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Hearing on "The 30,000 Foot View: Competition and Regulation in the U.S. Airline Industry"

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Chair Fitzgerald, Ranking Member Nadler, and members of the subcommittee, thank you for inviting me to testify. I have taught competitive strategy, antitrust, and regulation for 40 years, over which time my academic research has focused on competition, regulation, and antitrust, including extensive research on the airline industry. And I previously served as Deputy Assistant Attorney General for Economic Analysis in the Antitrust Division of the U.S. Department of Justice.

Today, I want to discuss the role of competition and antitrust enforcement in the airline industry as well as our broader economy, and emphasize the vital importance to American consumers, workers, and businesses of independent, evidence-based enforcement of our antitrust laws.

I. The Spirit/JetBlue Merger and Airline Competition

Antitrust did not kill Spirit Airlines. The recent collapse of Spirit Airlines is deeply regrettable. But we must be honest: Effective antitrust enforcement kept Spirit flying for at least two years longer than it would have if JetBlue had been allowed to complete its merger and eliminate Spirit's budget-focused consumer-friendly pricing. Spirit faced a number of operational and financial challenges to profitability post-pandemic, leading to bankruptcy filings to restructure its debt November 2024, again in August 2025, and apparently further negotiations in early 2026. But by all accounts, the last straw was the unprecedented increase in jet fuel prices caused by the Iran War. In announcing its immediate wind-down of operations on May 2, 2026, Spirit CEO Dave Davis made this clear:

> "In March 2026, we reached an agreement with our bondholders on a restructuring plan that would have allowed us to emerge as a go-forward business. However, the sudden and sustained rise in fuel prices in recent weeks ultimately has left us with no alternative but to pursue an orderly wind-down of the Company. Sustaining the

business required *hundreds of millions of additional dollars* [emphasis added] of liquidity that Spirit simply does not have and could not procure."[1]

Spirit's disappearance matters to everyone who flies. Spirit's exit is a significant loss—for all air passengers on routes that it served, and most especially for consumers on tight budgets. Spirit was the U.S. pioneer of the ultra-low-cost carrier model in the US, and its relentless focus on low fares consistently put pressure on other airlines to lower prices and innovate. That pushed fares lower on routes that it served, regardless of whether you flew on Spirit.[2] Indeed, legacy airlines' introductions of Basic Economy fares were a direct response to the Spirit business model, and positioned to pry the most price-sensitive customers away from Spirit and other ULCCs. As Delta executive Glenn Hauenstein said in a 2019 earnings call: "… our Basic Economy is not something that we want to grow. …it's as we've outlined before, a defensive product against ULCCs."[3] Over 2003-2025, Spirit served more than 428 million price-sensitive travelers who valued budget-friendly fares, including travelers who might not otherwise have been able to fly.[4] According to *The Wall Street Journal,* Flix North America, which operates the Flixbus and Greyhound lines, said it saw a year over year 30% increase in passengers on its 130 routes that overlapped with Spirit Airlines following Spirit's flight shutdown.[5] Liz Myers, a single mother in Illinois, told reporters: "We didn't fly it because we can afford other things and we're just being cheap. We fly Spirit because we're broke."[6]

Blocking the merger was sound enforcement, not overreach. DOJ's challenge was not an aberration, a mistake, or an overreach, but rather an application of sound antitrust enforcement principles to the particular facts and circumstances of the JetBlue/Spirit merger. And Federal District Court Judge William G. Young's decision to enjoin the merger was a response to careful consideration of the evidence presented by both sides over a 17-

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[1] Spirit Press Release, May 2, 2026.

[2] See e.g., Glen Hauenstein, Delta Airlines Earnings Call Q2 2015, July 15, 2015, at 9: "Basic Economy which is our Spirit match fare, if you will…"; and Brad Shrago (2024), "The Spirit Effect: Ultra-Low Cost Carriers and Fare Dispersion in the U.S. Airline Industry," *Review of Industrial Organization,* 64: 549-579.

[3] Glenn Hauenstein, Delta Air Lines, Inc. q3 2019 Earnings Call Corrected Transcript, 10-Ocotber 2019, p. 23.

[4] Passengers- All Carriers, All Airports, Bureau of Transportation Statistics. Downloaded 6/21/2026.

[5] Jacob Passy, "They Can't Fly Spirit Anymore, So They're Taking the Bus Instead," *The Wall Street Journal,* June 21, 2026.

[6] Dean Seal, "Why the Collapse of Spirit Airlines Means Higher Fares for Everyone," *Wall Street Journal,* May 4, 2026.

day bench trial. In his opinion, Judge Young described Spirit as a "uniquely disruptive competitor" that consistently put pressure on other airlines to lower prices and innovate. [7]

That decision gave consumers *years* longer to benefit from Spirit's ULCC fares. When JetBlue succeeded in its July 2022 bid for Spirit, it had no intention of preserving Spirit as a low-fare competitor. JetBlue documents and testimony at trial made it clear that JetBlue planned to strip out seats and repaint Spirit's bright yellow planes, to "convert Spirit's planes to the JetBlue layout and charge JetBlue's higher average fares to its customers."[8] Indeed, JetBlue financial modeling of the deal built in fare increases of 30% after closing the merger and shutting down Spirit.[9] Spirit would have been gone long before May 2026, and everyone on Spirit routes would have been paying higher fares.

At the time the merger was announced, it would have eliminated head to head competition that existed between JetBlue and Spirit on 54 nonstop overlap routes—many times more than the nonstop overlap in previous airline mergers. It would have eliminated the well-documented "Spirit Effect"—Spirit's competitive presence on a route constraining the fares of legacy and other carriers—on many more routes. And it would have eliminated a vital low-fare option for the most budget-constrained and price-sensitive Americans.

You do not need to take my word, or the DOJ's word, for this. Judge Young independently evaluated a full trial record, and concluded that if JetBlue were permitted to "gobble up Spirit," the transaction would eliminate one of the airline industry's "few primary competitors" providing "unique innovation and price discipline," and would further consolidate an oligopoly.[10] He found that the merger's "elimination of Spirit would harm cost-conscious travelers who rely on Spirit's low fares."[11] But the harm would have been broader—the court agreed with DOJ that Spirit's downward pressure on prices benefited not only Spirit passengers, but also consumers flying on JetBlue and other airlines.[12] This is one of the compelling benefits of competition, and a reason antitrust must be vigilant in protecting competitive markets.

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[7] United States et al. v. JetBlue Airways Corp. and Spirit Airlines, Inc., Findings of Fact and Conclusions of Law, No. 1:23-cv-10511-WGY (D. Mass. Jan. 16, 2024), at 81; hereafter "*JetBlue Findings of Fact*"

[8] *JetBlue Findings of Fact* at 53.

[9] Plaintiffs Closing Arguments demonstrative, US et al. v JetBlue Airways Corp and Spirit Airlines, Inc., 1:23-cv-10511-WGY, slide 49 based on Trial Ex 413 at 756; Nov. 9, 2023, Transcript vol 1, 24:15-18.

[10] *JetBlue Findings of Fact* at 8.

[11] *JetBlue Findings of Fact* at 53.

[12] *JetBlue Findings of Fact* at 53-55.

Judge Young agreed with DOJ. He concluded with a reminder of who the antitrust laws protect: "Spirit is a small airline. But there are those who love it. To those dedicated customers of Spirit, this one's for you. Why? Because the Clayton Act, a 109-year old statute requires this result—a statute that continues to deliver for the American people."[13] And this is important to remember: the Antitrust Division cannot block a merger on its own. Instead, it must convince a federal district court judge that the preponderance of evidence shows that the merger would violate section 7 of the Clayton Act, a considerable hurdle. If the evidence isn't there, DOJ will lose in court.[14]

This merger did not warrant a "failing firm" defense. After Spirit's demise, many have jumped on the argument that DOJ should have allowed the merger under a "failing firm" defense. To avoid such arguments being used pretextually to bypass merger law, the Supreme Court has established that such a defense requires proving three elements:[15] (i) The target faced "the grave probability of a business failure." That is, it was no longer a viable firm and would be forced to exit the market with or without the merger; (ii) "The prospects of reorganization …are dim or nonexistent"; and (iii) "The company that acquires the failing firm… is the only available purchaser" [that is,]….that the target company has made "unsuccessful good-faith efforts to elicit reasonable alternative offers that pose a less severe danger to competition than does the proposed merger."[16] There are many challenges to succeeding with such a defense, but in this case, the greatest was that the parties did not make it—likely because it was not true. JetBlue and Spirit had a team of superb antitrust lawyers, and I am confident that if they could have marshaled evidence that validated such a defense, they would have pursued that strategy and succeeded. They did not.

Instead, "multiple Spirit executives testified [at trial] that the airline had a plan to return to profitability,"[17] undermining the first and likely second element. The third had been discredited in the high-profile bidding war between Frontier and JetBlue for Spirit. In a

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[13] *JetBlue Findings of Fact* at 112.

[14] Unfortunately, the same is not true in reverse: Courts cannot compel the FTC and DOJ Antitrust Division to enforce the antitrust laws. If leadership in those agencies decide to allow anticompetitive mergers for reasons of negligence, political favors, or interference in law enforcement, courts cannot protect American consumers and workers.

[15] The following is based on the discussion in the Federal Trade Commission and U.S. Department of Justice, 2023 *Merger Guidelines*, p. 30-31; citing to the Supreme Court in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (building on *International Shoe Co. v. FTC*, 280 U.S. 291 (1930)).

[16] *Id.,* 30.

[17] *JetBlue Findings* at 103.

publicly released May 2, 2022, letter to JetBlue CEO Robin Hayes, Spirit board chair H. McIntyre Gardner foreshadowed the eventual outcome in explaining one of the many reasons the board rejected the JetBlue bid: "Spirit believes DOJ—and a court—will be very concerned that a higher-cost/higher fare airline would be eliminating a lower-cost/lower fare airline in a combination that would remove about half of the ULCC capacity in the United States."[18] When JetBlue accelerated its hostile takeover bid, Spirit's proxy filing urged a vote FOR the Frontier bid: "JetBlue's tender offer has not addressed the core issue of the significant completion risk and insufficient protections for Spirit stockholders. ...Based on our own research and the advice of antitrust and economic experts, our view is that the proposed combination of JetBlue and Spirit lacks any realistic likelihood of obtaining regulatory approval, while our company faces a long and bleak limbo period as we await resolution. In that scenario, a $1.83 per share reverse break-up fee will not come close to adequately compensating Spirit stockholders for the significant business disruption Spirit will face during what JetBlue acknowledges will be a protracted regulatory process."[19] It is hard to imagine that a court considering a failing or even "flailing" firm defense would be willing to overlook evidence of an eager buyer who the target board believed posed fewer competitive concerns.

The judge noted that there was some nod at trial to a "flailing firm" defense, what has been called by courts " the Hail-Mary pass of presumptively doomed mergers".[20] But given the lack of robust evidence and the optimism of Spirit executives for the future, the court declined to credit that as an exception for an anticompetitive merger.[21]

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[18] "Spirit Airlines Board of Directors Reiterates Support for Merger with Frontier Airlines," PRNewswire, May 2, 2022.

[19] Spirit Airlines SEC Filing Exhibit(a)(1)(G), "Spirit Airlines Board of Directors Urges Stockholders to Reject JetBlue Tender Offer," May 19, 2022.

[20] Citing to *ProMedica Health System, Inc. v. Federal Trade Commission, 749 F.3d 559 (6th Cir. 2014)* at 572: "This argument is known as a 'weakened competitor' one, and is itself 'probably the weakest ground of all for justifying a merger.' Courts 'credit such a defense only in rare cases, when the [acquiring firm] makes a substantial showing that the acquired firm's weakness, which cannot be resolved by any competitive means, would cause that firm's market share to reduce to a level that would undermine the government's prima facie case.' In other words, this argument is the Hail-Mary pass of presumptively doomed mergers." (citations in the original omitted).

[21] Spirit share prices were trading in the $14-$17 per share during the trial, and roughly $8 per share after the decision was announced, suggesting that investors thought the company had ongoing value for shareholders independent of the merger outcome. (https://www.digrin.com/stocks/detail/SAVE/price) Some have proposed a weakening of this standard, perhaps even imposing a "weakened competitor" standard that would allow the merger unless the plaintiffs can prove the target firm will continue to be a viable or strong competitor for five or even ten years into the future to block. Given the difficulty of predicting future corporate

JetBlue's merger attempt likely contributed to Spirit's financial weakness. While many factors contributed to Spirit's ongoing financial woes, the 19 months of merger limbo likely did not help—something Spirit's management foresaw and warned about in its proxy filing. A merger attempt may weaken the target firm whether or not the attempt is successful. When the target firm's fate remains uncertain for months or years, it may lose management focus, commercial momentum, and talent. That cost is borne by the target and its customers, creating a "heads I win, tails you lose" scenario for the acquiring firm: if the bid succeeds, the acquirer eliminates a competitor or benefits from its assets; if the bid fails, a long period of uncertainty may weaken the target, making it a less effective competitor going forward. Either way, the acquiring firm gets less competition, and customers, workers, and suppliers may pay the price. Spirit's management knew in 2022 that JetBlue's bid presented serious antitrust risk, and said so publicly.[22] But JetBlue kept increasing its bid over Frontier's until Spirit's shareholders decided the gamble was worth it. That mistake likely exacerbated Spirit's weakening position over time.

Where this fits with other airline mergers. Some critics have argued that because the DOJ allowed previous airline mergers, it should not have drawn the line at Spirit/JetBlue. This argument—a classic false equivalence—reminds me of the strategy my children used when they wanted to do something they knew I objected to: "But all the other kids got to do it!" That didn't convince me, and shouldn't convince you.

We should remember this was not the first time DOJ litigated an airline merger or merger equivalent. Just a year earlier, federal district court judge Leo Sorokin in the District of Massachusetts heard DOJ's and state AG's Sherman Section 1 challenge to the "Northeast Alliance" (NEA), an attempt by American and JetBlue to reduce competition by an agreement whose effects "resemble those of a merger of the parties' operations within the northeast."[23] Judge Sorokin also ruled for DOJ and the states, finding "The question before the Court is whether the NEA suppresses or promotes competition. The record supports only one answer. The NEA, operating as it was designed and intended by American and

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fortunes even a few years into the future, that could be a "loophole" large enough to drive most anticompetitive mergers through.

[22] See *supra* notes 18 and 19.

[23] US et al. v. American Airlines Group, Inc. and JetBlue Airways Corporation, Findings of Fact and Conclusions of Law, Case 1:21-cv-11558-LTS, May 19, 2023, at 28; hearafter *NEA Findings*.

JetBlue, substantially diminishes competition in the domestic market for air travel."[24] That decision was affirmed on appeal by American to the 1st Circuit in November 2024.[25]

Importantly, in antitrust, context is everything. The airline sector already had consolidated dramatically. Judge Young noted that the U.S. passenger airline industry is dominated by the "Big Four"—Delta, American, United, and Southwest—which control 80 percent of U.S. airline revenue, with the next-largest carrier, Alaska, accounting for 6 percent.[26] That does not mean that all future airline mergers should be blocked. But any proposed mergers should be carefully evaluated for whether they are likely to increase competition—by, say, combining two smaller airlines into a more effective competitor, as a Spirit-Frontier combination might have achieved—or reduce competition—as would likely be the case for an acquisition of one of the smaller carriers by one of the big 4 airlines, let alone the extraordinary proposal United CEO Scott Kirby recently made for a United/American tie-up.[27]

The courts and antitrust agencies recognize that prospective harm to competition from further consolidation in an already highly concentrated market may be much greater than in a fragmented one.[28] That's the reason the Merger Guidelines and the courts look at both the level and changes in concentration to determine whether a proposed merger is presumptively anticompetitive and hence unlawful. A merger that is not problematic in an unconcentrated market may be dangerous in an already consolidated market: a merger of two pharmacies in a town with fifteen is likely a footnote; a merger of the last two pharmacies in town is a crisis for anyone who needs a prescription to be filled.

Losing a "maverick" is especially dangerous in a concentrated market. A merger is particularly problematic when the firm being eliminated has a specific strategy of disrupting the comfortable equilibrium in an already concentrated industry, a role that the judge recognized Spirit played in airline markets. That comfortable equilibrium is what economists call "tacit collusion," and what business executives sometimes call the "quiet

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[24] *NEA Findings* at 92-93.

[25] U.S. v American Airlines Group, Inc, No 23-1802 (1st Cir. 2024).
[26] *JetBlue Findings* at 8.

[27] Leslie Josephs, "United Airlines EO confirms he approached American Airlines about merger," CNBC, April 27, 2026. One might have thought such a proposal absurd even two years ago, but it is unclear that even a merger that obviously anticompetitive would be rejected by the current DOJ leadership if the right lobbyists were hired.

[28] *US Department of Justice and Federal Trade Commission, Merger Guidelines, 2023.*

life." In an influential academic study, Nathan Miller and Matthew Weinberg [29] demonstrate how a merger can raise prices through increased coordination. They show that the 2008 joint venture of Miller and Coors (effectively a merger of US assets), despite substantial expected and realized distribution and production efficiencies, aligned the interests of Miller/Coors with market leader Anheuser-Busch, making it profitable for the firms to move to and maintain a higher-price coordinated equilibrium.[30] Whether a disruptive competitor declines to go along with an industry's "unwritten rules" because it has a different business model, or because it seeks to grow by taking share from rivals, its acquisition can eliminate an important competitive constraint.

Once such a maverick is extinguished by an acquisition, consumers may have no reprieve from the harmful consequences. Current antitrust law has limited ability to reach this kind of coordination—which occurs without an explicit agreement and may instead take the form of silent accommodation or parallel behavior. Because such coordination generally is easier to sustain when fewer firms remain in the market, strict merger enforcement in already-concentrated markets may be the primary, or only, bulwark against these anticompetitive effects.

II. The Role of Antitrust Enforcement in Today's Economy

Antitrust matters far beyond the airline industry. While I appreciate the subcommittee's attention to airline markets—an industry I have studied since the late 1980s—it is far from the only sector in which effective antitrust enforcement is critical. Over the last several decades, we have watched industry after industry consolidate. In some cases, consolidation follows from greater efficiencies by the larger firms in a sector, and quality-adjusted prices to consumer may fall, or at least not rise. There is an emerging body of literature in economics that documents these effects in specific industries or with respect to specific mergers.[31] But in other sectors—and particularly likely where consolidation is the result of merger activity or exclusionary conduct rather than technological change or efficiencies —consolidation raises serious concerns about higher prices for consumers,

[29] Nathan Miller & Matthew Weinberg (2017), "Understanding the Price Effects of the MillerCoors Joint Venture," *Econometrica* , 85: 1763-1791.

[30] *Id.*

[31] See, e.g., Nathan Miller (2025), "Industrial Organization and *The Rise of Market Power*," *International Journal of Industrial Organization,* 98.

lower wages or reduced bargaining power for workers and suppliers, and diminished innovation.

Agriculture: The squeeze on farmers and higher costs for consumers. In agriculture, farmers have been struggling with the effect of rising consolidation for decades—now on top of headwinds created by erratic tariff policy and Iran War-induced increases in the prices of fuel and fertilizer. For example, poultry and meat processing is highly concentrated among a small set of firms. USDA's Economic Research Service reports that by 2019 the four largest beef packers accounted for 81 percent of steer and heifer purchases, and that in many parts of the country ranchers and farmers now have only two to four buyers for their cattle or hogs. A recent paper by USDA economists reports recent evidence of stronger market power in meatpacking, including lower prices paid for cattle and sharply increased spreads between cattle prices and wholesale beef prices, since 2016.[32] A study of poultry processing finds that consolidation due to mergers in this sector has facilitated some efficiency gains, but the net effect has been to increase markups and wholesale prices for poultry.[33] As I discussed before, when a small number of firms dominate a market, collusion—tacit or explicit—may become a significant concern. A number of recent antitrust cases have alleged collusion among poultry and meat processing firms, facilitated through exchange of detailed competitive data under the auspices of third party Agri Stats.[34] And the FTC filed suit in 2025 against farm equipment manufacturer John Deere, alleging restrictive repair practices that limit farmers' right-to-repair infringe on their ability to control costs and maintain their own equipment.[35] As yet, there seem to be no published ex post assessments of the three huge mergers in the

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[32] James M. MacDonald, "Concentration in U.S. Meatpacking Industry and How It Affects Competition and Cattle Prices," U.S. Department of Agriculture, Economic Research Service, Amber Waves, January 2024, https://www.ers.usda.gov/amber-waves/2024/january/concentration-in-u-s-meatpacking-industry-and-how-it-affects-competition-and-cattle-prices

[33] Tina L. Saitone et al. (2025), "Consolidation, productivity, and downstream prices in the US poultry industry," *Agricultural and Resources Economics Review,* 54: 157-178

[34] US v Agristats, CASE 0:23-cv-03009, Complaint filed September 28, 2023; Proposed Final Judgment filed May 7, 2026. There have been a significant number of private enforcement actions against Agri Stats, with settlements of cases alleging wage suppression and meat and price-fixing in various markets. See e.g., Hagens Berman, "Settlements Reached with Agri Stats in Broilers, Turkey, Pork Antitrust Suits Over Price-Fixing Allegations," March 13, 2026.

[35] Federal Trade Commission, "FTC, States Sue Deere & Company to Protect Farmers from Unfair Corporate Tactics, High Repair Costs," January 15, 2025. See also Complaint, FTC, State of Illinois, and State of Minnesota v. Deere and Company, Case: 3:25-cv-50017, January 15, 2025.

seed/pesticide space (Dow/Dupont, Bayer/Monsanto, ChemChina/Syngenta), which significantly increased concentration into this space.

Healthcare consolidation and vertical integration in the sector. Concentration in healthcare markets has been a growing concern—within virtually all swaths of the sector,[36] including insurers, hospitals and other health care providers, pharmacy benefits managers, pharmaceutical companies—and through vertical integration, across many of these markets. For example, mergers and acquisitions have contributed to the highly concentrated and vertically integrated state of the pharmacy benefit manager market. The FTC reported in 2024 that the top three PBMs processed nearly 80 percent of the approximately 6.6 billion prescriptions dispensed by U.S. pharmacies in 2023, while the top six processed more than 90 percent. The FTC further reported that the largest PBMs are vertically integrated with major health insurers and pharmacy operations, giving them significant influence over Americans' access to medicines and the prices they pay.[37] Recent academic work suggests these vertical acquisitions have harmed consumers. Eric Yde concludes that divesting vertically integrated pharmacies from networks would reduce drug prices for Medicare Part D patients by more than 7%, and work by Charles Gray, Abby Alpert, and Neeraj Sood finds that UnitedHealth's 2015 acquisition of Catamaran, the last significant stand-alone PBM, foreclosed access for rival insurers without their own PBM, raising rival insurers' premiums by about $22/month with no discernible reduction in UnitedHealth premiums.[38] While it may be too late to address insurer/PBM integration, integration of hospitals and physician practices is an area of rapid but not yet complete consolidation, where greater antitrust scrutiny might yet preserve some competition. A 2025 GAO report suggests at least 47% of physicians were consolidated with hospital systems in 2024, an increase from less than 30% in 2012.[39] In a recent NBER working paper, Cooper et al. (2025) find that hospital acquisitions raised hospital prices by 3.3% and physician prices by 15.1%, with no discernable quality improvement.[40]

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[37] Federal Trade Commission, "Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies," Interim Staff Report, July 2024, 2–4.

[38] Eric Yde (2026), "Vertical Integration and Regulated Profits in Pharmacy Benefits Markets," Working Paper. Charles Gray, Abby Alpert, and Neeraj Sood (2026), "Disadvantaging Rivals: Vertical Integration in the Pharmaceutical Market," *American Economic Journal: Applied Economics,* 18: 286-304.

[39] US General Accounting Office (September 22, 2025), "Health Care Consolidation: Published Estimates of the Extent and Effects of Physician Consolidation," GAO-25-107450.

[40] Zack Cooper et al. (2025), "Are Hospital Acquisitions of Physician Practices Anticompetitive?" National Bureau of Economic Research Working Paper 34039.

A retail win for consumers and workers. In retail, the importance of antitrust enforcement was recently demonstrated when the FTC and a bipartisan group of state attorneys general secured a preliminary injunction blocking Kroger's proposed $24.6 billion acquisition of Albertsons, which the FTC described as the largest supermarket merger in U.S. history. The case was important not only for preserving competition in grocery prices—a first order pocketbook issue for consumers—but also because supermarkets compete for workers, and the benefits of that wage competition would have been lost by the combination.[41]

III. The Rule of Law and the Future of Antitrust

What follows is not a complaint against any single outcome, but a concern about a pattern in how these decisions are now being made. I remind my students that if you like a market-based capitalist economy, and especially if you think government regulation of prices or entry is often costly or flawed, you should love antitrust enforcement. It levels the playing field, keeps the economy dynamic, encourages innovation and productivity, and shares the benefits of growth with consumers, workers, entrepreneurs, and shareholders. Antitrust is not popular with executives who seek to maximize profits, share prices and executive compensation by buying competitors, building moats around profitable businesses, or colluding with their rivals. All the more reason to embrace its enforcement.

When I served in the DOJ Antitrust Division, the first thing any new employee—political or career—was told is that antitrust enforcement is a law enforcement activity. And that mantra was repeated often. Our role was to call balls and strikes based on the evidence. It did not matter which firms had political connections or which sectors might be favored or disfavored by an administration. At briefings for the Attorney General on a recommendation to challenge a high-visibility merger, the questions were crisp and analytical: Will this merger reduce competition? Are consumers going to pay more? Are workers, suppliers, or rivals likely to be harmed? Do we have the evidence to prove our case in court? If the answers were yes, we were told that political fallout was not our concern. We worked on behalf of the American people.

I find myself today in the unusual situation of feeling called to emulate Milton Friedman, who in a 1978 lecture said "about the only people who have any real freedom of speech left are people who are in the fortunate position of myself: tenured professors at major private universities on the verge of retirement!"[42] So let me use that freedom to acknowledge: I

[41] Federal Trade Commission, "Statement on FTC Victory Securing Halt to Kroger, Albertsons Grocery Merger," December 10, 2024.
[42] Milton Friedman, "The Future of Capitalism," Hoover Institution (original published in Imprimis, Feb 1977).

am deeply concerned today by a growing pattern of institutional irregularity that seems to abandon these fundamental principles of justice and threatens to undermine public confidence in antitrust enforcement and government in general. Antitrust *must* be governed by the rule of law, not by the prospect of political gain or the pleasure of delivering favors to friends and pain to others. But I fear that is increasingly not the case.

The first sign of this was the HPE/Juniper merger in 2025. DOJ initially sued to block Hewlett Packard Enterprise's $14 billion acquisition of Juniper Networks, alleging that the merger would harm competition in wireless networking. DOJ later settled, requiring divestitures and licensing commitments rather than blocking the deal.[43] Reuters reported that two senior Antitrust Division officials, Roger Alford and Bill Rinner, were fired amid controversy over how DOJ reached the settlement, and that sources familiar with merger protocol described the way the settlement was signed as unusual.[44]

Irregularities appear to be increasing since Assistant Attorney General Abigail Slater was reportedly forced out of the Antitrust Division in February 2026.[45] The proposed Nexstar/Tegna merger of the two largest owners of local broadcast television stations attracted public attention in March 2026. As the court wrote in granting a preliminary injunction against combining their assets (citations in the original omitted):

> In unusual circumstances — with the FCC's quasi-adjudicatory licensing proceeding still pending — the President himself weighed in publicly in February and urged federal regulators to approve the deal to "knock out the Fake News." FCC Chairman Brendan Carr publicly signaled his acknowledgement of, and agreement with, the President's endorsement. At a press conference on February 18, 2026, Chairman Carr reiterated, "I support that [Nexstar/TEGNA] transaction. We're going to be moving forward." On March 19, 2026, the same day U.S. DOJ announced early termination of its antitrust review, the FCC issued a ruling granting Nexstar's requested waivers and green-lighting the acquisition. The FCC approved Defendants' application for broadcast license transfers — not through a full, public Commission vote but through its Media Bureau (which acts under the FCC

[43] U.S. Department of Justice, "Justice Department Requires Divestitures and Licensing Commitments in HPE's Acquisition of Juniper Networks," June 28, 2025, https://www.justice.gov/opa/pr/justice-department-requires-divestitures-and-licensing-commitments-hpes-acquisition-juniper

[44] Jody Godoy and Sarah N. Lynch, "Two US Justice Dept antitrust officials fired over merger controversy, source says," *Reuters,* July 30, 2025. "HPE/Juniper: As Fight Between DOJ Leadership and Antitrust Division Broils, Tunny Act Proceeding Looms," *Capital Forum,* July 24, 2025. CITE to roger testimony

[45] Jennifer Jacobs and Sarah N. Lynch, "Trump Officials oust Abigail Slater as DOJ's antitrust chief, sources say," CBS News, Feb. 12, 2026.

Chairman's discretion). Immediately thereafter, effective March 19, 2026, Nexstar and TEGNA closed the deal (the "Transaction"). [46]

DirecTV and a group of state attorneys general have each filed a challenge to the merger. The states complaint alleges that Nexstar and TEGNA overlap in 31 Big Four "Overlap DMAs," where each company owns at least one ABC, CBS, Fox, or NBC affiliate, and that the transaction would create or expand duopolies and triopolies, increasing concentration well above the thresholds the Merger Guidelines treat as presumptively unlawful. The challengers also allege that the merger would increase Nexstar's bargaining leverage in retransmission-consent negotiations with MVPDs such as DirecTV, Comcast, DISH, and Charter, leading to higher retransmission fees that would be passed through to consumers nationwide.

Congress and the American public had long expressed bipartisan alarm at the tactics Live Nation has used since its merger with Ticketmaster in 2010. In May 2024, the DOJ and a coalition of 39 states and the District of Columbia sued Live Nation, alleging monopolization and other anticompetitive conduct in live entertainment markets, [47] reflecting the broad concern with Live Nation's conduct. Yet, mid-trial in March 2026, DOJ announced a settlement on terms that ensure very little will change; Live Nation stock closed 6.2% higher on the news, reflecting the expected benefit to the company of the settlement and suspension of the litigation.[48] The settlement reportedly was negotiated without consulting DOJ litigating attorneys or the partner state attorneys general, and DOJ did not inform the presiding judge of a settlement term sheet signed on Thursday, March 5 until the evening of Sunday, March 8. The judge rebuked DOJ and Live Nation executives: "Parties were acting as if we were going into trial on Monday when the leadership of the United States and the leadership of Live Nation were fully aware they had a signed term sheet. Again, this is hard to understand."[49]. Perhaps not so hard to understand given the political machinations reportedly behind this. *The Wall Street Journal* reported*:*

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[46] Order, In RE: Nexstar-Tegna Merger Litigation, Case 2:26-cv-00976-TLN-CKD, April 17, 2026, at 8.

[47] U.S. Department of Justice, "Justice Department Sues Live Nation-Ticketmaster for Monopolizing Markets Across the Live Concert Industry," May 23, 2024, https://www.justice.gov/archives/opa/pr/justice-department-sues-live-nation-ticketmaster-monopolizing-markets-across-live-concert.

[48] Ben Sisario, David McCabe, and Olivia Bensimon, "Justice Department and Live Nation Reach Settlement Terms in Antitrust Case," *New York Times,* March 9, 2026.

[49] Kara Scannell, "Judge scolds Live Nation and Justice Department for secret settlement talks," *CNN Politics,* March 10, 2026.

> After the trial began in March, Trump began calling around to ask why it hadn't been settled. *What's the holdup?* he wanted to know, according to people familiar with the matter. It was an extraordinary role for a president to play in a routine antitrust investigation. On March 5, both sides met at the White House to hash things out, according to people familiar with the meeting. Live Nation CEO Michael Rapino and the company counsel joined officials, including Bondi, White House counsel David Warrington and Slater's acting replacement. The settlement was signed that day, said people familiar with the matter.[50]

American concert-goers and performers owe a debt to the 33 state and DC AGs who told the judge they would continue the litigation, scrambling to replace the DOJ leads who had been pulled from the trial given the settlement. And to the jury that evaluated the evidence over four days of deliberation and found for the plaintiffs on all claims.[51] Unfortunately, this extraordinary circumvention of the process appears now to be almost routine.

Most recently, the *Wall Street Journal* reported that "The Justice Department's senior leadership closed an investigation of Paramount's bid for Warner Bros. Discovery before career staffers who had been investigating the transaction had an opportunity even to present their recommendation to object to the merger, according to people familiar with the matter." [52]

These examples raise an alarming concern that antitrust law enforcement is being turned from an evidence-based process into a political favor factory. To put it bluntly, it looks from the outside as though a "Justice for Sale" sign has been hung on the 5th floor of the RFK Building. That is an alarming message to send to the public, to markets, and to companies deciding whether to compete on the merits or invest in political influence to bypass the competitive process. As Roger Alford, Notre Dame law professor and former twice-

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[50] Dana Mattioli, Rebecca Ballhaus, and Josh Dawsey, "The Threats and Bare-knuckle Tactics of MAGA's Top Antitrust Fixer," *Wall Street Journal,* March 20, 2026.

[51] Office of the New York State Attorney General, "Attorney General James and Coalition of States Win Trial Against Live Nation and Ticketmaster," April 15, 2026, https://ag.ny.gov/press-release/2026/attorney-general-james-and-coalition-states-win-trial-against-live-nation-and

[52] Dave Michaels, Dana Mattioli, Sadie Gurman, and Jessica Toonkel, "Justice Department Decision to Allow Paramount Deal Surprised Staff Investigators," *Wall Street Journal,* June 15, 2026.

appointed Antitrust DAAG said recently, “The cost to the country of this new pay-to-play approach to antitrust enforcement is enormous.”[53]

Antitrust enforcement based on the rule of law is vital to the operation of a market economy. When the public and the markets lose faith that decisions are being made on the merits, that the wealthy or politically connected can buy the outcome they prefer, the entire system suffers. Surely we can find bipartisan support for evidence-based, politically independent enforcement that protects the American consumer, the American worker, and the competitive process itself.

[53] In *supra* note 50