

U.S. Senator Elizabeth Warren
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As Prepared for Delivery

It's really great to be back at the Open Markets Institute, surrounded by folks committed to this fight to protect our economy and our democracy from corporate monopolies.

Back in 2016, I set up a dinner in the conference room of my Senate office to talk about how we might breathe some life into antitrust enforcement. Barry was at that dinner, along with a young law student who was working on a paper about Amazon's antitrust issues and a practicing antitrust attorney who had started his career at the FTC. That law student was Lina Khan, and that antitrust attorney was Jonathan Kanter.

The room was drab. The food was mediocre, but the discussion sizzled. Later that year, I came to New America's Open Markets event to talk about the ruinous effects of consolidation on our economy as well as on our democracy.¹ I'm here today to talk about how far we've come and the big problems we have yet to solve – and to outline an agenda for what's next.

But let's start with something fun – big businesses are angry and throwing a temper tantrum. Last week, the U.S. Chamber of Commerce, along with 99 other trade associations, wrote a letter to the Federal Trade Commission² and rang the alarm bell on the editorial page of the Wall Street Journal.³

Let's pause here to remember that these trade associations are legal shields that let billionaires and big businesses hide their identities while they secretly call the shots in Washington.

Back to our story. The Chamber and the trade associations were slightly hysterical in describing the FTC's proposed rule to ban non-compete clauses in employment contracts.⁴ Big businesses and private equity love non-competes because they mean lower wages for workers and higher profits for Wall Street. According to the Chamber, it is "radical"⁵ to think that it might be an unfair practice for McDonald's to force their workers to sign agreements that they can't go work at Burger King. Radical progressives are "running wild"⁶ and the Chamber declares they will fight it with everything they've got. Wow.

Think about where this anger comes from. These powerful entities, the heirs to what Franklin Delano Roosevelt in 1932 referred to as "an informal group amounting to an economic government of the United States,"⁷ aren't just angry that our democratically elected government

is trying to promote competitive markets. They are angry that someone might challenge **their** power over those markets.

Their letter says, in essence, how dare you?

This has long been the response of those with power when confronted by the forces of justice. It's what Standard Oil said to Senator John Sherman and what the plutocrats said to FDR and Truman.⁸

But every time one of them is angry, we should smile just a little. They are telling us we are fighting the right fights – the ones that truly challenge the power of giant corporations and their armies of lobbyists and lawyers.

The need to take on these fights has never been greater. After more than 40 years of lax antitrust enforcement, competition in one market after another is on life support or has been snuffed out entirely. And the pandemic made it all worse. In 2021, there was a *70% increase* in mergers and acquisitions.⁹ One year into the pandemic, about a third of mom-and-pop shops nationwide were out of business.¹⁰ Across markets, Americans are paying more for groceries¹¹, prescription drugs, and on and on.¹² Meanwhile, CEOs like Kroger's brag openly about how inflation is good for their bottom lines.¹³

At the same time, the US government has increasingly become an easy mark for giant corporations. Look at the airline industry. During the early days of the pandemic, taxpayers sent a \$25 billion bailout to the airlines.¹⁴ And as flying picked back up, the corporate airlines said "thank you" by raising fares at a breath-taking pace,¹⁵ scheduling flights they knew they couldn't staff,¹⁶ and leaving passengers and workers to suffer the consequences. Powerful industries expect billions of taxpayer dollars when they need a handout – and then treat taxpayers like chumps and fight any oversight as soon as they've pocketed the money.

Forty years of indifference to antitrust law left the entire field scattered and largely ignored. But that has changed since we last met. Today the people who pay attention to the impact of industry consolidation are organized. We're focused, and we are making change—first steps, but real, honest-to-goodness, make-the-giants-shake-in-their-boots change.

One reason we've started to get traction is that the American people are on our side. Look at the debate over inflation. While pundits and ivory-tower economists spent the past two years scoffing at the idea that giant corporations were contributing to higher prices,¹⁷ polls showed that solid majorities of Americans believed those corporations used the pandemic as an opportunity to goose prices and pad profits.¹⁸

Working people had it right. Corporate profit margins in the second quarter of 2022 reached a 70-year high.¹⁹ An analysis by the Economic Policy Institute found that the spike in profit margins since the pandemic explains roughly 40% of the rise in prices since mid-2020.²⁰ A new study from the Federal Reserve Bank of Boston found that corporations in the most concentrated sectors have been the most successful at expanding their profit margins on the backs of consumers.²¹

The political pundits don't get it, but the American people do. So does President Biden and his economic team. Faced with mountains of data on the harm that consolidation is causing in our economy and our society, President Biden started 2021 with the strongest commitment to tackling monopolies since the 1970s. Just a few months into his administration, the President released an executive order with a whopping “72 initiatives by more than a dozen federal agencies to promptly tackle some of the most pressing competition problems across our economy.”²² One of those ideas: implementing the law I wrote with Senator Chuck Grassley to break up the hearing aid cartel and finally let other businesses sell hearing aids over the counter.²³

The President also has had an amazing team—strong regulators who actually believe in competition. I've said it before: personnel is policy. President Biden knocked it out of the park when he appointed Lina Khan as chair of the FTC and Jonathan Kanter as head of the Antitrust Division at DOJ – two champions in this fight against monopolies. Over the last two years, Lina and Jonathan, with an assist from Tim Wu and Bharat Ramamurti at the White House, have begun to turn our system from a puppet of the monopolists to a real cop on the beat enforcing competition laws. Making sure we maintain a strong team on these issues, especially at the White House, lets the President demonstrate his ongoing commitment to competition policy. Last year, Congress passed the first significant update to our antitrust laws in nearly fifty years.²⁴ The brand new merger fee law authorizes more money for FTC and DOJ antitrust enforcement and ensures that state attorneys general can bring antitrust lawsuits in their home states.²⁵

Khan. Kanter. More resources. More state-level partners. This is all good. But it is also just the start. Winning the fight against consolidation and monopoly power will require more—more from Congress, more from regulators, and more from all of us working in the field of economic competition. Seven years ago, I talked about the first steps we could take to promote competition in our broken markets.²⁶ Today I want to focus on where we go next.

Let's start with the to-do list for Congress.

Divided government means we won't get everything we need right now. But that doesn't mean sitting quietly and letting this moment pass. We have allies in industry-by-industry fights, and we need to put wind in their sails.

Let's start with Big Tech.

Last year, several bills collected substantial bipartisan support. It's a really good list:

- The Klobuchar-Grassley bill to prohibit platforms like Amazon from unfairly preferencing their own products.²⁷
- The Blumenthal-Blackburn bill to keep Apple and Google from abusing their control over their app stores.²⁸
- The Klobuchar-Kennedy bill to require Facebook and Google to pay journalists for their content.²⁹

The tech companies hated those bills. HATED them. But every time members of Congress were forced to vote on them in public, the bills survived. All three bills made it out of committee with big margins—supported by both Democrats and Republicans.

Those bipartisan antitrust bills should be law today. And they would be law today IF they had gotten votes on the floor of the Senate and the House. But there was never a vote on those bills. . . It was a mistake we cannot afford to repeat. But listen to the underlying lesson: There is demonstrated bipartisan appetite to rein in Big Tech. That means the time to move on legislation is right now.

Tech is a big deal, but we have opportunities to clean up other sectors of the economy. Consider agriculture.

Three decades ago, the top four pork packers controlled 36% of the market; today it's 70%.³⁰ Three decades ago, the top four beef packers controlled 32% of the market; today it's 85%.³¹ Senator Tester has led a bipartisan bill to create a special investigator office within USDA to police antitrust violations committed by meatpackers.³² Once every five years we have a chance to transform farming policy. We're going to vote on the Farm Bill later this year, and we should include Senator Tester's bill and other pro-competitive measures in the final package.

Next up: The defense industry. In the 1990s, America had 51 major contractors bidding for defense work. Today, thanks to merger after merger, there are only five *massive* companies remaining, and according to the Government Accountability Office, nearly 20,000 small businesses have been pushed out of the defense market in the last decade alone.³³

Big Defense firms should be banned from buying up the independent suppliers their competitors depend on. Defense contracting should be reworked to break up the massive contracts awarded to the big guys and create opportunities for firms of all sizes.

Tech. Ag. Defense. Those are starting places for Congress to get in the fight.

But our vision should go beyond industry-specific changes. It's time to restore the spirit of the Sherman Act across the board. That is why I will be reintroducing my bill – the Prohibiting Anticompetitive Mergers Act³⁴ – later this year. This proposal would establish clear rules on when mergers are illegal and set up a streamlined process for breaking up monopolies. I worked with a lot of advocates in this room on that bill, and we had great support last year. Let's keep pushing for it.

These policies should be supported by Democrats and Republicans alike, but if Republicans will not come to the table to pass them during the next two years, Democrats should prepare now to make them happen the next time we control both houses of Congress.

That's the to-do list for Congress. What about the executive branch?

The administration needs to build an even more comprehensive competition agenda:

- First, break up the giants.
- Second, stop harmful mergers **before** big companies turn into giants.
- Third, crack down on the tricks the giants use to reinforce their market power.
- And fourth, lock up corrupt executives when they violate criminal antitrust law.

Taking on the giants is hard, but to restore competition, we must break up today's worst monopolies. The FTC has made a good start with its lawsuit to spin off Instagram and WhatsApp from Facebook.³⁵ DOJ is finally bringing an enforcement action to separate Google's online advertising exchange from its search business.³⁶

We need more. Regulators should investigate companies that may have skirted around the conditions for merger approval in the first place. For example, the Ticketmaster-Live Nation deal from 2010.³⁷ Or Northrop Grumman's acquisition of Orbital ATK in 2019, which the FTC is reportedly investigating.³⁸ In any such case, if the government finds parties violated the terms of their remedies, then regulators are halfway home in breaking up these illegal monopolies.

We can also toughen up antitrust standards to prevent tomorrow's monopolies. The Biden administration has finally broken the pattern of rubber stamping every big merger that comes along.

This is great, but again, we need more. Back in the 1960s, our national merger guidelines set up clear criteria for what types of mergers were out of bounds.³⁹ For example, in markets where the four largest firms held a combined 75% or more of a market, the federal government would

usually oppose the merger.⁴⁰ That is easy to understand. But President Reagan tossed out these rules and replaced them with a hands-off approach⁴¹ that enabled wave after wave of consolidation. It's time for new merger guidelines that reflect President Biden's commitment to meaningful competition policy.

We can also do more to oppose bad mergers outright instead of trying to fix them up with so-called merger remedies. Oftentimes, when a company knows that its deal is anticompetitive, it pursues the merger anyway but makes certain promises to the federal government to fix some of the competition concerns raised by the deal.⁴² For instance, as part of its merger with Ticketmaster, Live Nation committed not to withhold tours from venue owners who did business with Ticketmaster's competitors.⁴³

You'll never guess what happened next: DOJ now alleges that Live Nation has repeatedly engaged in exactly the type of retaliation it swore would be prohibited.⁴⁴

That's not an isolated example. The point of most big deals is to monopolize, so the point of remedies is to trick enforcers into letting monopolistic deals go through. It is also costly for the government to monitor compliance with remedies.⁴⁵ Look--it's not the government's job to help companies get illegal mergers across the finish line. By and large, remedies should be off the table--if the deal is illegal, just say no!

Today the FTC and DOJ are doing the heavy lifting to block bad deals, but they should not be alone. Several federal agencies have clear statutory authority to block anticompetitive deals in their areas of expertise. But in agency after agency, those tools are gathering dust. It's time to pick them up and use them.

Transportation is one example. Between 2000 and 2020, the number of major airlines in the United States was cut by half, almost exclusively due to mergers.⁴⁶ The Department of Transportation played right along, approving route transfers and letting the deals slide right through.⁴⁷ Enough. If DOT determines a route transfer would harm competition, like JetBlue's possible acquisition of Spirit,⁴⁸ there's no need to wait for the DOJ. Secretary Buttigieg has the power to stop anticompetitive airline mergers⁴⁹ – and he should use that power. Right. Now.

Banking is another example. The Federal Reserve, OCC, and FDIC all have special tools to stop bad bank mergers under the Bank Merger Act.⁵⁰ They just keep letting banks get bigger and bigger. Just a few months ago, the Fed and the OCC let U.S. Bank, the fifth-largest bank in the nation, grow even larger by swallowing up a smaller rival.⁵¹ Since 2006, the Fed has received over 3,500 bank merger applications, and they haven't stopped a single one.⁵² Not one. C'mon, guys. Who are you working for? OCC Acting Comptroller Hsu needs to learn to say no to anticompetitive bank mergers. Comptroller Hsu should also start preparing the banking industry for change by advancing new bank merger guidelines.

And now we come to the Department of Agriculture. The Packers & Stockyards Act gives the USDA tools to prohibit a meat packer from buying up companies if that purchase helps create a monopoly.⁵³ In spite of this, under Secretary Vilsack’s watch, the USDA sat back while Sanderson Farms merged with Wayne Farms,⁵⁴ creating a monopoly with more power to exploit poultry growers across the South. And that’s not even the biggest story. After meat processing giant JBS admitted to price fixing,⁵⁵ and after its parent company was convicted of bribery,⁵⁶ the law gives USDA the power to refuse to give JBS any more federal contracts.⁵⁷ Instead, since JBS’s guilty pleas in 2020, USDA has awarded them at least \$115 million in new contracts.⁵⁸ Why not stop giving taxpayer money to these crooks? Well, as the Secretary argued, there really aren’t any competitors, so he has no choice but to keep working with a corporate criminal.⁵⁹ Here’s an idea—break up the big meatpackers so there’s real competition. Secretary Vilsack should use all of his authorities to act aggressively to advance and enforce the President’s competition agenda, to protect both growers and consumers.

Part 1, break up corporate monopolies. Part 2, stop the mergers that create these monopolies. Now, part 3, stop the anti-competitive practices that giant corporations use to exploit their power. I’ve already mentioned the non-compete ban. Three cheers for the FTC! Rohit Chopra at CFPB is also showing the way by cracking down on illegal junk fees⁶⁰ and deceptive hidden fees from big banks and credit card companies,⁶¹ and making it easier for customers to leave bad banks with poor customer service.⁶² Three more cheers for the CFPB!

There’s so much more the Biden Administration could do:

- Put rules in place to ban Big Pharma companies from using “pay for delay” tactics⁶³ to keep cheaper generic drugs off the market.
- Crack down on abusive patent strategies⁶⁴ and stop handing out weak patents that allow Big Pharma to charge sky-high prices even longer.
- Prohibit the giant meatpackers from owning livestock⁶⁵ to reduce vertical integration in our food supply chains.
- End the tournament system⁶⁶ that unfairly harms poultry growers.
- Adopt “right to repair” rules⁶⁷ that would allow farmers to fix their own machinery at a cheaper cost.
- Halt private-equity “roll up” strategies⁶⁸ that let greedy Wall Street firms buy local industries, strip off their assets, and force businesses into bankruptcy.
- Ban “horizontal shareholding”⁶⁹ that, among other things, permits the four largest mutual funds in America to be the largest shareholders of all—all—the major airlines.
- Require data portability and interoperability⁷⁰ online so people can change platforms and stay connected to all their friends and followers.

This is an important moment in our economy and in our democracy. We have lived through forty years of regulators and courts mostly looking the other way as giant corporations in one industry after another snuff out competition.

And after forty years of lax enforcement, too many corporate executives view the consequences of breaking antitrust laws as just a cost of doing business—the company pays a fine and everything keeps moving smooth as silk.

It's time to remind corporate executives and B-school gurus that monopolization is actually a crime. Collusive schemes like price fixing, wage fixing, and market allocation are violations of section 1 of the Sherman Act⁷¹, and monopolization itself is a felony under section 2 of the Sherman Act.⁷² For any executive who needs a reminder, that's *criminal* law--Miranda warnings, handcuffs, and orange jumpsuits. The DOJ should vigorously prosecute violations of the Sherman Act.

Antitrust law carries severe penalties for a reason: competition is essential to our economy **and** to our democracy. Today, as giant corporations get even bigger and even more economically powerful, they amass more resources to spend on lobbying and campaign contributions. As their political power grows, they use that power to ensure that all the rules—including the antitrust rules—tilt in their favor. These giants damage more than our economy; they corrode the foundations of our democracy.

Reining in giants is hard work. Industries that actually might face a little competition are already howling. But that doesn't change what needs to be done to promote fair competition in our markets. And it doesn't change the significance of this fight.

And that's why I'm so happy to be here with you today. I'm grateful to you because you are giving this fight real heft. You are bringing more ideas and more accountability and more determination to a righteous fight.

Sure, in the David-versus-Goliath battle to break up monopolies and give competition a chance to thrive, betting money would still be on Goliath. But the Davids are slinging rocks, and the giants are starting to sweat. We can feel it: change is coming.

I believe in markets—competitive markets. And I believe in what we can do together to make our markets work for all our people.

Thank you.

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