nearly a century. 33The most widespread anticompetitive conduct might not therefore be the conduct most in need of doctrinal development--it can be just the opposite, as the persistence of cartels demonstrates. 34Moreover, if the courts develop doctrine that needs revisiting, but that deters the government or private plaintiffs from filing cases, 35then the market for judicial attention to antitrust conduct will not work well dynamically; once doctrine is settled, there may be no mechanism outside of legislation or regulatory intervention to drive doctrinal change. We return to this issue below.

D. Generalists versus Industry Experts

Returning to an issue we put aside earlier, who is doing the adjudication can matter for substantive outcomes. In U.S. antitrust law, that adjudication has occurred, at least ultimately, in generalist federal courts. That institutional locus might well make sense given the wide variety of conduct, industries, and factual circumstances that antitrust cases present. However, as specific industries come to pose particular challenges for antitrust enforcement, the case for more specialized enforcement decisionmakers becomes stronger. Traditionally, where detailed, industry-specific knowledge is required to make sound competition policy decisions, Congress has assigned authority over those decisions, at least in part, to industry-specific regulatory agencies. Thus, the Securities and Exchange Commission has authority over competitive conduct in key financial sectors. 36The FCC has parallel authority with the Department of Justice (DOJ) over telecommunications mergers and sole authority to establish terms for competitive entry into various telecommunications markets. 37State regulators govern entry into hospital markets through Certifications of Public Need. 38The federal courts have increasingly safeguarded the domain of industry specific regulators over competition issues even when agency decisions might be in tension with antitrust law. 39

As antitrust enforcement focuses on distinct challenges posed by a particular industry, whether digital platforms, pharmaceuticals, or something else, expert and specialized knowledge becomes even more essential to making good enforcement decisions. Under current law and enforcement frameworks, there is no systematic way to bring such specialization into the ultimate adjudication of antitrust cases in industries not already covered by specific, competition-related, regulatory statutes. To be sure, the FTC and DOJ have divisions that specialize in various industrial sectors in which they have considerable expertise. Those divisions bring that expertise into their review of conduct and transactions, but neither the FTC nor DOJ has ultimate adjudicative authority over the cases they choose to litigate. The DOJ must go to federal court to seek enforcement. The FTC can opt for an administrative enforcement mechanism with the Commission itself sitting in appellate review of initial adjudication by an administrative law judge. The Commission's decision is, however, subject to review by federal appellate courts, which have not hesitated to reverse the agency's decisions. 40 The result is that, even when agencies have brought specific industry expertise into antitrust enforcement, doctrinal application and resolution still proceeds through the common-law process of adjudication by generalist judges.

E. Tradeoffs Inherent in the Adjudicatory Approach to Antitrust

As the foregoing discussion suggests, the ex post case-by-case approach, slow doctrinal evolution, and case selection mechanism of antitrust adjudication have potential advantages and disadvantages. The tradeoffs become particularly clear through the interaction of those three characteristics.

Adjudication may mitigate the rate of false positives or false negatives obtained through enforcement, as proceeding case-by-case is less likely to bring about those results than are general rules that impose limits on business conduct in advance, regardless of specific circumstances. Broad ex ante specifications could prohibit beneficial or harmless conduct, and narrow ex ante specifications could fail to prevent anticompetitive practices. As a decisionmaking process moves from strict ex ante prescription to pure case-by-case adjudication, particular facts and circumstances increasingly predominate over generic categorization of conduct. 41In principle, the movement along that spectrum enables the decisionmaker to avoid under-inclusiveness or over-inclusiveness of categorical rules. 42

The extent to which an adjudicator actually succeeds in reducing enforcement errors in either direction depends on the doctrine and precedent through which it evaluates the case-specific evidence. Doctrine and precedent will determine how a court allocates burdens, prioritizes facts, and weighs presumptions in evaluating the legality of conduct. If precedent provides mistaken guidance on those factors, case-specific adjudication might do no better a job than ex ante prohibitions in avoiding errors or bias toward either under or over-enforcement. For this reason, the evolutionary pace of doctrinal development through antitrust adjudication is very important. Where that evolution has been toward convergence with state-of-the-art analysis and evidence as to the effects of conduct, doctrinal stability is a virtue. Reasonable people disagree over the Supreme Court's movement from per se illegality to rule of reason treatment of vertical price restraints, as Justice Breyer's dissent in Leegin demonstrates. 43 The decision in that case nonetheless drew on a body of legal and economic analysis that, over decades, had continually narrowed the application of per se rules to vertical conduct and led logically (even if some might argue incorrectly) to the majority's conclusion. 44Many commentators might therefore say Leegin is a good example of where the evolution of doctrine through adjudication worked well: stakeholders had notice and the doctrine moved in an internally consistent direction. While it is debatable whether the per se rule against restraints on intra-brand competition has in recent years led to over-enforcement, there is a good case that it had done so in the past, 45so that the doctrine plausibly moved in an error-reducing direction.

#### That’s especially true for defense.

Garrettson ’16 [Jim; 2016; University of Hartford’s Barney School of Business, on the advisory board of the George Mason University’s College of Science; Govconwire, “FTC, DOJ Speak on Defense Consolidation & more,” <https://www.govconwire.com/2016/04/weekly-roundup-april-11-april-15-2016-ftc-doj-speak-on-defense-consolidation-more/>]

On Wednesday, the Justice Department and Federal Trade Commission weighed in on the matter and said they also want to use their status as antitrust agencies to “work closely” with the Pentagon to analyze any potential merger or acquisition in the defense industry.

Both the FTC and DOJ described their “necessarily general” antitrust guidelines as applicable to the defense sector but also highlighted its unique aspects affected by any major deal or acquisition.

#### 2. STABILITY---antitrust is settled law. New legal standards disrupt decades of favorable application, chilling mergers in the defense sector.

Thompson ’15 [Loren; October 6; Senior Contributor at Forbes, Specializing in Aerospace and Defense; Forbes, “Five Ways the Pentagon's AntiMerger Outburst Will Backfire,” https://www.forbes.com/sites/lorenthompson/2015/10/06/five-ways-the-pentagons-anti-merger-outburst-will-backfire/?sh=269f6c31ac15]

The acquisition czar asserted that Lockheed Martin's sheer size should be enough to provoke concern, and he invited Congress to assist his department in crafting "legal tools" to deal with the problem. That logic runs directly counter to traditional anti-trust standards. The Supreme Court enunciated a "rule of reason" in approving the forced breakup of the Standard Oil monopoly a century ago stating that there was nothing intrinsically evil about bigness; what mattered was whether a combination limited competition in a way injurious to the market without achieving some constructive public purpose.

Secretary Kendall has a different view: "The trend toward fewer and larger prime contractors has the potential to affect innovation, limit the supply base, pose entry barriers to small, medium and large businesses, and ultimately reduce competition." Such thinking does not appear to have influenced the Justice Department in its review of the Sikorsky transaction, and with good reason. It creates an amateurish, subjective standard for judging future combinations in the defense sector. Lockheed Martin contributes to my think tank and is a consulting client, so I have heard both sides of this story. Here are five undesirable consequences of departing from traditional antitrust criteria that Secretary Kendall does not appear to have thought through.

1. It will have a chilling effect on market forces. Although the defense sector is nobody's idea of a classic market -- there is only one customer -- federal policy has always sought to tap the dynamism of the free enterprise system in equipping U.S. warfighters. One facet of that dynamism is the agility with which contractors adapt to changes in the scale and composition of demand. For instance, when the purchasing power of the Pentagon's procurement budget fell by two-thirds at the end of the Cold War, so did the number of top military contractors. That's the way markets work. But Secretary Kendall's pronouncement will deter the biggest contractors from making market-driven decisions about their business mix, even if those decisions have no discernible impact on competition. He thus threatens to undermine the rational functioning of market forces in the defense sector, further isolating it from the commercial world.

2. It will limit competition for military contracts. The whole point of having antitrust laws is to assure that competition will continue to discipline the price and performance of market participants. However, when a senior regulator states that a company has become too big, that signals that it should limit which opportunities it pursues in its home market. It also implies that future growth will have to be achieved mainly by diversifying into other markets. Those are not smart messages to send to the small number of system integrators who remain committed to the military customer. Pentagon policymakers say they want to look outside the ranks of traditional military contractors for innovative technology, but there is no evidence that companies lacking a background in defense can deliver cutting-edge combat systems. Telling the few who can that they need to stop growing will limit future military options.

3. It will reward under-performers. Lockheed Martin issued a brief (and uncharacteristic) rebuttal to Secretary Kendall's statement arguing that defense contractors should be judged on the basis of their performance rather than their size. The main reason Lockheed is the world's biggest military contractor today is because it won a series of high-stakes competitions for next-generation warfighting systems in the decades after the Cold War ended. In fact, Kendall expressed concern in his statement about the market clout the company achieved by winning the triservice F-35 fighter program. One inference to be drawn is that competitors not as capable as Lockheed Martin will need to be awarded contracts to limit the company's market presence. Making such industrial base concerns a factor in who wins competitions is a prescription for further eroding the military's already waning edge in warfighting technology.

4. It will open the door to capricious legislation. By straying from traditional antitrust standards and inviting Congress to participate in the process, Secretary Kendall has opened the door to all sorts of legislative mischief. As I observe in Defense News this week, Congress is not a finelytuned instrument that weighs the merits of a case to craft optimum analytic solutions. It is a political institution more attuned to power relations than performance or profits. So there's a danger that if Congress weighs in, its response will inject constituent interests, ideology, and partisanship into the awarding of contracts that may one day decide whether America wins a major war. The process of sustaining a viable defense posture is already impeded by such political influences; inviting Congress to legislate in an area where the department's thinking appears to be muddled and subjective isn't likely to yield desirable outcomes.

### UQ---2NC

#### Defense contractors are rallying on the back of strong support from the DOD – BUT sensitive to policy shocks.

Cokyendall et al. ’21 [John, Mike Condro, Alan Faver, and Steve Shepley; 2021; Principals and partners at Deloitte, an industry-leading audit, consulting, tax, and advisory services firm; Deloitte, “2021 aerospace and defense industry outlook,” <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/energy-resources/us-eri-aerospace-defense-industry-outlook.pdf>]

Defense

Sector to remain stable as countries plan to sustain their military capabilities

In 2021, defense budgets and revenues for defense contractors are expected to remain largely stable, as military programs continue to be critical to national defense, especially considering geopolitical tensions. Global defense spending is expected to grow about 2.8% in 2021, crossing the $2 trillion mark.13 Countries across the globe continue to spend on strengthening their militaries as geopolitical tensions intensify despite the global pandemic.

In the United States, defense spending is likely to remain flat in 2021. However, fiscal pressures from reduced tax receipts due to the current recession and a potential need to reverse current levels of deficit spending could affect defense budgets from fiscal year 2022 onward. The fiscal year (FY) is the accounting period for the federal government that begins on October 1 and ends on September 30. Under a new administration, there could be some additional downward pressure on defense budgets in FY2022 and beyond, primarily due to debt from any stimulus spending or any shift in focus toward social and domestic programs. The government is expected to continue providing favorable payment terms to support the liquidity and cash requirements of both OEMs and the extended supply chain. Moreover, US foreign military sales (FMS), which increased $15 billion in FY2020 to reach $83.5 billion, are likely to offset some of the impact of flat domestic defense spending. Growth in FMS is likely to continue in FY2021, boosting export opportunities for US defense contractors.14

Most major defense spending nations have remained committed to strengthening their military presence, despite the pandemic’s economic impact on fiscal deficits. China announced a $178.2 billion military budget in May 2020, up 6.6% from the previous year.15 India is also bolstering its military,16 and Japan is increasing its air-sea military capabilities. Japan announced a $51.6 billion defense budget for fiscal 2021, a ninth straight increase.17 France did not announce any reductions in the defense budget for 2021; in fact, France’s lawmakers and the defense industry were expecting additional financial support from the government to counter the effects of the pandemic.18 However, some countries are diverting spending to other social programs to revive the economy and reduce the repercussions of the pandemic. For example, Russia plans to reduce military spending by 5% between 2021 and 2023 due to the impact of the pandemic on economic growth.19

Overall, disruption in global and diversified defense supply chains could result in minor near-term cost overruns and schedule delays in 2021. In addition, the sector’s operational performance in the coming year could be affected by trade policies or sanctions, including potential Chinese sanctions on US defense players and their suppliers, Turkey’s removal from the F-35 program, and possible US government sanctions on Turkey. Also, some commercial aerospace companies are focusing more on their defense businesses to counter the broader pandemic-driven economic pressures. For instance, Spirit AeroSystems received funding from the Department of Defense (DoD) to expand its production capability for advanced tooling and fabrication for the defense sector. The increased work on defense programs helped the company shift more than 400 employees from its commercial business to defense.20 This move may lead to increased competitive pressure for traditional defense companies and disruptive solutions and technologies entering the defense marketplace.

## Adv CP

### Adv CP 1NC

#### Plank 1: USFG should massively increase funding for research universities and fund quantum computing startups and technology.

#### Plank 2: The 50 States should enforce the Supreme Court’s decision to prevent the NCAA from being exempt from antitrust laws.

#### Solves university research and quantum lead through investment which is what their first advantage actually advocates for. Their Harris card says only reason supreme court failed is because of states, which the CP also solves.

#### Doesn’t link to the DA because it doesn’t expand scope of federal antitrust.

### Adv CP Solves---2NC

#### 1AC ev says funding solves. We’re yellow

1AC Report of NSF Materials 2022 (A Subcommittee of the Mathematical and Physical Sciences Advisory Committee, “Developing a vision for the infrastructure and facility needs of the materials community: Report of NSF Materials 2022,” <https://www.nsf.gov/mps/advisory/mpsac_other_reports/dmr_materials_2022_report.pdf>, 2022)//KAK

**Characterization equipment and facilities are paramount to advancing the state-ofthe-art in materials research. US universities** **face considerable challenges in obtaining instrumentation and associated facilities, funding operational expenses, and attracting/retaining expert technical staff essential to the conduct of advanced, cuttingedge research.** Furthermore, differing clientele, educational roles, and **budgetary constraints make it impossible to devise a “one size fits all” model for best practices.** Nevertheless, **there exists a need to develop models that maximize the effectiveness of** the education and **research missions** of these capabilities, while communicating the importance of such equipment and facilities in national education and research goals.

#### Investment solves US quantum lead. We’re yellow

Grobman 18 (Steve Grobman is senior vice president and chief technology officer (CTO) for McAfee, “Quantum Computing Must Be a National Security Priority,” <https://blogs.scientificamerican.com/observations/quantum-computing-must-be-a-national-security-priority/>, October 25, 2018)//KAK

#### For much of the last 70 years, the national security of the United States and its allies was in large part due to the technological superiority of their public and private sectors. Today, however, the future of that technological leadership is in doubt as nation-state rivals such as China are pursuing leadership positions in a next generation of technologies likely to redefine the geopolitical power structure. This is particularly so in cybersecurity, where a newly emergent field called quantum computing threatens to break the world’s leading data encryption standards that currently secure computer files and network communications in both the private and public sectors, including the most sensitive of military secrets. It’s not an exaggeration to say that the ability of free nations to defend their economic and national security interests will be seriously threatened in the event they fall behind in quantum computing. Leadership in signals intelligence—the ability to intercept and decrypt the communications of our adversaries—has literally saved millions of lives by enabling key strategic breakthroughs in past world wars and global conflicts. During World War II, the Allies used signals intelligence to break encrypted Nazi communications, allowing their forces to dodge enemy U-boats and facilitating the preparation and execution of the pivotal D-Day landings at Normandy. Forty years later, intercepted Soviet military communications provided evidence that the shoot-down of Korean Air Flight 007 was intentional, allowing President Reagan and U.S. allies to hold the Soviets accountable for hostile actions against innocent civilians. In our modern era, the monitoring of key mobile communications led U.S. forces to locate and kill Osama Bin Laden. If the U.S. falls behind its geopolitical rivals in quantum computing, it will lose the leadership in signals intelligence that made such strategic successes possible, which would put global peace and stability at risk for decades to come. The reason this issue has such major implications is that the foundational RSA algorithm upon which most of today’s encryption systems are based is susceptible to quantum computing. Named for its inventors Ron Rivest, Adi Shamir and Leonard Adleman, the cybersecurity standard is based in large part on the premise that it is computationally infeasible to mathematically factor very large numbers into their corresponding prime numbers. For example, we can easily multiply the prime numbers 13 and 97 to get 1261, but the reverse math problem is much more difficult (starting with 1261 and finding the two underlying primes). Today’s computers can both multiply the primes and find the primes for smaller numbers, but as the numbers become extremely large, as they do in the generation of encryption keys, the factoring challenge becomes computationally impractical. The RSA algorithm is founded on the assumption that, even with improvements in future computing capabilities, the math required to perform the factoring would take too long to make the decryption workable in practice. Quantum computing, however, changes the underlying assumptions about how computing works and how quickly computers can perform math calculations. Quantum computing relies on the principles of quantum physics to solve specialized classes of mathematical problems that are not practical to solve on traditional computers. The new computers would use quantum bits (qubits), unlike conventional digital computers that are based on transistors and encode data into binary digits (bits). Qubits can exist in multiple states simultaneously, offering the potential to compute a large number of calculations in parallel, speeding time to resolution. Thus, quantum computing would be capable of determining the underlying RSA prime numbers used to generate encryption keys that can access RSA-encrypted data. Falling behind our adversaries in quantum computing would put U.S. and allied intelligence services at a critical disadvantage in their efforts to protect encrypted national security secrets and access the encrypted data of their adversaries. We must assume that every major nation-state will invest heavily in the technology to read protected data throughout the public and private sectors. While quantum computing is realistically a number of years away (at the earliest estimates), we must take action now to protect the future of our country’s national secrets. This is because America’s adversaries are using their present signals intelligence capabilities to gather large amounts of our sensitive encrypted data today with the objective of decrypting it as soon as the first quantum technologies can be applied. Think of it as storing all our data on a shelf, until quantum allows them to break the encryption and read through everything. It’s dangerously naive to assume that we’ll receive plenty of advanced notice as to when those technologies are operable among our adversaries.

## Inherency

### Inherency---1NC

#### The aff is not inherent---the NCAA no longer has an antitrust exemption.

Hittinger et al 21 [Carl Hittinger, Lauren Lyster and Julian Perlman are all legal scholars at JD Supra, “Supreme Court Holds That the ‘NCAA Is Not Above the Law' and Issues Warning to Colleges, Universities and Other Not-for-Profit Institutions”, July 1, 2021, https://www.jdsupra.com/legalnews/supreme-court-holds-that-the-ncaa-is-3282382/#:~:text=On%20June%2021%2C%202021%2C%20in,of%20the%20Sherman%20Antitrust%20Act.] IanM

On June 21, 2021, in NCAA v. Alston, the **U.S.** Supreme Court unanimously held that the National Collegiate Athletic Association’s (NCAA) **rules limiting** education-related **compensation** that colleges and universities can provide to student-athletes violate Section 1 of the Sherman Antitrust Act. Slip Op. 20-512 (June 21, 2021). In the **opinion** written by Justice Neil Gorsuch, the Court affirmed that the NCAA is not exempt from the antitrust laws, in the process sending a shot across the bow of colleges and universities (and other not-for-profit entities), stating, “[T]o the extent [the NCAA proposes] a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade – that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports[] and money – we cannot agree.”

### On T---1NC

#### The Scope of Antitrust already applies to the NCAA---the plan does NOT curtail an exemption or immunity.

Edelmen, 20 – ([Marc Edelman](https://www.forbes.com/sites/marcedelman/) Senior Contributor for Forbes, [Ninth Circuit Upholds That NCAA Violates Antitrust Law; Judge Describes College Sports As A ‘Cartel’ (forbes.com)](https://www.forbes.com/sites/marcedelman/2020/05/19/ninth-circuit-upholds-finding-ncaa-violates-antitrust-law-concurring-judge-correctly-describes-college-sports-as-a-cartel/?sh=7eb3773d32a4) nL

Yesterday, the U.S. Court of Appeals for the Ninth Circuit issued an important ruling in the NCAA Grant-In-Aid Cap Litigation case, unanimously upholding an earlier court finding that the NCAA rules limiting college athletes’ education-related benefits violate Section 1 of the Sherman Antitrust Act.

### Inherency---2NC

#### Here’s more evidence AND it’s about the NCAA’s amateurism model!

NLR 21 [The National Law Review, “NCAA May Not Sidestep Antitrust Law, SCOTUS Holds”, June 22, 2021, https://www.natlawreview.com/article/ncaa-may-not-sidestep-antitrust-law-scotus-holds] IanM

The National Collegiate Athletic Association (NCAA) doesn’t get a free pass when it comes to antitrust law, the Supreme Court held today in a unanimous decision written by Justice Neil Gorsuch. The justice said lower courts correctly applied antitrust scrutiny to the NCAA’s “amateur” requirement which denies athletes compensation they would command in a competitive market. In a concurring opinion, Justice Brett Kavanaugh said the NCAA is not above the law. He noted the adverse impact of the organization’s restrictions particularly on Black and low-income Americans.

#### NCAA is already subject to federal antitrust laws

Cooper 21 (J.J. Cooper, writer for Baseball America, 6-21-2021, "Supreme Court Calls Out Baseball's Antitrust Exemption In NCAA Ruling," No Publication, https://www.baseballamerica.com/stories/supreme-court-calls-out-baseballs-antitrust-exemption-in-ncaa-ruling/, accessed 10-8-2021)

Baseball’s antitrust exemption has long meant that baseball stands alone among the major United States professional sports. But a new Supreme Court ruling gave some indications that the precedent on which baseball’s perceived antitrust exemption exists may be on shakier legal ground than previously indicated.

The NBA, NFL and NHL are subject to antitrust laws. The NCAA was informed on Monday in a unanimous 9-0 ruling that it is also subject to Federal antitrust laws.

But baseball stands out as the exception. Ever since “Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs” in 1922, baseball has been seen as exempt from many of the provisions of Federal antitrust laws.