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Federal Trade Commission
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Office of Commissioner
Alvaro M. Bedoya

Statement of Commissioner Alvaro M. Bedoya
Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter

Regarding Amendments to the Hart-Scott-Rodino Rules and Premerger Notification Form and Instructions

October 10, 2024

My colleagues Commissioners Ferguson and Holyoak write at some length in support of the Commission's decision not to adopt, at this time, a set of proposed requests for employment information ("the labor screen") that was included in the original Notice of Proposed Rulemaking.[1] Rather than litigating the merits of the labor screen, I write to respond to one of the ideas underlying my colleagues' arguments against it.

The Sherman Act was passed in 1890; the Clayton Act and the Federal Trade Commission Acts were passed in 1914, creating this Commission and empowering it to enforce this newly expanded set of antitrust laws.[2] Yet it was only in 2021 that a federal antitrust enforcer first stopped a merger because of its impact on competition in the labor market.[3]

My colleagues cite the absence of such merger challenges as a key reason for dropping the labor screen. Both stress the extensive efforts the antitrust agencies have expended to identify such mergers.[4] They argue that, if enforcers have been working for years to identify mergers that harm competition in labor markets and have not brought more challenges, how can we justify requesting *additional* data to identify those mergers? In fact, Commissioner Holyoak seems to imply that labor monopsony is rare, going so far as to say that the labor screen "was a solution in search of a nonexistent problem."[5]

History tells a different story. While my colleagues suggest that the absence of labor-based merger challenges exists "not for a lack of trying,"[6] a review of the first hundred years of

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[1] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178, 42197 (June 29, 2023) (to be codified at 16 C.F.R. pts. 801, 803).
[2] 15 U.S.C. §§ 1-38; 15 U.S.C. §§ 12-27; 15 U.S.C. §§ 41-58.
[3] *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 1 (D.D.C. 2022).
[4] Statement of Commissioner Melissa Holyoak, *Final Premerger Notification Form and the Hart-Scott-Rodino Rules*, at 9; Concurring Statement of Commissioner Andrew N. Ferguson, *In the Matter of Amendments to the Premerger Notification and Report Form and Instructions and the Hart-Scott-Rodino Rule*, at 11.
[5] Statement of Commissioner Melissa Holyoak, *Final Premerger Notification Form and the Hart-Scott-Rodino Rules*, at 9.
[6] *Id.*; *see also* Concurring Statement of Commissioner Andrew N. Ferguson, *In the Matter of Amendments to the Premerger Notification and Report Form and Instructions and the Hart-Scott-Rodino Rule*, at 11 ("It is not for a lack of effort.").

that history finds dreadfully little trying. Indeed, most of the history of antitrust enforcement has been marked by a clear aversion to protecting labor market competition. This arguably has only been reversed in the last decade.

The historical record reveals several reasons for the lack of labor-based merger challenges, none of which suggest that labor monopsony is rare. The first would be early antitrust enforcers' overt hostility to labor organizing specifically and labor organizations more generally – a position that put them in sharp opposition to the legislators who created American antitrust law.

From the first Senate debates over passage of the law that would come to bear his name, Senator John Sherman made clear that he was concerned with combinations of companies that could unilaterally set the price of labor. In denouncing the "trust," he explained that:

> "The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests… It dictates the terms to transportation companies, *it commands the price of labor without fear of strikes, for in its field it allows no competitors*. Such a combination is more dangerous than any heretofore invented…"[7]

He wasn't the only legislator who was concerned with labor. The debates in 1890 as well as 1914 were defined by an overriding concern that the laws being considered would be misused to stop labor organizing. Thus, the Sherman Act was amended not once but twice to avoid such a result, ultimately being rewritten nearly in its entirety; sections 6 and 20 of the Clayton Act were enacted for the same reason 24 years later.[8]

Early antitrust enforcers ignored this legislative intent, as did the courts hearing challenges brought under the laws. Prosecutors instead turned the Sherman Act into what Professor Hovenkamp termed a "savage weapon" against labor, [9] using it to break the strikes of longshoremen in New Orleans and hungry Pullman Palace Car workers in Illinois.[10] The labor protections in the Clayton Act arguably fared worse. Despite the law's clear prohibition against the use of antitrust laws against labor organizing, courts in the 1920s used it to stop 2,100 strikes.[11]

In short, for the first four decades of their existence, the antitrust laws were used as a cudgel against organized labor, not a tool to detect and block mergers that risked harming labor markets. While the law was there to allow for a challenge to a merger based on its impact on

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[7] 21 CONG. REC. 2457 (Mar. 21, 1890) (remarks of Sen. John Sherman of Ohio) (emphasis added).
[8] *See* Alvaro M. Bedoya & Bryce Tuttle, *"Aiming at Dollars, Not Men": Recovering the Congressional Intent Behind the Labor Exemption to Antitrust Law,"* 85 ANTITRUST L.J. 805, 809-812 (2024).
[9] Herbert Hovenkamp, *Labor Conspiracies in American Law*, 1880-1930, 66 TEX. L. REV. 919, 928 (1988).
[10] *See* Bedoya & Tuttle, *supra* note 8, at 811-812; *see also U.S. v. Workingmen's Amalgamated Council of New Orleans*, 54 F. 994, 996 (E.D. La. 1893); Melvin I. Urofsky, *Pullman Strike*, ENCYC. BRITANNICA (Sept. 2, 2022), https://www.britannica.com/event/Pullman-Strike.
[11] *See* William E. Forbath, *Law and the Shaping of the American Labor Movement* 158 (1991).

labor market competition,[12] the idea that the DOJ or FTC of that era would try to block such mergers finds no basis in reality.

In his treatise exploring the absence of antitrust enforcement targeted at labor markets, Professor Posner presents two other reasons for the lack of labor-based merger challenges, both of which post-date the heyday of the labor injunction in the first half of the 20th century.[13] He argues that, starting in the 1960s, legal scholars began to prevail upon law enforcers to target antitrust enforcement on conduct and combinations that raised the prices on products and services sold to the public – that is, "consumer welfare." More interestingly, he explains that until very recently, most economists assumed that labor markets were more or less competitive, and that labor market power – the power of employers to set wages below a competitive level – was thus not an important problem for society.[14]

That understanding of labor markets has begun to unravel. New research suggests that the fewer companies in a community competing for workers, the lower the wages.[15] Research also suggests that mergers, specifically, help companies keep wages low.[16] This appears to be a common problem in American society. Professor Posner found it plausible that in many labor markets, workers receive thousands of dollars less than the competitive rate.[17] Two years ago, the Treasury Department estimated that as a result of current employer market concentration as well as how time consuming it is to find, interview for, and accept a job, Americans likely lose out on the equivalent of eight weeks of pay every year. In other words, in a perfectly competitive labor market – in a world where we can easily switch jobs to one of any number of firms, most

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[12] In 1926, in line with Senator Sherman's intent, the Supreme Court held that antitrust law could be used affirmatively to protect competition in labor markets, allowing a group of sailors to sue shipowners for wage-fixing. *Anderson v. Shipowners Ass'n of the Pac. Coast*, 272 U.S. 359, 365 (1926).

[13] *See generally* Eric A. Posner, *How Antitrust Failed Workers* (2021).

[14] *See id* at 4. Professor Posner cites a popular economics textbook from 2005 which declared that "[m]ost labor economists believe there are few monopsonized labor markets in the United States." *Id. citing* Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 108 (2005). *See also* David Card*, Who Set Your Wage?* AMERICAN ECONOMIC REVIEW at 1075 (2022) ("the time has come to recognize that many—or even most—firms have some wage-setting power. Such a shift was made with respect to firm's *price-setting* power many decades ago[…] In the past few years we may have reached a tipping point for a similar transition in labor economics, driven by the combination of new (or at least post-1930) theoretical perspectives, newly available data sources, and accumulating evidence on several different fronts."); *id.* at 1086 ("By insisting that 'markets set wages,' labor economists ceded the field, and had very little to say about questions like the design of online labor markets, or the effects of no-solicitation or no-poaching agreements—other than that they should not matter[…] One of the most exciting developments in the field today is the evidence of labor economists taking questions about wage setting seriously[...] I also expect this work to lead to some rethinking on policies such as minimum wages, the regulation of trade unions, and anti-Trust").

[15] See, e.g., Efraim Benmelech, et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages*, 57. J. OF HUM. RES. S200, S203 (Supplement) (2022).

[16] See Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397, 397 (2021); Benmelech, supra note 3, at S200 ("instrumenting concentration with merger activity shows that increased concentration decreases wages"); David Arnold, *Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes* (unpublished) (Oct. 29, 2021) ("M&As that increase local labor market concentration have negative impacts on worker earnings with the largest impacts in already concentrated markets."), *available at* https://sites.google.com/site/davidhallarnold/research.

[17] *See* Posner, *supra* note 13, at 28.

of us would be about two to four paychecks richer.[18] Few people may know about "labor monopsony," but anyone on a budget knows what they'd do with that money.

In short, my colleagues seem to say that labor monopsony is not a problem even though we've only just started to look for that problem. Then, they wave away tools to help find that problem because we haven't found it yet.[19]

All of this said, a key barrier to *any* merger challenge, including labor-based challenges, is a lack of time. The changes voted out today will help FTC staff quickly find and focus on the mergers that hurt competition in any market, including labor markets. For this and many other reasons, I am proud to support them.

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[18] The report's review of academic studies "places the decrease in wages at roughly 20 percent relative to the level in a fully competitive market." This is a middle estimate from an estimated range of $0.15 to $0.25 cents of lost wages on every dollar. The "eight weeks of pay" figure applies the lower bound of that estimate ($0.15, or 15%) to 52 weeks of pay. *See* U.S. Dep't of Treasury, *The State of Labor Market Competition*, at ii (2022) ("20 percent"); *id.* at 24-25 ("15 -25 cents on the dollar").

[19] Commissioner Holyoak states that "[t]he agencies have never made a standalone labor challenge to an acquisition," and Commissioner Ferguson states that the agencies have never made a challenge "based on labor market theories that could have been identified by the proposed requirements." Statement of Commissioner Melissa Holyoak, *Final Premerger Notification Form and the Hart-Scott-Rodino Rules*, at 9-10; Concurring Statement of Commissioner Andrew N. Ferguson, *In the Matter of Amendments to the Premerger Notification and Report Form and Instructions and the Hart-Scott-Rodino Rule*, at 11. I evaluate this new era quite differently. In 2021, our colleagues at the Antitrust Division successfully blocked a proposed merger between two of the nation's largest book publishers based on a labor theory that the elimination of competition between the merging publishers likely would have negatively impacted the advances paid to authors for their work. *See United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1 (D.D.C. 2022). What's more, in addition to Commission staff's challenge of the Kroger/Albertson's merger in part on a labor theory, FTC staff just last month submitted a comment urging the Indiana Department of Health to deny an application that seeks to combine Union Hospital and Terre Haute Regional Hospital, in part because, in staff's view, the proposed merger would likely depress wage growth for hospital employees and exacerbate challenges with recruiting and retaining healthcare professionals. *See* Complaint, *FTC v. Kroger Co., and Albertsons Co.,* (D. Or. Feb. 26, 2024); Federal Trade Commission Staff Submission to Indiana Health Department Regarding the Certificate of Public Advantage Application of Union Health and Terra Haute Regional Hospital at 54-63 (Sept. 5, 2024). The Commission unanimously authorized staff to file the comment. Press Release, Fed. Trade Comm'n, *FTC Staff Opposes Proposed Indiana Hospital Merger* (Sept. 5, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-staff-opposes-proposed-indiana-hospital-merger. Additionally, in 2018, under Republican leadership, the Commission alleged that Grifols S.A.'s proposed acquisition of Biotest U.S. Corporation would likely have enabled the combined firm to decrease fees paid to blood plasma donors and required Grifols to divest certain assets as a condition of the acquisition. *See* Complaint, *In the Matter of Grifols S.A. and Grifols Shared Services North America, Inc.* (Aug. 1, 2018). Finally, I note that prior to my arrival at the Commission, Chair Khan and Commissioner Slaughter sounded the alarm on labor concerns in the abandoned merger between Lifespan Corporation and Care New England Health System stating that, in addition to allegations contained in staff's complaint, they would have also supported an allegation on labor grounds. *See* Concurring Statement of Comm'r Rebecca Kelly Slaughter and Chair Lina M. Khan Regarding FTC and State of Rhode Island v. Lifespan Corporation and Care New England Health System, Fed. Trade Comm'n (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespancne_redacted.pdf.