FROM MANUSCRIPTS TO MONOPSONIES: REVISITING *UNITED STATES V. BERTELSMANN SE & CO. KGAA*

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United States v. Bertelsmann SE & Co. KGaA *is a unique antitrust case that has reframed decades of precedent. In November 2020, Bertelsmann SE & Co. KGaA ("Bertelsmann"), the parent company of PRH, announced its plan to acquire S&S from its parent company, Paramount Global ("Paramount"). This announcement positioned the merged entity ("S&S + PRH") to control a third of the book market, the largest market share held by a publishing house. The following year, the Department of Justice Antitrust Division ("DOJ ATR") sued to block the merger. In* United States v. Bertelsmann SE & Co. KGaA*, the DOJ ATR's case was distinct because the merger arguably posed a risk of a monopsony instead of a monopoly. Monopsony actions like this case are a noted departure from the "consumer welfare prescription," which focuses solely on potential consumer price increases and has dominated modern antitrust jurisprudence. Much to the surprise of antitrust scholars, the presiding judge blocked the merger, finding overwhelming evidence that the merger would decrease authors' compensation and thus lessen competition. This decision was hailed as a victory for the neo-Brandeisian movement. However, the victory celebration might have been premature. In August 2023, Kohlberg Kravis Roberts & Co. (KKR), a private equity firm, agreed to purchase S&S. Private equity firms are notorious for aggressive revenue driving and "efficient" reallocation of assets, normally translating to cutting costs through layoffs and other downsizing maneuvers. In theory, tantamount anticompetitive harms could arise through a private equity acquisition of a publishing company as much as through a horizontal merger between two competing publishing*

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houses. The persistence of this risk and the departure from precedent begs the following question: Was Bertelsmann correctly decided?

This Case Note will argue that the judge crucially erred in her decision. The judge's departure from consumer price points, the antitrust norm, was too dramatic. Specifically, the decision's cited findings of increased concentration, history of collusion, and lack of efficiencies were much more correlated to book-reader harm as opposed to that of authors. Furthermore, this Case Note explores the potential underlying rationale behind choosing to frame this action as protecting authors, evaluating why this approach fell short of its intended goals beyond the proposed merger itself. The failure to incorporate the aforementioned rationale into the case is significant, because while focusing on book readers rather than authors might not have changed the case's outcome, this departure from precedent deviates too far from the original intent of American antitrust laws. Changes in antitrust precedent have taken place to realign jurisprudence with the originally intended meaning of these laws, not the reverse. This Case Note will argue that this push beyond the bounds of American antitrust jurisprudence is not unwarranted, in fact quite the opposite; rather, that this case is indicative of some much needed changes to Section 7 merger cases. Moreover, this Case Note will argue that the precedential value of choosing to base the decision around authors will create a false flag for emboldened antitrust regulators as to the bounds of the Clayton Act. As such, this Case Note will highlight that this decision will not prevent monopsony-like conditions in publishing due to private equity acquisitions' ability to evade antitrust regulators' radar and the FTC's track record of failure during the Biden administration. Consequently, this Case Note proposes that consumers once again become the crux of Section 7 merger cases until a change in the statutory language occurs– not to undermine the goals of the Neo-Brandeisian movement, but because current case law does not provide a workable framework to achieve those goals.

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INTRODUCTION

What do a penguin and a sower have in common? Besides lining the spines of most novels in bookstores, Penguin Random House (PRH) and Simon & Schuster (S&S), the publishing houses each bearing their image, were at the heart of *United States v. Bertelsmann SE & Co. KGaA*, a unique antitrust case that has reframed decades of precedent.[1]

This case is particularly important because antitrust law recently enjoyed a renaissance in the Biden administration.[2] Due to the increasing reach of companies such as Amazon, Alphabet, and Meta, regulatory agencies and elected officials aimed to revitalize enforcement of existing antitrust laws.[3] For example, Lina Khan, a noted scholar and vocal critic of "Big Tech" companies' alleged anticompetitive conduct,[4] was

1 646 F. Supp. 3d 1, 10–11 (D.D.C. 2022).

2 *See* Diane Bartz, *Big Tech to Face Another Bipartisan U.S. Antitrust Bill*, REUTERS (Oct. 14, 2021, 6:37 PM), https://www.reuters.com/world/us/big-tech-face-another-bipartisan-antitrust-bill-2021-10-14 [https://perma.cc/T6K4-SAL8].

3 *See* Leah Nylen, *Huge Win for Progressives as Lina Khan Takes Helm at FTC*, POLITICO (June 15, 2021, 6:35 PM), https://www.politico.com/news/2021/06/15/khan-confirm-ftc-494609 [https://perma.cc/8SBT-KMTB]; *see also* John D. McKinnon, *Republican and Democrat Lawmakers Step Up Efforts to Adopt Tougher Tech Laws*, WALL ST. J. (Oct. 19, 2021, 5:30 AM), https://www.wsj.com/articles/u-s-lawmakers-step-up-pressure-to-adopt-tougher-tech-laws-11634635802 [https://perma.cc/KX5K-DVKP].

4 *See* Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 753–61 (2017).

confirmed as Chair of the Federal Trade Commission (FTC) in 2021 with strong bipartisan support.[5] Further, the Biden administration pushed for a revitalized antitrust approach.[6] On July 9, 2021, President Joseph R. Biden signed Executive Order 14036, calling on the FTC and Department of Justice Antitrust Division ("DOJ ATR") to embark on an aggressive enforcement agenda.[7] Although seeking to target Big Tech companies,[8] the Order had broader implications because it directed these agencies to monitor mergers in industries experiencing consolidation.[9]

The publishing industry has undergone significant consolidation in the past decades.[10] Traditionally, the American trade book market[11] was effectively controlled by the publishing houses Penguin Group, Random House, Hachette Books, Harper Collins, S&S, and Macmillan, colloquially known as the "Big Six."[12] In 2013, Penguin Group and Random House, two of the Big Six's stalwarts, merged to become PRH, tightening the market to a "Big Five."[13] In the wake of this merger, PRH accumulated 25% market share, the largest of any Big Five publisher.[14] Furthermore, as of 2022, the Big Five controlled approximately 80% of

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5 Nylen, *supra* note 3.

6 *See* Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36990 (July 9, 2021).

7 *Id.*

8 *See id.* at 36987 ("[A] small number of dominant internet platforms use their power to exclude market entrants [and] extract monopoly profits . . . for their own advantage.").

9 *See id.* at 36990.

10 *See* Alex Kirshner, *The Publishing Industry Has a New Nightmare*, SLATE (Aug. 11, 2023, 10:00 AM), https://slate.com/business/2023/08/simon-schuster-kkr-private-equity-publishing-consolidation.html [https://perma.cc/TC4U-YFAX]; Rachel Brooke, *The Consolidation of Publishing Houses, Past and Present*, AUTHORS ALL. (Dec. 8, 2021), https://www.authorsalliance.org/2021/12/08/the-consolidation-of-publishing-houses-past-and-present [https://perma.cc/AGH8-8XRW].

11 *See* United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 12 (D.D.C. 2022) (explaining that trade books are "books intended for general readership, as opposed to specialized books like textbooks or manuals").

12 Jim Milliot, *Over the Past 25 Years, the Big Publishers Got Bigger—and Fewer*, PUBLISHERS WKLY. (Apr. 19, 2022), https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/89038-over-the-past-25-years-the-big-publishers-got-bigger-and-fewer.html [https://perma.cc/HAN6-58QJ].

13 *Id.*

14 Benjamin Mullin & Jeffrey A. Trachtenberg, *Penguin Random House Parent to Buy Simon & Schuster from ViacomCBS*, WALL ST. J. (Nov. 25, 2020, 12:54 PM), https://www.wsj.com/articles/penguin-random-house-parent-near-deal-to-buy-simon-schuster-from-viacomcbs-11606268232 [https://perma.cc/78FU-SPSU].

the book market based on sales revenue.[15] The consolidation has created a breeding ground for anticompetitive conduct.[16] For instance, in 2015, the U.S. Court of Appeals for the Second Circuit affirmed a ruling in favor of the DOJ ATR, determining that Apple Inc. and five members of the Big Six engaged in a conspiracy to fix the price of e-books between 2009 and 2012.[17] Currently, litigation is underway in the U.S. District Court for the Southern District of New York against Amazon for colluding with members of the Big Five in a nearly identical price-fixing scheme.[18]

In November 2020, fears of further consolidation and collusion returned when Bertelsmann SE & Co. KGaA ("Bertelsmann"), the parent company of PRH, announced its plan to acquire S&S from its parent company, Paramount Global ("Paramount").[19] This announcement positioned the merged entity ("S&S + PRH") to control a third of the book market, the largest market share held by a publishing house.[20] The following year, the DOJ ATR sued to block the merger.[21] In *United States v. Bertelsmann SE & Co. KGaA*, the DOJ ATR's case was distinct because the merger arguably posed a risk of a monopsony instead of a monopoly.[22] In plain English, the DOJ ATR feared that this merger would lower author compensation as opposed to increasing book prices.[23] Monopsony actions like this case are a noted departure from the "consumer welfare prescription,"[24] which focuses solely on potential consumer price increases and has dominated modern antitrust

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15 Constance Grady, *The Planned Penguin Random House-Simon & Schuster Merger Has Been Struck Down in Court*, VOX (Nov. 1, 2022, 10:57 AM), https://www.vox.com/culture/23316541/publishing-antitrust-lawsuit-merger-department-justice-penguin-random-house-simon-schuster [https://perma.cc/HZW6-R6LL].

16 *See, e.g.*, United States v. Apple, Inc., 791 F.3d 290, 339 (2d Cir. 2015).

17 *Id.* Random House, then a separate entity, was the only Big Six publishing house not charged as a defendant. *See* United States v. Apple Inc., 952 F. Supp. 2d 638, 646 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290.

18 *In re* Amazon.com, Inc. eBook Antitrust Litig., No. 21-cv-00351, 2024 WL 918030, at *1 (S.D.N.Y. Mar. 2, 2024), *reconsideration denied*, No. 21-cv-351, 2025 WL 833390 (S.D.N.Y. Mar. 17, 2025).

19 *PRH Owner Bertelsmann to Buy Simon & Schuster in $2bn Deal*, GUARDIAN (Nov. 26, 2020, 6:28 AM), https://www.theguardian.com/books/2020/nov/25/prh-owner-bertelsmann-to-buy-simon-schuster-in-2bn-deal [https://perma.cc/96XX-56CG]. At the time of the agreement, Paramount Global was known as ViacomCBS. *See id.*

20 *Id.*

21 United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 11 (D.D.C. 2022).

22 *Id.*

23 *Id.*

24 Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citing ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)).

jurisprudence.[25] In contrast to this precedent, lawsuits against monopsonies align more closely with the neo-Brandeisian movement[26] embraced by Chair Khan and her supporters, which seeks to expand the scope of potential anticompetitive harm into labor markets.[27]

Much to the surprise of antitrust scholars, the presiding judge blocked the merger,[28] finding overwhelming evidence that the merger would decrease authors' compensation and thus lessen competition.[29] This decision was hailed as a victory for the neo-Brandeisian movement.[30] However, the victory celebration might have been premature. In August 2023, Kohlberg Kravis Roberts & Co. (KKR), a private equity firm, agreed to purchase S&S.[31] Private equity firms are notorious for aggressive revenue driving and "efficient" reallocation of assets,[32] normally translating to cutting costs through layoffs and other downsizing maneuvers.[33] In theory, tantamount anticompetitive harms could arise

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25 *See* Fred Ashton, *Why the Consumer Welfare Standard Is the Backbone of Antitrust Policy*, AM. ACTION F. (Oct. 26, 2022), https://www.americanactionforum.org/insight/why-the-consumer-welfare-standard-is-the-backbone-of-antitrust-policy [https://perma.cc/7FDP-RZW4].

26 *See* Gina Chon, *Breakdown: Antitrust's Hipsters Go Mainstream*, REUTERS (Mar. 10, 2021, 7:24 PM), https://www.reuters.com/article/idUSKBN2B300Y; *see also* Bryce Covert, *Lina Khan's Anti-Monopoly Power*, NATION (Dec. 9, 2023), https://www.thenation.com/article/society/lina-khan-ftc-monopoly [https://perma.cc/3YA6-PTHW] (explaining that the Khan FTC's enforcement agenda is directly connected to the broader policy goals of the neo-Brandeisian movement).

27 *See, e.g.*, Andrea O'Sullivan, *What is 'Hipster Antitrust?'*, MERCATUS CENT. (Oct. 18, 2018), https://www.mercatus.org/economic-insights/expert-commentary/what-hipster-antitrust [https://perma.cc/8VA9-LXGG] (noting that antitrust jurisprudence does not typically examine labor markets).

28 *See* Parmida Esmaeilpour, *Waddling into New Territory? Take-Aways from the Blocked Penguin Random House and Simon & Schuster Merger*, MCGILL BUS. L. PLATFORM (Jan. 16, 2023), https://www.mcgill.ca/business-law/article/waddling-new-territory-take-aways-blocked-penguin-random-house-and-simon-schuster-merger [https://perma.cc/2U8P-M6ME].

29 *Bertelsmann*, 646 F. Supp. 3d at 56.

30 *See* Ashton, *supra* note 25; *see also* Jacob Noti-Victor & Xiyin Tang, *Antitrust Regulation of Copyright Markets*, 101 WASH. U. L. REV. 851, 854 (2024) (underscoring how the *Bertelsmann* decision represented a rare win for the neo-Brandeisian movement).

31 Elizabeth A. Harris, Lauren Hirsch & Benjamin Mullin, *Paramount Agrees to Sell Simon & Schuster to KKR, a Private Equity Firm*, N.Y. TIMES (Aug. 7, 2023), https://www.nytimes.com/2023/08/07/books/booksupdate/paramount-simon-and-schuster-kkr-sale.html [https://perma.cc/D4HC-GUWN].

32 *See* Neil McFerran et al., *Four Key Areas for Cost Reduction and Value Creation in Private Equity*, EY PARTHENON (Mar. 6, 2023), https://www.ey.com/en_gl/insights/private-equity/four-key-areas-for-cost-reduction-and-value-creation-in-private-equity [https://perma.cc/HB8G-MVZK].

33 *See* Martin Olsson & Joacim Tåg, *Private Equity, Layoffs, and Job Polarization*, 35 J. LAB. ECON. 697, 697–98 (2017).

through a private equity acquisition of a publishing company as much as through a horizontal merger between two competing publishing houses.[34] The persistence of this risk and the departure from precedent begs the following question: Was *Bertelsmann* correctly decided?

This Case Note will argue that the judge crucially erred in her decision. The judge's departure from consumer price points, the antitrust norm, was too dramatic.[35] Specifically, the decision's cited findings of increased concentration, history of collusion, and lack of efficiencies were much more correlated to book-reader harm as opposed to that of authors.[36] Furthermore, this Case Note explores the potential underlying rationale behind choosing to frame this action as protecting authors, evaluating why this approach fell short of its intended goals beyond the proposed merger itself.[37] The failure to incorporate the aforementioned rationale into the case is significant, because while focusing on book readers rather than authors might not have changed the case's outcome, this departure from precedent deviates too far from the original intent of American antitrust laws.[38] Changes in antitrust precedent have taken place to realign jurisprudence with the originally intended meaning of these laws, not the reverse.[39] This Case Note will argue that this push beyond the bounds of American antitrust jurisprudence is not unwarranted, in fact quite the opposite; rather, that this case is indicative of some much needed changes to Section 7 merger cases.[40]

Moreover, this Case Note will argue that the precedential value of choosing to base the decision around authors will create a false flag for emboldened antitrust regulators as to the bounds of the Clayton Act.[41] As such, this Case Note will highlight that this decision will not prevent monopsony-like conditions in publishing due to private equity acquisitions' ability to evade antitrust regulators' radar and the FTC's track record of failure during the Biden dministration.[42] Consequently, this Case Note proposes that consumers once again become the crux of

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34 *See* Carter Dougherty & Andrew Park, *Book Publishing Has a Toys 'R' Us Problem*, ATLANTIC (Sept. 9, 2023), https://www.theatlantic.com/ideas/archive/2023/09/private-equity-simon-and-schuster/675261 [https://perma.cc/VNS3-4BC7].

35 *See infra* Part III.

36 *See infra* Section III.A–B.

37 *See infra* Section III.C.

38 *See infra* Section III.D.

39 *See infra* Section III.D.

40 *See infra* Section IV.A.

41 *See infra* Section IV.A.

42 *See infra* Section IV.A.

Section 7 merger cases until a change in the statutory language occurs–not to undermine the goals of the Neo-Brandeisian movement, but because current case law does not provide a workable framework to achieve those goals.[43]

Part I will explain the evolution of merger scrutiny under American antitrust laws and the competition dynamics of the publishing industry. Part II will provide a statement of the facts and procedural history of *Bertelsmann*, as well as elucidate the case's holdings on each relevant issue. Part III will examine the decision's shortcomings, identify improvements that could have strengthened the judge's rationale, and underscore the potential for misinterpreted precedential value. Lastly, in Part IV, this Case Note will delve into the significance of the holding with respect to KKR's recent acquisition of S&S. Part IV will also propose a theoretical statutory solution as well as a practical recommendation to guide future DOJ ATR and FTC monopsony actions.

I. PRIOR LAW AND PUBLISHING INDUSTRY BACKGROUND

A. *Evolution of Merger Review Under American Antitrust Law*

To better dissect *United States v. Bertelsmann SE & Co. KGaA*, examining the evolution of antitrust jurisprudence is helpful. The origin of these laws dates back to the Gilded Age, a period where a few large corporations created monopolies, or "trusts," across entire industries such as transportation, telecommunication, and energy.[44] The extent of their power threatened potential competitors' ability to enter the market.[45] In response, Congress passed the Sherman Antitrust Act of 1890 ("Sherman Act").[46] The Sherman Act prohibits conduct that would

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43 *See infra* Section IV.B.

44 *See* Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2280, 2282–86 (2013) (referring to "trusts" as "combinations of competitors, whether large or small, that were able to raise the prices at which they sold their output . . . to an extent regarded as injurious to the public interest"); *see also* Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766, 767–70 (2019) (explaining the history of the economic conditions that gave rise to antitrust laws).

45 *See* Collins, *supra* note 44, at 2291–92.

46 Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7; *see* Collins, *supra* note 44, at 2334–35. This statute focused on prohibiting anticompetitive behavior by attacking "[e]very contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1. This statute further penalized those that "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." *Id.* § 2.

restrict output or fix prices for consumers.[47] Two decades later, the Supreme Court issued a landmark ruling in *Standard Oil Co. of New Jersey v. United States* declaring that Standard Oil Co., arguably the most dominant trust at that time, violated the Sherman Act because it repeatedly fixed the price and limited the production of crude oil.[48] As a remedy, the Court ordered the breakup—one of the first of its kind—of Standard Oil Co. into subsidiaries, each operating in distinct geographic regions.[49]

Following *Standard Oil Co.*, Congress broadened the scope of American competition law by enacting additional antitrust laws,[50] including the Federal Trade Commission Act[51] and the Clayton Act of 1914.[52] Unlike the Sherman Act, the Clayton Act aimed to proactively prevent practices that could create anticompetitive effects.[53] Principally, one of the Clayton Act's key mechanisms to accomplish this goal was Section 7, which forbids companies from engaging in mergers and acquisitions that "substantially . . . lessen competition."[54]

After World War II, the U.S. Supreme Court more explicitly defined "[substantially] lessen[ing] competition."[55] In *United States v. Philadelphia National Bank*, the Court held that a newly merged entity resulting in a significantly increased market share would diminish competition.[56] This case centered around two competing banks that collectively controlled over 30% of the commercial banking business in the Philadelphia metropolitan area.[57] In *Brown Shoe Co. v. United States*,

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47 *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 492–93 (1940).

48 221 U.S. 1, 30–32 (1911).

49 *Id.* at 78–79.

50 *See The Antitrust Laws*, FTC, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/A3CX-RF3E].

51 15 U.S.C. § 41. This statute established the agency responsible for enforcing the new antitrust laws. *Id.*

52 15 U.S.C. §§ 12–27.

53 *See* FTC, *supra* note 50.

54 15 U.S.C. § 18.

55 United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963). During the Great Depression, antitrust enforcement became lax because the government preferred industry-government cooperation, such as the economic planning models of the New Deal. After the end of World War II, antitrust law enjoyed a new heavy enforcement era as it came to represent the "Magna Carta of free enterprise." Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement [https://perma.cc/3UG9-EVPK]. The prevention of mergers of massive companies was equated with ensuring economic and political freedom. *Id.*

56 *Phila. Nat'l Bank*, 374 U.S. at 363–65.

57 *Id.* at 364.

the Supreme Court recognized the need to employ a multifactor analysis to determine a Clayton Act violation.[58] Here, the merger was between two prominent shoe producers.[59] The merger would have led to varying market share controls—ranging between 5% in some shoe markets and over 20% in others[60]—resulting from the fragmented nature of the shoe market.[61] While the Court acknowledged market share as crucial to the analysis, it underscored how the likelihood of increasing concentration across the industry should be considered an equally important factor.[62] Similarly, the Court echoed this sentiment in *United States v. Von's Grocery Co.*[63] The Court reasoned that competition in the grocery market would suffer because the concentration trend highlighted a risk to smaller grocery chains becoming eliminated through acquisitions.[64]

A shift in jurisprudence occurred in the 1970s, as the Chicago School of Economics began to influence the Supreme Court.[65] The Chicago School of Economics proffered that consumer welfare—as defined by price of goods and services—and economic efficiency should be the only two focuses of antitrust law, better known as the "consumer welfare standard."[66] In the so-called "Chicago era," courts were not as skeptical of mergers because they trusted market conditions and their ability to self-correct.[67] While none of the aforementioned cases were overturned, the multifactor analysis yielded economic productivity.[68] In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, Justice Thurgood Marshall incorporated this rationale by finding no violation of Section 4 of the Clayton Act where

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58 370 U.S. 294, 334–35 (1962).

59 *See id.* at 327, 342–43.

60 *Id.* at 343.

61 *See id.*

62 *See id.* at 345–46.

63 384 U.S. 270, 277 (1966).

64 *Id.* at 277–78.

65 *See* Stucke & Ezrachi, *supra* note 55 (noting that the dawn of the 1970s brought with it a more laissez-faire antitrust enforcement outlook). *See generally* Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 U. PA. L. REV. 2145 (2020).

66 *See id.* at 2147, 2149, 2151.

67 *See* Jay L. Levine & Porter Wright, *1990s to the Present: The Chicago School and Antitrust Enforcement*, PORTER WRIGHT (June 1, 2021), https://www.antitrustlawsource.com/2021/06/1990s-to-the-present-the-chicago-school-and-antitrust-enforcement [https://perma.cc/FV8A-EAA7].

68 *See* Yoo, *supra* note 65, at 2149–50 (reflecting that the framing of antitrust cases here began to revolve around consumer welfare); *see also* BORK, *supra* note 24, at 79–89 (arguing that practices that are arguably anticompetitive but that do not result in higher prices should not be subject to antitrust enforcement).

plaintiffs sued defendant, a manufacturer of bowling equipment, for acquiring and operating over 200 competitor bowling centers.[69] Justifying his decision, Justice Marshall emphasized that the purpose of the country's antitrust laws were to "protect[] . . . competition [and] not competitors."[70]

Conversely, in *Reiter v. Sonotone Corp.*, the plaintiff class demonstrated a Clayton Act violation because the defendant manufacturers' price-fixing schemes increased hearing aid costs, directly impacting purchasers' expenses.[71] Although these cases were based on Section 4 of the Clayton Act, they still reflected the paradigm shift because the reasonings were centered largely in terms of a cost analysis for consumers.[72]

By the mid-1980s, the "post-Chicago" school emerged.[73] While this school was still based on the consumer welfare standard, the post-Chicago era introduced a greater consideration for efficiencies because of their potential to save costs for consumers.[74] In fact, binding case law shows that evidence of efficiencies have the potential to rebut the DOJ ATR's argument for a merger's anticompetitive effects.[75] However, in order to use them as evidence, these efficiencies must be verifiable and not merely speculative.[76] Furthermore, any alleged efficiencies must be

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69 429 U.S. 477, 479–81, 490 (1977). Section 4 of the Clayton Act allows for the recovery of treble damages when "any person [is] . . . injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15.

70 *Id.* at 488 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

71 442 U.S. 330, 343 (1979) (quoting BORK, *supra* note 24, at 66).

72 *See* Christine S. Wilson, Comm'r, FTC, Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? 3–4 (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf [https://perma.cc/9D5N-TWVL].

73 *See* Yoo, *supra* note 65, at 2160; *see also* Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 225 (1985) (observing that economies of scale have a potential to reduce consumer price points).

74 *See* Yoo, *supra* note 65, at 2160; Hovenkamp, *supra* note 73, at 225.

75 *See, e.g.*, FTC v. Sysco Corp., 113 F. Supp. 3d 1, 81 (D.D.C. 2015) (citing FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001)) (recognizing that "efficiencies resulting from [a] merger may be considered in rebutting the government's *prima facie* case").

76 *Heinz*, 246 F.3d at 721; U.S. DEP'T OF JUST. & FTC, HORIZONTAL MERGER GUIDELINES § 10 (2010), https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf [https://perma.cc/6T3W-EKXD].

specific to the merger.[77] Lastly, the current standard heightens the bar to prove these efficiencies when occurring in a concentrated market.[78]

Moreover, the legal landscape regarding monopsony is not as well-established.[79] To date, the Supreme Court has not addressed a case specifically analyzing a monopsony under Section 7.[80] However, certain district court cases have shaped the monopsony analysis. In *United States v. Rice Growers Association of California*, the DOJ ATR challenged the merger of two rice milling operators.[81] Despite the DOJ ATR identifying various relevant markets, the U.S. District Court for the Eastern District of California determined that the merger would substantially lessen competition in the paddy rice market where these two millers were the primary buyers of paddy rice in California.[82]

The monopsony issue remained relatively dormant until a case within the same court as *Bertelsmann* brought it to the forefront.[83] In *United States v. Anthem, Inc.*, the U.S. District Court for the District of Columbia examined the proposed merger between Anthem and Cigna, two of the nation's biggest insurance carriers.[84] The DOJ ATR alleged that the merger would result in a monopsony over the healthcare services market,[85] potentially leading to reduced payments to healthcare providers.[86] While the case was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit on the grounds of its anticompetitive impact on the health insurance customer market,[87] then-Circuit Judge Brett Kavanaugh expressed that he would have remanded the monopsony issue in his dissent.[88] He argued that if the DOJ ATR's monopsony theory held true, it could constitute a Section 7 violation.[89] According to Judge

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77 FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 150 (D.D.C. 2004) (citing U.S. DEP'T OF JUST. & FTC, 1997 MERGER GUIDELINES § 4 (1997), https://www.justice.gov/atr/hmerger/11251.pdf [https://perma.cc/YDP5-HYS6]).

78 *See, e.g.*, *Heinz*, 246 F.3d at 720; *Sysco*, 113 F. Supp. 3d at 72.

79 *See* Debbie Feinstein & Albert Teng, *Buyer Power: Is Monopsony the New Monopoly?*, ANTITRUST, Spring 2019, at 13.

80 *Id.* at 12–13.

81 No. S-84-1066, 1986 WL 12562, at *2 (E.D. Cal. Jan. 31, 1986).

82 *Id.* at *12.

83 *See* Feinstein & Teng, *supra* note 79, at 14–15.

84 855 F.3d 345, 348 (D.C. Cir. 2017).

85 United States v. Anthem, Inc., 236 F. Supp. 3d 171, 186–88 (D.D.C. 2017), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017).

86 *See id.* at 187.

87 *Anthem*, 855 F.3d at 368–69.

88 *Id.* at 377 (Kavanaugh, J., dissenting).

89 *See id.* at 377–79.

Kavanaugh, if insurance carriers were the exclusive purchasers of healthcare services, healthcare providers might increase prices for their employer-customer policy holders, leading to anticompetitive behavior.[90]

To complement case law, the DOJ ATR began developing Merger Guidelines in 1968 as its own set of rules for merger review.[91] These guidelines first served as persuasive authority for judges adjudicating Clayton Act cases.[92] While they have undergone a series of revisions,[93] the DOJ ATR and FTC released guidelines specifically governing horizontal mergers in 2010 and are now focal for judges examining Section 7 Clayton Act cases.[94] The guidelines weigh the risk of anticompetitive harm by "measur[ing] market shares and market concentration."[95] Primarily, this measurement is accomplished through the use of the Herfindahl-Hirschman Index (HHI),[96] which sets a mathematical threshold for a presumptively anticompetitive merger.[97] Nevertheless, the hypothetical monopolist test is also deployed, which asks whether "a hypothetical profit-maximizing firm, not subject to price regulation . . . likely would impose at least a small but significant and non-transitory increase in price . . . on at least one product in the market."[98] While employed to delineate the boundaries of the pertinent market, the hypothetical monopolist test still reflects deference to the consumer welfare standard because it evaluates whether a potential monopolist could maintain prices above competitive levels, consequently impacting consumers' finances.[99]

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90 *Id.* at 378.

91 U.S. DEP'T OF JUST. & FTC, 1968 MERGER GUIDELINES § 1 (1968), https://www.justice.gov/atr/hmerger/11247.pdf [https://perma.cc/W4JA-76RG].

92 *See id.*

93 *See* Debra A. Valentine, Former Gen. Couns., FTC, Prepared Remarks Before INDECOPI Conference: The Evolution of U.S. Merger Law (Aug. 13, 1996), https://www.ftc.gov/news-events/news/speeches/evolution-us-merger-law [https://perma.cc/V3CG-K2LQ].

94 *See* HORIZONTAL MERGER GUIDELINES, *supra* note 76, § 1.

95 *Id.* § 4.

96 The Herfindahl-Hirschman Index is "a commonly accepted measure of market concentration . . . calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$)." *Herfindahl-Hirschman Index*, U.S. DEP'T OF JUST. (Jan. 17, 2024), https://www.justice.gov/atr/herfindahl-hirschman-index [https://perma.cc/AEK2-9GL7].

97 *See* HORIZONTAL MERGER GUIDELINES, *supra* note 76, § 5.3; FTC v. Staples, Inc., 190 F. Supp. 3d 100, 128 (D.D.C. 2016); United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 71–72 (D.D.C. 2011).

98 HORIZONTAL MERGER GUIDELINES, *supra* note 76, § 4.1.1.

99 *See id.*

B. *Competition in the Publishing Industry*

To grapple with the S&S + PRH merger's potential effects on competition, the nature of the publishing industry must also be scrutinized. In the publishing industry, there is an upstream market, which consists of publishing houses' payments to authors for manuscripts, and a downstream market, entailing consumer purchases of books.[100] The publishing houses' editors within each "imprint" are tasked with sifting through a myriad of manuscripts, acquiring those they wish to publish.[101] From here, imprint editors initiate a collaboration process that takes a manuscript to a product ultimately on a bookshelf.[102]

Publishing houses and their imprints acquire manuscripts by paying authors an advance, or an upfront payment of royalties from the book's sales.[103] Advances essentially function as loans against future royalties.[104] They are often the biggest component of negotiation because they are normally the authors' only type of compensation.[105] Although most published book sales will not surpass this advance, publishing houses absorb this risk in the hopes that a new title might become a popular book.[106] The negotiation process for book sales primarily occurs between an author's agent and a single editor or imprint.[107] Otherwise, a title will go to auction among publishing houses and their imprints.[108]

While all publishing houses are eager to acquire new titles, the Big Five have a major financial advantage.[109] Since only 35% of books earn a profit, a publishing house's ability to compete for new titles hinges on its ability to withstand losses.[110] Otherwise, publishing houses would face financial ruin from paying advances without recouping a return. As such, the Big Five are better able to tolerate these losses because they can breakeven from their "back list" of previous bestselling titles, which

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100 *See* United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 12 (D.D.C. 2022).

101 *Id.* at 12–13 ("An imprint is a trade name or brand name for an editorial group. Imprints specialize in publishing certain types of books and thus develop reputations for success in particular genres.").

102 *Id.* at 13.

103 *Id.*

104 *Id.*

105 *Id.* at 13–14.

106 *Id.* at 19.

107 *Id.* at 15.

108 *Id.* at 15–16.

109 *Id.* at 14, 19.

110 *Id.* at 13.

generate the majority of their profitability.[111] Authors' agents generally prioritize submitting to Big Five imprints because of their tolerance for losses and built-in structural advantages.[112] The advance amount paid to authors is largely determined by competition among other publishing houses.[113] These houses are usually keyed into which books will likely be successful in sales and experience "auction fever" when vying for a new title.[114] Agents leverage this auction model by submitting a book manuscript to multiple imprints in a publishing company.[115] As a result of this competition, publishers will sometimes allow their imprints to bid against one another in auctions.[116] The system's consequences are such that authors are positioned to receive higher advances because their agents leverage the imprints' fear that the agent will simply go to another imprint or publishing house.[117]

Alternatives exist to the Big Five. For instance, Scholastic has carved a successful niche in children's literature, even attracting established Big Five authors to write for them on occasion.[118] Additionally, Kensington is a prominent independent publishing house known for its reputation in romance literature.[119] Lastly, major companies such as Disney and Amazon have their own publishing houses, each raising over $100 million in revenue annually.[120] Yet these figures pale in comparison to S&S + PRH, whose combined annual revenues have exceeded $4.5 billion in recent years.[121] Outside of these independent houses, authors always have the option to self-publish.[122] However, the self-publishing route is rarely considered viable because authors cannot pay themselves an advance and must front all of the distributions costs normally absorbed by a publishing house.[123]

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111 *Id.*

112 *See id.* at 14, 19–21.

113 *See id.* at 16–17.

114 *Id.* at 16.

115 *Id.* at 18.

116 *Id.* at 17–18.

117 *Id.*

118 *See id.* at 12.

119 *Id.*

120 *Id.*

121 Dean Talbot, *Book Publishing Companies Statistics*, WORDSRATED (Jan. 27, 2023), https://wordsrated.com/book-publishing-companies-statistics [https://perma.cc/KY8U-VQDS].

122 *See Bertelsmann*, 646 F. Supp. 3d at 21.

123 *Id.*

Despite these alternatives, the Big Five have achieved their market dominance through the acquisition of smaller competitors.[124] The first step towards mass consolidation occurred in 1977, when Bertelsmann acquired Bantam Books.[125] Subsequently, Bertelsmann acquired Doubleday Dell in 1986, followed by Random House in 1998.[126] These mergers paved the way for Random House to merge with Penguin in 2013, becoming the publishing house with the largest market share.[127] From there, the Big Five have exacerbated the consolidation trend by acquiring more independent competitors.[128] For example, Hachette acquired Workman Publishing, Worthy, Perseus, and Black Dog & Leventhal.[129] In 2021, HarperCollins acquired Houghton Mifflin Harcourt.[130] Finally, since 2013, PRH has bought Sasquatch Books, Rodale, Little Tiger, F&W Media, and Sourcebooks.[131]

II. STATEMENT OF THE CASE

A. *Facts and Procedural History*

Four years ago, the consolidation trend reached a peak. In March 2020, ViacomCBS announced its intention to sell S&S,[132] citing the publishing house as a noncore asset and a desire to use the proceeds to venture into the streaming industry.[133] In November 2020, Bertelsmann, PRH's parent company, signed an agreement to purchase S&S for $2.175 billion.[134] In November 2021, the DOJ ATR sued Bertelsmann and ViacomCBS under the Clayton Act to block their proposed merger in the U.S. District Court for the District of Columbia.[135] In their complaint, the

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124 *Id.* at 12.

125 *Id.*

126 *Id.*

127 *Id.*; *see* Mullin & Trachtenberg, *supra* note 14.

128 *See Bertelsmann*, 646 F. Supp. 3d at 12.

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.* at 11.

133 *See* Press Release, Bus. Wire, ViacomCBS to Sell Simon & Schuster to Penguin Random House for $2.175 Billion (Nov. 25, 2020, 9:00 AM), https://www.businesswire.com/news/home/20201125005459/en [https://perma.cc/82L3-XYGK].

134 *Id.*; *see also* Mullin & Trachtenberg, *supra* note 14.

135 *Bertelsmann*, 646 F. Supp. 3d at 11.

DOJ ATR alleged that the merger would increase market concentration and thus allow publishers to depress author advances for their books' publishing rights.[136] Defendants stoutly countered that this merger would not decrease advance levels in the publishing industry.[137] Despite the rising concentration, the defendants actually insisted that advances would increase as a result of the merger, asserting that the competitive landscape in the book market would be enhanced.[138]

On August 1, 2022, the case proceeded to trial, where Judge Florence Pan heard evidence from authors, literary agents, and publishing industry executives alike on the effect of the merger on the upstream market.[139] To prove their point, the DOJ ATR even presented frequent S&S author Stephen King as a witness.[140] The judge sided with the DOJ ATR and blocked the merger for reasons that will be detailed in Section II.C.

B. *Applicable Legal Standard*

The U.S. District Court for the District of Columbia utilizes a tripartite test from *United States v. Baker Hughes Inc.* to evaluate Smergers under Section 7 scrutiny.[141] Before initiating an anticompetitive analysis, the DOJ ATR must demonstrate the existence of a relevant market.[142] For Section 7 merger cases, the relevant market has been predominantly defined around purchasable goods and services.[143] In *Baker Hughes*, the relevant market was defined as that for hard rock hydraulic underground drilling rigs.[144] In *United States v. Anthem, Inc.*, the same court found the relevant market as the national market for health insurance when Anthem and Cigna attempted to merge.[145]

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136 *Id.*

137 *Id.* at 23.

138 *Id.*

139 *Id.* at 11.

140 *Id.* at 11 & n.2. In his testimony, King lamented that "[c]onsolidation is bad for competition." Adam Bednar, *Stephen King Testifies That Merger Between Publishing Giants Would Hurt Writers*, N.Y. TIMES (Aug. 2, 2022), https://www.nytimes.com/2022/08/02/business/stephen-king-penguin-random-house-antitrust-testimony.html [https://perma.cc/SK8W-UNT6].

141 908 F.2d 981, 982–83 (D.C. Cir. 1990).

142 *See* FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 291–92 (D.D.C. 2020) (citing *Baker Hughes*, 908 F.2d 981); United States v. Marine Bancorporation, 418 U.S. 602, 618 (1974).

143 *See, e.g.*, *Baker Hughes*, 908 F.2d 981; United States v. Anthem, Inc., 855 F.3d 345 (D.C. Cir. 2017).

144 *See Baker Hughes*, 908 F.2d at 983.

145 *Anthem*, 855 F.3d at 350–51.

However, district courts have also found labor markets to be relevant markets for antitrust considerations.[146] In *FTC v. Sysco Corp.*, the relevant market was pinpointed as the labor of foodservice distribution services to national buyers of foodservices equipment.[147] Consequently, all labor markets, including authors, are considered relevant for antitrust concerns.[148]

After identifying the relevant market, the DOJ ATR must first display a prima facie case of the violation by showing undue market concentration, establishing a presumption of anticompetitive effects.[149] Second, the defendants then must prove that the market concentration alone will not result in anticompetitive effects.[150] Finally, if the defendants meet this burden, then the DOJ ATR would need to rebut the defendants' argument to prove an illegal merger.[151]

C. *Holdings on Each Relevant Issue*

In *Bertelsmann*, for the preliminary relevant market requirement, the district court ruled that the DOJ ATR was correct to focus on the authors' sale of manuscripts to publishing houses, commonly referred to as the upstream market.[152] Within this upstream market, Judge Pan determined that the DOJ ATR had successfully pinpointed the relevant market as that for books expected to receive an advance of over $250,000.[153] She recognized that books receiving advances over this amount are expected to be top-selling titles and that their authors function as "targeted sellers" to publishing houses.[154] The Big Five's higher degree of concentration supported this relevant market selection because they comprised 91% of the competition for expected top-selling

146 *See, e.g.*, O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (finding that the labor market for college athletes was a relevant market for antitrust purposes).

147 113 F. Supp. 3d 1, 83 (D.D.C. 2015).

148 *See* United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 24–25 (D.D.C. 2022).

149 *Anthem*, 855 F.3d at 349; FTC v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001).

150 *See* United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990); *Anthem*, 855 F.3d at 349.

151 *See Baker Hughes*, 908 F.2d at 983; *accord Anthem*, 855 F.3d at 350.

152 *Bertelsmann*, 646 F. Supp. 3d at 12.

153 *Id.* at 26.

154 *Id.* at 24 ("If a monopsonist could 'profitably target a subset of [sellers] for price [de]creases, the [government] may identify relevant markets defined around those targeted [sellers].'" (alterations in original) (quoting HORIZONTAL MERGER GUIDELINES, *supra* note 76, § 4.1.4)).

titles.[155] Judge Pan further ruled that the defendants' alternative thresholds, $50,000 or $1 million, did not render the DOJ ATR's threshold unusable.[156] Additionally, the relevant market selection was inversely supported by non-Big Five publishers possessing a market share of 45% for books paying advances less than $250,000.[157]

First, Judge Pan found that the DOJ ATR had proven a prima facie case.[158] She cited to strong evidence of concentration in the relevant market: S&S + PRH would account for 49% of the publishing market for anticipated top-selling books.[159] For context, a combined share exceeding 30% has been deemed unlawfully high in other cases.[160] The new "Big Four" would then encompass 91% of the relevant market.[161] The merger would result in "[u]nilateral [anticompetitive] effects."[162] Since S&S and PRH already compete closely, the merger would result in less motivation to compete for books, resulting in less bids and ultimately lower advance payouts.[163] The merger would also result in "coordinated [anticompetitive] effects."[164] Judge Pan cited *United States v. Apple, Inc.* to demonstrate that the potential for tacit collusion between the former Big Six members to collectively raise e-book prices would also pose a risk

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155 *Id.* at 25–26.

156 *Id.* at 26–28; *see also* United States v. Aluminum Co. of Am., 377 U.S. 271, 275 (1964) (explaining that even though insulated aluminum conductor and insulated copper conductor could both be in "a single product market," that "does not preclude their division for purposes of [Section] 7 into separate submarkets").

157 *Bertelsmann*, 646 F. Supp. 3d at 26.

158 *See id.* at 35–38.

159 *Id.* at 36.

160 *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 342–43, 346 (1962); United States v. Phila. Nat'l Bank, 374 U.S. 321, 364 (1963).

161 *Bertelsmann*, 646 F. Supp. 3d at 36.

162 *Id.* at 39. Unilateral effects are anticompetitive harms that result from the direct elimination of competition between the merging parties. *Id.* (citing United States v. Anthem, Inc., 236 F. Supp. 3d 171, 216 (D.D.C. 2017)).

163 *Id.* at 39–42; *see* HORIZONTAL MERGER GUIDELINES, *supra* note 76, § 6.2 ("A merger between two competing [buyers] prevents [sellers] from playing those [buyers] off against each other in negotiations.").

164 *Bertelsmann*, 646 F. Supp. 3d at 44 (explaining that coordinated effects take place "when market participants mutually decrease competition in the relevant market"); *see also* United States v. AT&T Inc., 310 F. Supp. 3d 161, 246 (D.D.C. 2018) ("A proposed merger may violate Section 7 by 'enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms [consumers].'" (alteration in original) (quoting Proposed Conclusions of Law of the United States ¶ 67, United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018) (No. 17-cv-2511))), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

of repetition for this particular merger.[165] Additionally, she underscored that recent collusion in the last decade has resulted in a major push for standardization of contract terms, such as changing the advance installment schedule from two payments to four.[166] Since these effects are more probable in concentrated markets,[167] and because of the history of collusion in the publishing industry,[168] S&S + PRH would be primed to continue previous collusive behavior.[169]

Next, the defendants failed to show that this merger would not cause the DOJ ATR's proposed anticompetitive effects.[170] According to Judge Pan, the defendants were unable to show that existing competition would restrain the merged entity.[171] As a result, the winning bids would be lower.[172] If there are five publishers, the auction system might ensure that the top bid is $500,000 with the runner-up at $450,000; with four publishers, the top bid might instead be $475,000. Additionally, while imprints could have still competed against each other, such promises were deemed unreliable.[173] The theoretical Big Four would possess distinct advantages that create significant barriers to entry, such as back lists and economies of scale.[174] Therefore, S&S + PRH would then have the greatest amalgamation of these advantages.[175] Evidence of efficiencies, such as access to PRH's distribution network, were not verifiable and thus

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165 *Bertelsmann*, 646 F. Supp. 3d at 45 (citing United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015)).

166 *Id.* at 45–46.

167 *See* FTC v. H.J. Heinz Co., 246 F.3d 708, 716 (D.C. Cir. 2001).

168 *See Apple*, 791 F.3d at 339; HORIZONTAL MERGER GUIDELINES, *supra* note 76, § 7 ("Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others.").

169 *Bertelsmann*, 646 F. Supp. 3d at 44–45.

170 *See id.* at 47–53.

171 *Id.* at 48; *see also* HORIZONTAL MERGER GUIDELINES, *supra* note 76, § 5.3 ("The Agencies may measure market concentration using the number of significant competitors in the market. This measure is most useful when there is a gap in market share between significant competitors and smaller rivals . . . .").

172 *Bertelsmann*, 646 F. Supp. 3d at 48 ("[I]n situations where PRH or S & S would have won a book, regardless of the runner-up, the merged entity might submit a lower bid due to its decreased motivation to achieve organic growth.").

173 *See id.* at 49–50.

174 *See id.* at 53. For context, economies of scale refer to the proportional cost savings with respect to increased production. *What Is 'Economies of Scale,'* ECON. TIMES, https://economictimes.indiatimes.com/definition/economies-of-scale [https://perma.cc/3EHF-KTBV].

175 *See Bertelsmann*, 646 F. Supp. 3d

" at 53.

could not be admitted.[176] However, the judge noted that efficiencies might be relevant if the newly merged entity would reduce competition.[177] Finally, Judge Pan did not need to examine whether the DOJ ATR could rebut the defendants.[178]

III. ANALYSIS

While Judge Pan's opinion may seem compelling, her choice to approve the upstream market was an integral flaw of the decision.[179] Even though establishing a monopsony under Section 7 is practically identical to a monopoly,[180] the choice of the relevant market nevertheless lays the foundation for the case.[181] As such, the DOJ ATR's decision and the judge's approval of the downstream market would have been better for three main reasons: First, the evidence of concentration in the publishing industry speaks more to harm to book readers than to authors;[182] Second, the evidence of collusion and the absence of cognizable efficiencies would have provided stronger grounds in the downstream market;[183] And third, Judge Pan's argument for the relevant major weaknesses of approving the upstream market.[184] Choosing the downstream market here would have avoided the establishment of a perilous precedent.[185] It still would have blocked the merger.[186] However, more crucially, making the downstream selection would have prevented the precedential misconception that antitrust laws, as they exist, primarily examine monopsonies for their

176 *Id.* at 55.

177 *Id.* (quoting FTC v. Sysco Corp., 113 F. Supp. 3d 1, 82 (D.D.C. 2015)).

178 *Id.* at 56.

179 *See id.* at 11, 24–25.

180 *See id.* at 22 n.13; *see also* Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1062 (2019) ("[T]he consumer welfare standard applies in exactly the same way to monopsony.").

181 *See* United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957) (quoting Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 299 n.5 (1949)).

182 *See infra* Section III.A.

183 *See infra* Section III.B.

184 *See infra* Section III.C.

185 *See infra* Section III.D.

186 *See* FTC v. H.J. Heinz Co., 246 F.3d 708, 717 (D.C. Cir. 2001) (acknowledging that a lack of recent entrants into the market acts as a high barrier to entry and thus reduces competition); United States v. Baker Hughes Inc., 908 F.2d 981, 982–83 (D.C. Cir. 1990) (explaining that large HHI figures can help to prove FTC's prima facie case of a merger being anti-competitive); *see also* Marinescu & Hovenkamp, *supra* note 180, at 1062 ("The defining attribute of the consumer welfare standard is the elimination of monopoly.").

impact solely and broadly on workers' wages and not for trickle-down effect on consumer prices, which been the gold standard of antitrust jurisprudence.[187]

187 *See* Feinstein & Teng, *supra* note 79, at 12–13.

A. *The Evidence of Concentration Better Supports Harm to Book Buyers*

The approval of the upstream market was flawed because potential harm in the downstream market would have been more closely connected to the original purpose of American antitrust laws: protecting consumers. Judge Pan placed great importance on the existing concentration levels within the publishing industry and the risks of further consolidation.[188] While the Supreme Court has recognized the peril of concentration, almost all of this concentration occurred in the consumer market for the respective goods and services.[189]

Revisiting the post-World War II interventionist era, while *Brown Shoe*, *Philadelphia National Bank*, and *Von's Grocery* broadened the interpretation of Section 7 into market concentration, this assessment was still contextualized in potential consumer harm.[190] In *Brown Shoe*, the presiding judge acknowledged how fears of market concentration played a central role in the amendments made to Section 7 in 1950.[191] Also, the defendants were shoe *sellers*.[192] Further, the DOJ ATR won this case on the theory that the merger would decrease competition because the loss of smaller, locally owned shoe businesses would lower *consumer choices*.[193] The decision in *Philadelphia National Bank* echoed the sentiment that a core purpose of Section 7 was to halt concentration trends.[194] However, this sentiment must be scrutinized through the facts of *Philadelphia National Bank*. There, the merger under review was between two commercial banks.[195] As such, fear that consumers would lose choices for retail banking services informed the discussion as to how competition would be lessened.[196] Lastly, in *Von's Grocery*, the

188 United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 26 (D.D.C. 2022).

189 *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 343–46 (1962); United States v. Phila. Nat'l Bank, 374 U.S. 321, 362–67 (1963); United States v. Von's Grocery Co., 384 U.S. 270, 275–78 (1966).

190 *See, e.g.*, *Brown Shoe*, 370 U.S. at 315–18; *Phila. Nat'l Bank*, 374 U.S. at 362–63; *Von's Grocery*, 384 U.S. at 276–78.

191 *Brown Shoe*, 370 U.S. at 315.

192 *Id.* at 297.

193 *Id.* at 344.

194 *See Phila. Nat'l Bank*, 374 U.S. at 362–63.

195 *Id.* at 330–32.

196 *See id.* at 366–68.

justification to block the merger was driven by concerns that future mergers would propound in the already-concentrated grocery market.[197]

Moving to the Chicago and post-Chicago eras, skepticism towards merger and acquisition intervention stemmed from the understanding that mergers did not inherently harm consumers' pockets. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, the Court found no antitrust violation despite the bowling center operator's acquisition of numerous smaller bowling centers.[198] While this trend might have warranted closer scrutiny during the post-World War II era of decisions,[199] the Court reasoned that the loss of income by the plaintiff class did not suffice as the type of violation envisioned by the Clayton Act.[200] Justice Marshall's ruling was influenced by the reality that the plaintiff class consisted of competing bowling operators rather than avid bowlers who would pay to rent out lanes.[201] In *United States v. General Dynamics Corp.*, the Court eschewed fears of a merger between two coal mining companies that would have significantly increased market share in an already-concentrated market.[202] Instead, it looked at the broader context of the energy market and reasoned that this merged entity would still have to compete against new, alternative types of energy.[203] This rationale evinces the focus on the consumer welfare standard because this level of concentration would not have given the Court a reason to raise prices on consumers.[204]

In light of this evolution, analyzing the HHI figures would still show a violation of Section 7 if the downstream market were chosen.[205] Concentration has remained integral to the analysis, as it has not been excluded since the integration of the consumer welfare standard—the use of the HHI is proof of such.[206] In *Bertelsmann*, the HHI was projected to

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197 United States v. Von's Grocery, 384 U.S. 270, 277 (1966).

198 429 U.S. 477, 479–80, 484–89 (1977).

199 *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294 (1962); *Phila. Nat'l Bank*, 374 U.S. 321; *Von's Grocery*, 384 U.S. 270.

200 *Brunswick Corp.*, 429 U.S. at 490–91.

201 *See id.* at 487–88.

202 415 U.S. 486, 497–98 (1974).

203 *Id.* at 491.

204 *See generally* James J. Bernstein, *Back to the Future . . . of Competition*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (2023) (explaining that the *General Dynamics* court reasoned that "if consumers continue to gain in terms of competitive pricing, i.e. prices are not raised 'above competitive levels,' then a merger between two companies is not illegal even if it increases the merged company's market share").

205 *See infra* notes 207–210 and accompanying text.

206 *Herfindahl-Hirschman Index*, *supra* note 96.

far exceed the threshold for an anticompetitive outcome.[207] Demonstrating this spike in concentration strengthens the argument for blocking the merger, as it allows for a more straightforward comparison with previous cases where consumer harm allegations were raised.[208] Although these figures measured advance spending for top-selling titles,[209] similar HHI readings can be inferred from the Big Five's dominance over bestselling titles in the book market.[210] Consequently, Judge Pan could have stayed true to the more widely accepted principles of antitrust law by selecting the downstream market, since her decision then would have fused HHI metrics with comparable case law.

B. *The Risk of Coordinated Effects and Lack of Efficiencies Better Supports a Consumer Harm Argument*

Furthermore, the enhanced risk of collusion would have been grounded in prior case law had the downstream market been chosen.[211] In particular, the emphasis on *United States v. Apple, Inc.* speaks more directly to the potential anticompetitive harm to consumers than to authors.[212] The referenced examples of explicit collusion, where five of the Big Six were actively communicating with Apple through backchannels, were intended to appraise the terms of a price-fixing scheme.[213] Moreover, a key distinction is that *Bertelsmann* was brought under the Clayton Act, which bars mergers that hurt competition.[214] In contrast, *Apple* was brought under the Sherman Act, which forbids collaboration between separate companies to harm competition.[215] In *Reiter v. Sonotone Corp.*, the Court held that the purpose of the Sherman Act was to enshrine a "consumer welfare prescription."[216] The *Apple* court, operating under this mandate, considered the potential harm through the

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207 646 F. Supp. 3d 1, 37–38 (D.D.C. 2022).

208 FTC v. H.J. Heinz Co., 246 F.3d 708, 715–16 (D.C. Cir. 2001); 1997 MERGER GUIDELINES, *supra* note 77, § 1.5.

209 *Bertelsmann*, 646 F. Supp. 3d at 26.

210 *See* Grady, *supra* note 15; Milliot, *supra* note 12.

211 *See infra* notes 212–217 and accompanying text.

212 *See Bertelsmann*, 646 F. Supp. 3d at 45 (citing United States v. Apple, Inc., 791 F.3d 290, 300, 302, 316, 318, 321–29, 339 (2d Cir. 2015)); *Apple*, 791 F.3d at 316, 318.

213 *See Apple*, 791 F.3d at 339.

214 *Bertelsmann*, 646 F. Supp. 3d at 11.

215 *Apple*, 791 F.3d at 296–97.

216 442 U.S. 330, 343 (1979) (quoting BORK, *supra* note 24, at 66).

lens of artificially inflated prices for consumers and not the potential impact on authors.[217] Therefore, if the relevant market was the downstream market, it would have allowed for a more straightforward analogy.

Finally, the downstream market would have been better because the lack of cognizable efficiencies would have pointed more convincingly to a *potential monopoly*. As previously mentioned, evidence of efficiencies was not admitted because of evidentiary technicalities.[218] Nevertheless, merger efficiencies have recently played a focal role for suspect mergers under the Clayton Act. In *FTC v. Sysco Corp.*, the merger efficiencies allegedly created $490 million worth of savings for consumers, yet these efficiencies were not deemed to be "merger specific" because the judge was unpersuaded they could be achieved without a merger.[219] Thus, they did not outweigh the anticompetitive effects.[220] Conversely, in *New York v. Deutsche Telekom AG*, the U.S. District Court for the Southern District of New York acknowledged the substantial cost savings for consumers expected from the T-Mobile and Sprint merger, allowing it to proceed.[221] In *Bertelsmann*, since no type of efficiency was introduced,[222] the defendants would have been deprived of one of the best defenses available to them. As such, choosing the upstream market misses the forest for the trees with respect to efficiencies. Selecting the downstream market would have made the better choice, as there was substantial evidence of anticompetitive harm to consumers and no evidence supporting the recently recognized corresponding benefit.

C. *The Upstream Market Selection Harbored Inherent Structural Flaws*

Perhaps the upstream market was chosen in part because the government found the interests in protecting authors more compelling than the interests of consumers. However, they need not have made such a binary choice. The Judge's reasoning in favor of the upstream market

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217 *See Apple*, 791 F.3d at 332–35.

218 *See Bertelsmann*, 646 F. Supp. 3d at 55. This Case Note does not take a position on the dismissal of the efficiencies as an evidentiary issue under FED. R. EVID. 702.

219 113 F. Supp. 3d 1, 85 (D.D.C. 2015).

220 *Id.* at 73.

221 439 F. Supp. 3d 179, 209 (S.D.N.Y. 2020).

222 *See Bertelsmann*, 646 F. Supp. 3d at 52, 55.

did not protect those who would be most severely impacted: the authors themselves.

The selection of the upstream market likely reflects a deference to copyright concerns. The exclusive nature of a copyright effectively grants a limited monopoly to its holder to incentivize further content creation.[223] Despite recognition that copyright grants a monopoly power, intellectual property scholarship recognizes that individual copyright does not confer meaningful market power.[224] Instead, the greater power lies in the ability to aggregate exclusive licenses, which publishers achieve through authors' copyrights of their books.[225] This type of aggregation in creative industries has led to cartel behavior, which has been prosecuted under the Sherman Act.[226] Concurrently, creative industries have trended towards copyright aggregation as a way to reduce transaction costs.[227] In the same way, the conglomeration of copyrights to a few licensees—such as the publishing houses—would risk depressing the value of the copyright for the copyright holder.[228] Given the publishing industry's consolidation track record, a copyright holder would have diminished negotiating power to secure a higher advance when faced with only four significant publishing options as opposed to five.[229] Judge Pan seems to hint at accepting this rationale by acknowledging that lower advances would

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223 *See* Aaron Xavier Fellmeth, *Copyright Misuse and the Limits of the Intellectual Property Monopoly*, 6 J. INTELL. PROP. L. 1, 2–3 (1998); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 11–14 (2003). *See generally* John T. Cross & Peter K. Yu, *Competition Law and Copyright Misuse*, 56 DRAKE L. REV. 427 (2008) (asserting that the exclusive right granted by a copyright is most likely based out of a desire to incentivize creating works).

224 Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 217–18 (2004).

225 *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 318–19 (1970).

226 The United States brought lawsuits against the American Society of Composers, Authors and Publishers (ASCAP), and Broadcast Music, Inc. (BMI) under Section 1 of the Sherman Act to address competitive concerns arising from the market power each organization acquired through the aggregation of public performance rights held by their member songwriters and music publishers. The results of these lawsuits were consent decrees that set rules and obligations for the organizations to songwriters, composers, and publishers. *See* United States v. Am. Soc'y of Composers, Authors & Publishers, No. 41-1395, 2001 WL 1589999 (S.D.N.Y. June 11, 2001); United States v. Broad. Music, Inc., No. 64 Civ. 3787, 1966 U.S. Dist. LEXIS 10449 (S.D.N.Y. Dec. 29, 1966), *modified*, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. Nov. 18, 1994).

227 *See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1293–94 (1996).

228 *See* Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 325 (2004).

229 *See* United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 23 (D.D.C. 2022).

preclude authors from writing, thus limiting creative expression and the free flow of ideas.[230]

Despite the decision's apparent intention to protect smaller authors facing limited options after the merger, the actual relevant market never accounted for them. It seems contradictory that the opinion recognized that most books do not make a profit while the relevant market has been selected as that of best-selling titles.[231] Specifically, the average advance for a new book is anywhere between $1,000 and $50,000,[232] well below the $250,000 of the relevant market for best-selling titles.[233]

In addition, the upstream market choice for advances over $250,000 was maligned with structural deficiencies.[234] Principally, the $250,000 threshold was probably too narrow. Courts prefer narrowly drawn markets for accurate impact measurement, as broad markets make it challenging to assess price changes' effects on consumer turnout.[235] While excessively narrow markets might complicate measurement of anticompetitive effects,[236] there is precedent for utilizing the narrowest potential market to determine the market.[237] Judge Pan rejected this precedent because these were monopoly cases, not monopsony cases.[238] However, this distinction would not have made a narrower relevant market untenable because the U.S. District Court for the District of Columbia based its precedent on measuring demand substitution.[239] Even though the $250,000 as a numerical threshold was an analytical tool, competitive conditions begin to change at the $50,000 threshold, where

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230 *See id.*

231 *Id.* at 13, 24, 28–29.

232 Victoria Griffin, *How Much Do Authors Get Paid for Their First Book? A Guide to Understanding Publisher Payments*, BLUE PEN (May 18, 2023), https://www.bluepenbooks.com/2023/05/how-much-do-authors-get-paid-for-their-first-book-a-guide-to-understanding-publisher-payments [https://perma.cc/N8BT-RTTM].

233 *Bertelsmann*, 646 F. Supp. 3d at 25–29.

234 *Id.*

235 Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 612 n.31 (1953).

236 *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956).

237 *See, e.g.*, FTC v. RAG-Stiftung, 436 F. Supp. 3d 278, 292 (D.D.C. 2020); FTC v. Sysco Corp., 113 F. Supp. 3d 1, 26–27 (D.D.C. 2015); United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 59–60 (D.D.C. 2011); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 120 (D.D.C. 2004).

238 *See Bertelsmann*, 646 F. Supp. 3d at 35 n.24 (D.D.C. 2022).

239 *See, e.g.*, *RAG-Stiftung*, 436 F. Supp. 3d at 292; *Sysco*, 113 F. Supp. 3d at 26–27; *H&R Block*, 833 F. Supp. 2d at 59–60; *Arch Coal*, 329 F. Supp. 2d at 120. Demand substitution, also known as the substitution effect, is "[t]he change in demand for a good as a result of a change in the relative price of the good in terms of other goods." *Substitution Effect*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/economics/substitution-effect [https://perma.cc/P3Z7-GN6Q].

the non-Big Five's market share goes from 58% to 17%.[240] As such, from both legal and forward-looking perspectives, the choice of this upstream market failed.

D. *Why the Downstream Market in Terms of Precedential Value Matters*

The argument for choosing the downstream market gains substantial support from evidence of concentration, collusion, and the absence of verifiable efficiencies.[241] Despite the monopsony-framing concerns, the merger was successfully blocked because it met all elements of the *Baker Hughes* test.[242] The pivotal question then becomes: Why does Judge Pan's relevant market choice matter? The answer lies in the precedential value of the case.[243] Specifically in the context of antitrust law, judges deciding Section 7 cases hold the power to strongly guide jurisprudence.[244] While this case may be at the district court level, it stands out as one of the highest profile recent Section 7 cases, particularly in addressing a monopsony risk.[245] Notably, there has never been a Supreme Court case focused on monopsony; more broadly, the Supreme Court has not issued a ruling on a Section 7 case in nearly fifty years.[246]

The risk posed by this case is the precedent potentially suggesting that Section 7 was intended solely to address monopsonies for their wage impact on labor markets.[247] By selecting the upstream market in this instance, Judge Pan has not only endorsed an interpretation of Section 7 that probably was not envisioned, but she has also set a precedent that may prove inadequate for future cases. In a practical sense, this reasoning may also have unintended consequences by misconstruing how to present a Section 7 monopsony violation for future cases.[248]

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240 *Bertelsmann*, 646 F. Supp. 3d at 26–27 (D.D.C. 2022).

241 *See supra* Sections III.A–B.

242 *See supra* Sections II.B–C.

243 *See infra* Section III.D.

244 *See infra* Section III.D.

245 *See* Esmaeilpour, *supra* note 28.

246 *See* Feinstein & Teng, *supra* note 79, at 13.

247 *See* Pablo Florian & Anne Gron, *Economist's Perspective: US Antitrust Regulators Focus on Defining Relevant Labour Markets*, GLOBAL COMP. REV. (Aug. 25, 2023), https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2024/article/economists-perspective-us-antitrust-regulators-focus-defining-relevant-labour-markets [https://perma.cc/7E2N-WLNW].

248 *See infra* Section IV.A.

Following the *Von's Grocery* case, which blocked a merger resulting in only a 7.5% combined market share,[249] scholarship began to reflect that consumers might have suffered at the expense of competition, as the merger could have potentially lowered production costs, leading to more affordable products.[250] Thus, subsequent cases underscored in their reasoning the need to rein in the concentration analysis to return to consumer focus.[251] Notably, in *General Dynamics*, the Court explicitly rested their reasoning on the competitive position of coal companies, emphasizing their inability to manipulate coal prices.[252] The precedential impact of this analysis emphasized the imperative to avoid conflating a Section 7 violation with other conflicting objectives, such as the protection of small businesses.[253] The Court's stance clarified that antitrust considerations should remain focused on *preserving competition as defined by consumer welfare* without dilution by unrelated social goals.[254]

In a similar context, choosing the downstream market would have all-but-eliminated the risk of wage depression with the consumer-oriented mandate of American antitrust law.[255] The scrutiny of monopsonies under Section 7 stems from buyer-side power, typically causing a transfer of increased costs to consumers.[256] Judge Kavanaugh explicitly drew this connection in his dissent in *Anthem*.[257] Kavanaugh's dissent discusses the intersection between Section 7 of the Clayton Act and monopsony concerns.[258] Kavanaugh took the inferential step that the contemplated merger should be blocked because an increase in buyer power on the carrier side could prompt medical providers to pass on the costs to employers.[259] This reasoning aligns with antitrust jurisprudence's fundamental concern for consumer welfare.[260] However, Pan's decision

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249 384 U.S. 270, 272 (1966).

250 Valentine, *supra* note 93.

251 *See, e.g.*, United States v. Gen. Dynamics Corp., 415 U.S. 486, 496–97 (1974).

252 *Id.* at 500–03.

253 *See* Valentine, *supra* note 93.

254 *See id.*

255 *See* United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 11–12 (D.D.C. 2022).

256 United States v. Anthem, Inc., 855 F.3d 345, 377–78 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

257 *See id.*

258 *See id.*

259 *Id.* at 377–78; *see* 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 980 (3d ed. 2009); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 1.2b (4th ed. 2011).

260 *See Anthem*, 855 F.3d at 377 (Kavanaugh, J., dissenting).

fails to incorporate the inferential step present in Kavanaugh's dissent.[261] Consequently, the precedential impact of this omission is the potential impression that the Clayton Act aims to combat wage depression as a standalone objective. Furthermore, the failure to include this inferential step reintroduces the problematic blending of goals reminiscent of the post-World War II cases.[262] This blending has the potential to create internal inconsistencies within the reasoning, presenting it as at odds with itself.[263]

IV. FUTURE IMPLICATIONS AND PROPOSED SOLUTIONS

A. *Aftermath of the S&S + PRH Fallout*

The legal aftermath and business repercussions for both defendants offer valuable insights as to how current antitrust laws cannot fully compensate for the anticompetitive harms they seek to tame. In July 2023, the DOJ ATR and FTC released draft Merger Guidelines for public comment.[264] These guidelines are discernable from their predecessors because of their heightened focus on monopsonies.[265] Notably, they deem mergers that could lead to wage suppression and stagnation as potentially anticompetitive.[266] This development suggests that the FTC and the DOJ ATR might extrapolate the holding of *Bertelsmann* to inform and standardize future merger review accordingly. Moreover, after PRH was contractually required to pay $200 million to Paramount due to the merger's collapse,[267] KKR announced its plan to acquire S&S for $1.62

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261 United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 55–56 (D.D.C. 2022).

262 *See* cases cited *supra* notes 55–64.

263 *See* BORK, *supra* note 24, at 79–89.

264 Press Release, FTC, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines [https://perma.cc/6SK7-6Z4V].

265 *See* U.S. DEP'T OF JUST. & FTC, MERGER GUIDELINES (2023), https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf [https://perma.cc/X2YZ-JWZL] [hereinafter 2023 MERGER GUIDELINES] (including an appendix that discusses in-depth the hypothetical monopsonist test, which is analogous to the hypothetical monopolist test referred to in the prior guidelines).

266 *Id.* § 11.

267 Elizabeth A. Harris, Alexandra Alter & Benjamin Mullin, *A Huge Merger's Collapse Breaks a Pattern of Consolidation in Publishing*, N.Y. TIMES (Nov. 21, 2022), https://www.nytimes.com/2022/11/21/books/penguin-random-house-simon-schuster-deal.html [https://perma.cc/NSX9-SYH9].

billion in August 2023.[268] Since KKR is a private equity firm and thus does not directly compete with S&S, the acquisition did not trigger horizontal merger review.[269] However, that reality might be part of the bigger problem.

A private equity acquisition, particularly by KKR, raises distinctive and equally pernicious anticompetitive concerns. Judge Pan acknowledged the defendants' argument favoring the merger because the alternative might be a private equity acquisition.[270] Private equity firms are known for their deployment of leveraged buyouts, largely using investor-provided debt to complete an acquisition of a company.[271] Furthermore, the acquired company, not the private equity firm, is responsible for repaying the debt.[272] In pursuit of realizing quick profits, private equity firms, exemplified by KKR in their infamous 1988 RJR Nabisco leveraged buyout,[273] may engage in a "buy, strip, and flip" strategy, where private equity management restructures the company by selling off its most profitable divisions.[274]

KKR's ongoing leveraged buyout of S&S highlights the anticompetitive concerns from *Bertelsmann*. The financing of the transaction involves approximately $1 billion in debt, placing repayment responsibilities on S&S.[275] As the company prioritizes servicing the high debt, author advances may wither due to the potentially burdensome financial obligations faced by S&S.[276] Although KKR asserts that employees will receive ownership stakes, it remains unclear how and

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268 Elizabeth A. Harris & Alexandra Alter, *KKR Closes Deal to Buy Simon & Schuster*, N.Y. TIMES (Oct. 30, 2023), https://www.nytimes.com/2023/10/30/books/kkr-simon-schuster-sale.html [https://web.archive.org/web/20250219120516/https://www.nytimes.com/2023/10/30/books/kkr-simon-schuster-sale.html].

269 *See* HORIZONTAL MERGER GUIDELINES, *supra* note 76, § 1.

270 United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 55 (D.D.C. 2022).

271 *Leveraged Buyout (LBO)*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/valuation/leveraged-buyout-lbo [https://perma.cc/6DXS-SZGY].

272 *See id.*

273 *See generally* BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE (2008) (summarizing how KKR engaged in a ruthless bidding war to ultimately acquire RJR Nabisco for $25 billion). The burden of the debt for RJR Nabisco ultimately led to the sale of the company's key assets and mass layoffs. *See RJR Nabisco to Cut 3,900 Jobs*, CBS NEWS (Dec. 14, 1998, 1:03 PM), https://www.cbsnews.com/news/rjr-nabisco-to-cut-3900-jobs [https://perma.cc/M2EN-MYXP]; Michael Janofsky, *RJR Nabisco Revamping to Cut 6,000 Jobs*, N.Y. TIMES (Dec. 9, 1993), https://www.nytimes.com/1993/12/08/business/rjr-nabisco-revamping-to-cut-6000-jobs.html [https://perma.cc/8QSZ-9WEP].

274 *See* Harris et al., *supra* note 31.

275 Dougherty et al., *supra* note 34.

276 *See id.*

whether authors will benefit from such an arrangement.[277] Given Judge Pan's skepticism towards PRH's CEO's commitment to allow imprints within S&S + PRH to bid against one another,[278] such a promise bears similarities to previously discredited assurances in the industry. Failure to meet debt obligations could also lead to a discounted sale of S&S by KKR,[279] reigniting the fear of wage depression that initiated this case.[280]

The Biden FTC and DOJ ATR's attention to private equity hinted at a *Bertelsmann*-like willingness to use private equity transactions as a vector to challenge existing antitrust norms. Specifically, the new merger guidelines have language that indicates a desire to target private equity's business strategies.[281] The guidelines would lower the anticompetitive bar by shifting the focus from individual mergers or acquisitions to analyzing transaction patterns.[282] In response, many law firms across the country have released memorandums to their private equity clients that such language is indicative of future agency scrutiny.[283] On the litigation front, the FTC filed a lawsuit in September 2023, against private equity firm Welsh, Carson, Anderson & Stow ("Welsh Carson"), another leading private equity firm specializing in healthcare-based acquisitions, for utilizing a "roll-up" strategy, whereby multiple anesthesia practices were acquired and then consolidated into a single entity.[284] The complaint reflected the distinctive nature of this action—wherein it is not a singular acquisition but a series of consecutive acquisitions that aimed to establish a monopoly share in the anesthesia provider market—leading to

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277 *See id.*

278 *See* United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 50–51 (D.D.C. 2022).

279 *See id.* at 55–56 (explaining that a potential private equity acquisition in lieu of the merger is not part of the evaluation criteria for a Section 7 case).

280 *See supra* Section II.A.

281 *See* 2023 MERGER GUIDELINES, *supra* note 265, § I (discussing how mergers should not further a trend toward concentration, and that market concentration can take the form of vertical integration that would foreclose small manufacturers from entering markets otherwise open to them).

282 *See id.*

283 *See, e.g.*, *Proposed Merger Guidelines and Private Equity*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP (Sept. 6, 2023), https://www.paulweiss.com/practices/transactional/private-equity/publications/proposed-merger-guidelines-and-private-equity?id=47769 [https://perma.cc/Q6MR-WEKX]; Michael J. Sheerin, Steven C. Sunshine & David P. Wales, *What the New Federal Merger Guidelines Mean for Companies Pursuing Deals*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (2023), https://www.skadden.com/insights/publications/2023/09/the-informed-board/what-the-new-federal-merger-guidelines-mean [https://perma.cc/82AN-3K9E].

284 Complaint at 3, FTC v. U.S. Anesthesia Partners, Inc., No. 23-cv-3560 (S.D. Tex. Sept. 21, 2023).

increased prices.[285] Former FTC Chair Khan has highlighted that as a result, Welsh Carson was then able to collect millions of dollars at the expense of Texas patients and businesses.[286]

However, the promise of these guidelines to incorporate novel antitrust considerations will face uphill battles. The aggressive antitrust agenda has received pushback from courts.[287] A notable example occurred in February 2023, when the FTC was not granted a preliminary injunction against Meta Platforms, Inc. ("Meta").[288] The FTC argued that Meta's acquisition of a virtual reality startup would violate Section 7 of the Clayton Act due to the potential to reduce competition in the virtual reality fitness app market.[289] The FTC's argument was distinguishable because they had relied on an "actual potential competition theory," postulating that a merger still has the potential to harm direct competition even when said companies are not currently in the same market.[290] Such a theory has never been endorsed by the Supreme Court,[291] yet the 2023 Merger Guidelines specifically pronounce this scenario as one that can potentially reduce competition.[292] While the presiding judge gave credence to this theory, he nevertheless did not find in favor of the FTC because they could not prove their likelihood of success on the merits.[293] The FTC then subsequently dismissed their complaint against Meta.[294] In light of this pushback, a string of private equity acquisitions might also not survive as they could be seen as resting on a novel, but tenuous legal theory.

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285 *Id.* at 3–5.

286 Press Release, FTC, FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas (Sept. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across [https://perma.cc/9JAQ-PUZC].

287 *See* Diane Bartz & David Shepardson, *FTC Chair Defends Tenure as Lawmakers Battle over Consumer Agency's Impact*, REUTERS (July 13, 2023, 1:42 PM), https://www.reuters.com/world/us/us-ftc-chair-face-questions-court-losses-congressional-hearing-2023-07-13 [https://perma.cc/9ULP-8MAP].

288 *See* FTC v. Meta Platforms, Inc., 654 F. Supp. 3d 892, 902–903 (N.D. Cal. 2023).

289 FTC v. Meta Platforms, Inc., 654 F. Supp. 3d 892, 911–13, 917–21 (N.D. Cal. 2023).

290 *Id.* at 926–28.

291 *Id.* at 926.

292 *See* 2023 MERGER GUIDELINES, *supra* note 265, § II.4.A.

293 *Meta Platforms*, 654 F. Supp. 3d at 938.

294 *See* Order Returning Matter to Adjudication and Dismissing Complaint, Meta Platforms, Inc., No. 9411 (F.T.C. Feb. 24, 2023).

B. *Potential Solution*

This Case Note does not take the position that the desired incorporation of neo-Brandeisian concepts into antitrust jurisprudence is a bad idea– in fact quite the opposite. However, a new solution is required to remedy the harms that the *Bertelsmann* case sought to eliminate, but on a wider scale. One thing is clear: The merger guidelines are not designed to bridge the gaps between the consumer welfare standard and neo-Brandeisian movement. The merger guidelines have always served the purpose of clarifying, not mandating, what it means to substantially lower competition.[295] Nevertheless, the guidelines have still changed over time.[296] Furthermore, even if the new guidelines garner increased credibility, a substantial amount of time would be required for the development of legal precedents supporting such a perspective. As exemplified with the *Meta* case, the judge may have recognized the underlying theories, yet the ruling or decision has yet to propel those theories into precedent.[297] Moreover, the Biden administration's support for the theories underlying both *Bertelsmann* and the new merger guidelines remain uncertain under the second Trump administration; Chair Khan's term as Chair of the FTC ended on January 20, 2025.[298] Similarly, Jonathan Kanter, the DOJ ATR's antitrust counterpart, did not continue in his position after former President Biden's term.[299]

As such, the best solution is to change the statutory language of the Clayton Act. The discourse has already commenced, with Senator Amy Klobuchar actively promoting the discussion.[300] She has advocated for new legislation that explicitly prohibits mergers based on risk of monopsony power.[301] She also advocates for burden-shifting to begin

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295 *See* 1968 MERGER GUIDELINES, *supra* note 91, § 1; *see also* HORIZONTAL MERGER GUIDELINES, *supra* note 76, § 1.

296 *See* 2023 MERGER GUIDELINES, *supra* note 265, § I.

297 *See Meta Platforms*, 654 F. Supp. 3d at 936.

298 *See* Press Release, FTC, Andrew N. Ferguson Takes Over as FTC Chairman (Jan. 22, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/01/andrew-n-ferguson-takes-over-ftc-chairman [https://perma.cc/J6Y7-HCCC].

299 *See Former Assistant Attorney General Jonathan Kanter*, U.S. DEP'T JUST. (Dec. 20, 2024), https://www.justice.gov/archives/atr/staff-profile/former-assistant-attorney-general-jonathan-kanter [https://perma.cc/DJM7-279U].

300 Bill Baer, *How Senator Klobuchar's Proposals Will Move the Antitrust Debate Forward*, BROOKINGS INST. (Feb. 8, 2021), https://www.brookings.edu/articles/how-senator-klobuchars-proposals-will-move-the-antitrust-debate-forward [https://perma.cc/KW8Q-JFQB].

301 *Id.*

with the defendant entities as opposed to the DOJ ATR.[302] Lastly, her legislative suggestions would reduce the probabilistic standard of the Clayton Act.[303] However, this action needs to be taken a step further. To properly prevent the types of anticompetitive harms envisioned in *Bertelsmann*,[304] the Clayton Act should be revised to explicitly delineate that horizontal mergers would slow wage growth and substantially lessen competition. In addition, small acquisitions that indicate an anticompetitive pattern should also be included in the statute as substantially lessening competition. These modifications would cover both bases, curtailing anticompetitive harm arising from the horizontal mergers involving PRH, as well as alleviating worries regarding anticompetitive harm from private equity acquisition.

In the meantime, there is a practical interim solution until a change in the statutory language occurs: If there's a potential monopsony risk, opt for the consumer market as the relevant market. This would be a good idea for two reasons. First, as discussed in great detail throughout this Case Note, there is far more Section 7 case law pertaining to monopolies than there is to monopsonies.[305] Framing future Section 7 cases around consumer markets proactively would not risk creating a precedent that government agencies would be enticed to pursue but ultimately fall flat on.[306] Second, and of more practical importance, framing the decision around consumers still might help to eliminate at least some of the anticompetitive concerns, like wage depression, present in *Bertelsmann*.[307] Usually when there is a monopsony, there is also a monopoly.[308] Therefore, if there is a risk that a merger will depress wages in an industry, blocking a merger on consumer market grounds would at least stop anticompetitive mergers that private equity firms would not be interested in acquiring.

CONCLUSION

The implications of this case underscore a current impasse in antitrust law. While the outcome in the *Bertelsmann* case may seem

302 *Id.*

303 *Id.*

304 *See supra* Part III.

305 *See supra* Parts I, III.

306 *See supra* Section IV.A.

307 *See* United States v. Bertelsmann SE & Co. KGaA, 646 F. Supp. 3d 1, 24 (D.D.C. 2022).

308 *See* Complaint, United States v. AT&T Inc., No. 11-cv-1560 (D.D.C. Aug. 31, 2011).

appealing, there is a risk of *Bertelsmann* becoming an outlier, not a standard-bearer.[309] The DOJ ATR's evidence unequivocally demonstrates present and future concentration, a history of collusion, and a lack of efficiencies that support a violation of Section 7. Despite this, the considerable precedent at the district, circuit, and Supreme Court levels all points in the opposite direction. It seems improbable that one case could overturn this extensive history, granting monopsonies in the labor market the same breadth and deference as monopolies. Additionally, S&S now faces an arguably more precarious situation.[310] If KKR lives up to its reputation as "Barbarians at the Gate,"[311] book buyers, authors, and the publishing house itself could find themselves in a worse position than at the beginning of the antitrust probe.[312] Therefore, if current antitrust laws do not fully account for all of the anticompetitive harms that exist in the twenty-first century, then the statutes themselves, not the agencies' approaches, need to change. Lastly, this author invites readers to take up the issues from this Case Note—perhaps it will be the basis for a manuscript worthy of publication by PRH or S&S.

309 *See supra* Part III.

310 *See supra* Section IV.A.

311 BURROUGH & HELYAR, *supra* note 273.

312 *See supra* Section IV.A.