Written Testimony
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Chair Warren, Ranking Member Kennedy, Members of the Subcommittee, thank you for the opportunity to give this testimony.

I am the Director of Policy and Advocacy at the American Economic Liberties Project, a policy and advocacy organization dedicated to addressing the problem of concentrated economic power—monopolies. The harms of systemic monopolization in America are vast: higher consumer prices, fewer small businesses, depressed levels of entrepreneurship and business dynamism, more fragile supply chains and shortages, markedly lower wages for workers (particularly lower-income workers), regional inequality, worse outcomes for patients as a result of hospital mergers and private equity roll-ups, reduced military preparedness resulting from extreme concentration in the defense industry, the destruction of a sustainable revenue model for local news because of Google and Facebook's monopolization of digital advertising, and I could go on. The point is that monopoly power is one of the main impediments to broad-based social, economic, and racial justice in America.

My journey to Economic Liberties and the anti-monopoly movement, which seeks to revive enforcement of our nation's antitrust laws and increase competition across the economy, has much to do with two professional experiences in the years following the 2008 global financial crisis. The first was working as a corporate attorney at a global law firm, where I witnessed how quickly big banks, including those that had been deemed "too big to fail" after causing the mortgage crisis, had rebounded and were generating incredible gains through record deal flow. Their insulation from the consequences of irresponsible risk-taking was striking, and it suggested that something about our policy responses had been horribly misguided.

The second was working as a regulatory attorney and Senior Advisor at the Consumer Financial Protection Bureau, taking on the payday lending industry, debt collectors, and banks that cheated consumers and imposed ridiculous fees like overdraft charges that nickel and dimed Americans at one of the country's most vulnerable moments. At the CFPB, we used our legal authorities aggressively to hold those who broke the law accountable and ensure consumers knew their rights in the financial marketplace.

But the reality was that we were swimming upstream. The structural advantages of large financial institutions put in place in the 1990s, and turbo-charged after the financial crisis, ensured that they knew they could lie to their regulators, consider fines rounding errors, and expect that consumers, small businesses, and entrepreneurs would take it because there was nowhere else to go.

These experiences made clear to me that concentrated economic power was the most pressing problem of our times, and in the years since I've helped lead a growing movement to revive our nation's antitrust laws and address the threats to our economy and democracy from concentrated corporate power.

Consolidation in the banking sector is one area requiring special attention. In 1990, there were 15,000 banks in America.[1] Today, there are hardly more than 4,000.[2] The six largest banks – JP Morgan Chase, Bank of America, Citigroup, Wells Fargo, Goldman Sachs, and Morgan Stanley – control more assets ($13.6 trillion) than all others combined.[3] The largest four "trillionaire" banks, which controlled under 10% of the nation's deposits in 1995, accounted for 36% in 2020.[4] Meanwhile, the share of assets held by smaller banks with total assets under $1 billion has dropped from 25% in 1994 to just 6% in 2019, likely even smaller now.[5] Today, more than three- quarters of the United States' local banking markets are considered uncompetitive, even more pronounced in rural areas, where nearly 90 percent of local markets are considered highly concentrated.[6]

Most of this consolidation has not occurred organically, but rather, results from persistent merger and acquisition strategies with disastrous consequences for the business community and consumers, and the stability of our financial system overall as more and more power and capital concentrates in fewer and fewer hands at the top of the financial food chain, allowing a handful of powerful financial firms to exercise outsized control over our economy and democracy. This year has seen a string of bank failures – Silvergate Bank, Signature Bank, Silicon Valley Bank, and First Republic Bank – which have required federal intervention and heightened concerns about the stability of the banking industry. Many of these same banks had undergone recent mergers or raced towards rapid growth after the rollback of critical financial regulations.

Despite the litany of evidence of the harms of bank consolidation and recent bank failures spotlighting financial stability risks of a consolidated banking industry, some of our top economic officials continue to argue that more consolidation is needed, cheerleading *more* bank mergers.[7] Economic Liberties recently led sixteen other public interest organizations in writing to Treasury Secretary Yellen and Acting Comptroller of the Currency Hsu to express our concerns about cavalier attitudes towards banking consolidation.

Yesterday, on the same day that Acting Comptroller Hsu publicly pushed for more bank mergers, *his own agency* found that too big to fail mega-bank Bank of America systematically and illegally double-dipped on fees slapped on customers with too little money in their accounts without

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[1] Jeremy C. Kress, Reviving Bank Antitrust, 72 Duke Law Journal 519-598, Nov. 2022, https://scholarship.law.duke.edu/dlj/vol72/iss3/1/.
[2] "Annual Historical Bank Data," FDIC, https://banks.data.fdic.gov/bankfind-suite/historical.
[3] Large Holding Companies, Federal Reserve Data, 2022, https://www.ffiec.gov/npw/Institution/TopHoldings.
[4] Letter from Americans for Financial Reform Education Fund to Assistant Attorney General Makan Delrahim, Oct. 16, 2020, https://ourfinancialsecurity.org/wp-content/uploads/2020/10/AFREF-Comment-on-DOJ-Bank-Merger-Guidelines-10-16-20.pdf.
[5] FDIC Community Banking Study, FDIC, Dec. 2020, https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf.
[6] Kress, Reviving Bank Antitrust
[7] Matt Egan, "Janet Yellen told bank CEOs more mergers may be necessary, sources say," CNN, May 19, 2023, https://www.cnn.com/2023/05/19/investing/janet-yellen-bank-mergers/index.html.

customer knowledge or authorization.[8] Bank of America was ordered to pay a quarter billion dollars in victim restitution and penalties.[9]

At its core, banking is not like other industries, and banks are not companies like any other – they play a unique role in the economy. The U.S. banking system functions through private firms that carry out a public function on behalf of the central bank and Treasury Departments. This monetary function is banks' most important purpose – above credit intermediation and generation – meaning that banking is uniquely vested with the public interest.[10] While the public allows banks a license to engage in vital commercial activity crucial, creating money and credit, banking law endeavors to prevent them from abusing this privilege. Accordingly, Congress long ago determined that bank consolidation deserved special scrutiny, passing the Bank Holding Company Act in 1956 and the Bank Merger Act in 1960, in addition to the nation's antitrust laws prohibiting anticompetitive mergers.

To put it bluntly: in recent decades, bank regulators have failed to enforce antitrust laws and these statutes in the banking sector, to the detriment of small businesses, consumers, entrepreneurs and the stability of our economy overall. That's why I'm grateful to the Senators for organizing this hearing, which can hopefully serve as an accelerant to learn from past mistakes in policymaking as the Justice Department and banking regulators reconsider merger policy in this critically important market.

I. The Cost of Bank Mergers and Consolidation

Contrary to industry boosters who suggest that consolidation has resulted in greater efficiencies, bank consolidation has wrought devastating consequences for communities and small businesses across the country.

For example, in Ohio, where I live, the $22 billion mega-merger between Columbus-based Huntington Bank and Michigan's TCF in 2021 led to more than 250 branch closures.[11] When Huntington acquired Ohio-rival First Merit in 2016, they shuttered over 100 branches in the state.

Historically, a key factor driving dynamism in the American economy is the large number of small banks, including their physical branches, serving communities-consumers and small businesses-

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[8] Michelle Chapman, "BofA hit with $250 million in fines, penalties, refunds for 'double-dipping' fees, fake accounts," AP, Jul 11, 2023 https://apnews.com/article/bank-america-fees-customer-account-56fa8400ab01a15ec75a372561a3d851

[9] Sam Sutton, "Hsu makes a (limited) case for large bank mergers," Politico Morning Money, Jul 11, 2023, https://www.politico.com/newsletters/morning-money/2023/07/11/hsu-makes-a-limited-case-for-large-bank-mergers-00105524

[10] Robert C. Hockett and Saule T. Omarova, *The Finance Franchise*, 102 Cornell Law Review 5, July 2017, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4731&context=clr

[11] Robert Channick, "Fifth Third to close 44 Chicago-area branches in July after completing MB bank merger," Chicago Tribune, June 17, 2019, https://www.chicagotribune.com/business/ct-biz-fifth-third-mb-close-branches-20190617-story.html; Tristan Navera, "Here's where the next wave of Huntington branch closings will take place," Columbus Business First, April 22, 2021, https://www.bizjournals.com/columbus/news/2021/04/22/huntington-bank-closing-44-branches-in-meijer-stor.html; Letter from Senator Sherrod Brown to Acting Comptroller of the Currency Michael Hsu, March 2, 2023, https://www.banking.senate.gov/imo/media/doc/occ_letter.pdf.

across the nation. This is still true today: smaller banks provide banking access to local communities, offering community-connected, face-to-face consumer banking services, and more accessible and affordable financial products with fewer fees. Just ask Federal Reserve Chair Jerome Powell, who in testimony before House Financial Services last month revealed that after his family's most recent mortgage was denied by a huge bank they turned to a local community bank – which, knowing both his family and the house itself, gave the family a mortgage within days. This is a common story across America.

Small local banks, in addition to providing banking access to rural communities that larger banks avoid, also play a particularly outsized role in commercial lending to small and newly formed businesses, including during times of economic stress when access to credit dries up.[12] Small businesses and entrepreneurs rely on smaller local banks to access the credit and financing they need to grow. This is partly because larger banks prioritize larger businesses, simply because it is easier to award and manage fewer, larger loans.[13]

Big banks' prioritization of larger businesses showed during COVID, when the federal Paycheck Protection Program (PPP) offered forgivable loans through banks to American firms at the height of the COVID pandemic. This program laid bare the consequences of consolidation, with areas with the most big banks less likely to receive PPP funding.[14] Tellingly, the four largest U.S. banks originated just 3 percent of PPP loans, even though they originated 36% of small business loans before the program.[15] In contrast, though community banks account for just 15 percent of bank industry assets and 12 percent of loans, they issued 31 percent of all PPP loans made by banks.[16]

These benefits to small businesses from smaller community and regional banks are lost through mergers. For small businesses that can still access credit after a bank merger, the cost of credit increases, with more difficult terms and lower loan sizes.[17] One study suggested that post-merger branch closures lead to a 22% decrease in banks' small business lending.[18] Banking consolidation has degraded access to capital, creating capital deserts for many aspiring entrepreneurs – 80% of whom struggle to obtain any funding at all.[19] After bank mergers, new business formation drops,

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[12] Matt Hanauer et al., "Community Banks' Ongoing Role in the U.S. Economy," Federal Reserve Bank of Kansas City, Economic Review 106 No. 2, Jun. 24, 2021, https://www.kansascityfed.org/documents/8159/EconomicReviewV106N2HanauerLytleSummersZiadeh.pdfhttps://www.kansascityfed.org/Economic%20Review/documents/8159/EconomicReviewV106N2HanauerLytleSummersZiadeh.pdf.

[13] FDIC Community Banking Study, 2020, https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf.

[14] Haoyang Liu and Desi Volker, "Where Have the Paycheck Protection Loans Gone So Far?," Federal Reserve Bank of New York, May 6, 2020, https://libertystreeteconomics.newyorkfed.org/2020/05/where-have-the-paycheck-protection-loans-gone-so-far.html.

[15] João Granja et al, "Did the Paycheck Protection Program Hit the Target?," Becker Friedman Institute Working Paper 2020-52, available at https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_202052-1.pdf.

[16] Margaret Han- rahan & Angela Hinton, The Importance of Community Banks in Paycheck Protec- tion Program Lending, 14 FDIC Q., no. 4, 2020, at 31.

[17] Mark J. Garmaise and Tobias J. Moskowitz, "Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition," NBER, Dec. 2004, https://www.nber.org/papers/w11006.

[18] Yichen Xu, "The Importance of Brick-And-Mortar Bank Offices: Evidence From Small Business And Home Mortgage Lending, 1998-2016," University of Delaware, 2018, https://udspace.udel.edu/server/api/core/bitstreams/99172649-6544-495c-a4b7-7bf028c15038/content.

[19] Elizabeth MacBride and Seth Levine, The New Builders: Face to Face With the True Future of Business, Wiley, May 4, 2021

with documented links to declines in commercial real estate development, construction activity, and local property prices, and rises in unemployment and income inequality.[20]

A consolidated financial sector cuts back drastically on consumer services as well. Mergers eliminate important services associated with in-person, brick-and-mortar branches – like extended business hours, ATMs, safety deposit boxes, and customer service benefits[21] – with physical proximity to a bank branch also playing a significant role in, for example, whether Americans can obtain a mortgage.[22] When BB&T and SunTrust merged in 2019 to become Truist, the merged bank closed over 820 branches across the country, nearly a third of its locations.[23] M&T Bank, as part of its 2022 $7.6 billion purchase of Connecticut-based People's United, announced plans to reduce its footprint in New York and Connecticut by more than 40 locations.[24] U.S. Bank, after winning approval for its $8 billion takeover of Union Bank in December 2022, announced 145 branch closures in California alone.[25] With the merger-induced loss of bank branches, access to banking tightens, credit dries up, and too many Americans are pushed out of the financial system.

This particularly affects low-income and minority communities. In fact, 25% of all rural bank closures are in majority-minority census tracts.[26] Elderly, low-income, disabled, and non-college-educated Americans more heavily rely on brick-and-mortar bank branches for financial services.[27] Branch closures can push consumers out of the banking system entirely, driving them into the arms of predatory non-bank financial companies like payday lenders and check cashers that pop up in place of banks after merger-induced branch closures, leading to more debt collections and evictions.[28]

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[20] Bill Francis et al., "Bank Consolidation and New Business Formation," Journal of Banking and Finance 32 8, 2008, https://www.sciencedirect.com/science/article/abs/pii/S0378426607003718; Garmaise and Moskowitz, "Bank Mergers and Crime."

[21] Committee for Better Banks, "Mapping the Banking Divide: How Bank Branch Openings Close Financial Opportunities," Sept. 29, 2022, https://storymaps.arcgis.com/stories/79517729f59c4db38dbc3e032e0d42e1; Jaime Weisberg, "How Branch Closures Impact Hard Hit Communities," Association for Neighborhood & Housing Development, May 6, 2021, https://anhd.org/blog/how-branch-closures-impact-hard-hit-communities.

[22] Sumit Agarwal and Robert Hauswald, "Distance and Private Information in Lending," The Review of Financial Studies, July 2010, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=996602.

[23] Richard Craver, "Truist surpasses goal of closing 800 branches. Workforce down 14% since bank debuted.," Winston-Salem Journal, April 19, 2022, https://journalnow.com/business/local/truist-surpasses-goal-of-closing-800-branches-workforce-down-14-since-bank-debuted/article_73c96916-bf1d-11ec-b566-1f02b2039bbd.html.

[24] Denise Civiletti, "M&T Bank's acquisition of People's United to close in early April," Riverhead Local, March 17, 2022, https://riverheadlocal.com/2022/03/17/mt-banks-acquisition-of-peoples-united-to-close-in-early-april.

[25] John Lindt, "U.S. Bank acquires Union Bank. Here's what it means for customers in SLO County," The San Luis Obispo Tribune, March 8, 2023, https://www.sanluisobispo.com/news/business/article272814670.html.

[26] Jason Richardson et al., "Bank Branch Closures from 2008-2016: Unequal Impact in America's Heartland," National Community Reinvestment Coalition, May 2017, https://ncrc.org/wp-content/uploads/2017/05/NCRC_Branch_Deserts_Research_Memo_050517_2.pdf.

[27] National Survey of Unbanked and Underbanked Households, FDIC, 2021, https://www.fdic.gov/analysis/household-survey/2021report.pdf.

[28] Vitaly Bord, "Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors," Harvard Business School, Dec. 1, 2018, https://scholar.harvard.edu/files/vbord/files/vbord-bank_consolidation_and_financial_inclusion_full.pdf; Dimuthu Ratnadiwakara and Vijay Yerramilli, "Effect of Bank Mergers on the Price and Availability of Mortgage Credit," Sept. 2020.

Bank consolidation also raises consumer privacy concerns. Privacy, an "important dimension of quality," impacts how consumers' sensitive financial data is collected, aggregated, and often further monetized when banks sell that data to third parties. Mergers – which concentrate data in fewer number of financial institutions, leaving more Americans are increased risk of data breaches – enable banks to harvest and blend consumer, "making it easier for them to price discriminate and take advantage of customers' biases."[29]

As merged banks take advantage of their increased market power, they reduce the services they provide while increasing prices for services and products that remain. Banks reduce interest rates for depositors[30] and hike the "junk fees" they levy on consumers for basic financial services – painful fees for things like account maintenance, ATM access, nonsufficient funds, overdrafts, and stop payments – lucrative practices for banks that cost Americans billions every year. [31] These junk fees make it more expensive for low-income households to keep their bank accounts.[32] Bank mergers are associated with higher rejection rates for mortgage applications[33] – particularly for federally backed mortgage loans insured by the Federal Housing Authority (FHA), on which lower income and minority borrowers are more reliant for homeownership.[34] Low-income and racial minority communities are also disproportionately targeted by banks' junk fees relative to other customers, compounding racial wealth imbalances and exacerbating economic inequality.[35]

With these branch closures also come job losses. The BB&T-SunTrust merger saw more than 8,000 jobs lost.[36] After a $2.6 billion merger with Flagstar Bank, New York Community Bank in 2023 cut more than a thousand jobs,[37] while after its merger with People's Bank, M&T Bank announced plans to cut 28% of its jobs in the state.[38] One study quantified these job losses, high-

[29] Kress, Reviving Bank Antitrust
[30] Valeriya Dinger, "Bank Mergers and Deposit Interest Rate Rigidity," Federal Reserve Bank of Cleveland Working Paper No. 11-31, Dec. 4, 2011, https://ssrn.com/abstract=1971315.
[31] Timothy H. Hannan, "Retail Deposit Fees and Multimarket Banking," Finance and Economics Discussion Series Divisions of Research & Statistics and Monetary Affairs, Federal Reserve Board, 2005, https://www.federalreserve.gov/pubs/feds/2005/200565/200565pap.pdf; Charles Kahn et al., "Bank consolidation and the dynamics of consumer loan interest rates," Journal of Business, 78 No. 1, 2005, https://www.jstor.org/stable/10.1086/426521?seq=11.
[32] Bord, "Bank Consolidation."
[33] Greg Buchak and Adam Jørring, "Do Mortgage Lenders Compete Locally? Implications for Credit Access," Jan. 7, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3762250.
[34] Neil Bhutta and Aurel Hizmo, "Do Minorities Pay More for Mortgages?," Board of Governors Federal Reserve Working Paper No. 2020-007, https://academic.oup.com/rfs/article/34/2/763/5827007.
[35] Id.; Erik J. Mayer, "Big Banks, Household Credit Access, and Intergenerational Economic Mobility," Southern Methodist University Cox School of Business Research Paper no. 21-04, https://ssrn.com/abstract=3816308.
[36] Craver, "Truist"; Austin Weinstein, "Truist cuts 800 jobs. More cutbacks expected in BB&T, SunTrust merger," The Charlotte Observer, April 20, 2020, https://www.charlotteobserver.com/news/business/banking/article242131711.html.
[37] Candice Williams, "Flagstar Bank trims retail mortgage, cuts jobs in wake of merger," The Detroit News, Jan. 31, 2023, https://www.detroitnews.com/story/business/2023/01/31/flagstar-bank-trims-retail-mortgage-cuts-jobs-in-wake-of-merger/69858748007/.
[38] Kenneth R. Gosselin, "M&T Bank laid off more than 300 in its acquisition of People's United. There's more to come.," Hartford Courant, Oct. 3, 2022, https://www.courant.com/2022/10/03/mt-bank-laid-off-more-than-300-in-its-acquisition-of-peoples-united-theres-more-to-come/.

lighting that a 142-point increase in county-level HHI corresponds with a 0.5 percent drop in employment – jobs that remained took a 2 percent hit to average wages, with a more drastic fall in Black communities.[39]

For large financial institutions, the perception among other market participants that they will receive government bailouts – the "too-big-to-fail subsidy,"[40] only further emphasized during the bank collapses of 2023 – allows big banks to borrow more cheaply than they would otherwise, given their risk profiles.[41] This gives banks a financial incentive to grow even larger, disadvantaging smaller firms like community banks, degrading competition, and artificially encouraging further consolidation.[42]

Bank mergers also pose a threat to competition in other industries outside of the financial sector. Bank consolidation, via increased risk of depository institutions failure, leading to bankruptcies of corporate clients – take SVB, for example, whose failure was described as "an extinction level event for startups" that "will set startups and innovation back by 10 years or more."[43] Mergers also lead banks to prioritize credit to larger incumbent firms,[44] decreasing credit availability and increasing its cost to smaller companies and startups.[45] As the U.S. Supreme court put it simply in 1963: "concentration in banking accelerates concentration generally."[46]

When industry boosters propose further consolidation as a positive solution to bank failures, the truth is that this consolidation comes with grave short- and long-term consequences for everyday Americans.

II. Threats to Financial Stability

Relevant to the events of this past year in the industry, bank mergers and consolidation also increase systemic risk in the financial system. The concentration of assets at a handful of large financial institutions concentrates the risk of failure within fewer points in the banking system, magnifying risk and increasing fragility. This is borne out by the Federal Reserve's own research,

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[39] Robert Mann, "Bank Competition, Local Labor Markets, and the Racial Employment Gap," Aug 8, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4013042

[40] Gary H. Stern and Ron J. Feldman, "Too Big to Fail: The Hazards of Bank Bailouts," The Brookings Institution, Dec. 2003, https://www.jstor.org/stable/10.7864/j.ctt1gpcc87.

[41] Independent Community Bankers of America, "Too-Big-To-Fail Subsidies Threaten Economy, Community Banks, and Taxpayers," 2014, https://www.icba.org/docs/default-source/icba/advocacy-documents/testimony/113th-congress/test073114.pdf?sfvrsn=2.

[42] Ofc. Of the Comptroller of the Currency, Bd. Of Governors of the Fed. Reserve Sys. & Fed. Deposit Ins. Corp., Regulatory Capital Rules: Regulatory Capital, Enhanced Supplementary Leverage Ratio Standards for Certain Bank Holding Companies and Their Subsidiary Insured Depository Institutions, 78 Fed. Reg. 51101, 51102-03 (Aug. 20, 2013), https://www.govinfo.gov/content/pkg/FR-2013-08-20/pdf/FR-2013-08-20.pdf.

[43] https://www.wired.com/story/silicon-valley-bank-collapse-

[44] Nicola Cetorelli and Philip E. Strahan, "Finance as a Barrier to Entry: Bank Competition and Industry Structure in Local U.S. Markets," The Journal of Finance, Oct. 2004, https://www.nber.org/papers/w10832.

[45] Garmaise and Moskowitz, "Bank Mergers and Crime"; Jonathan A. Scott and William C. Dunkelberg, "Bank Mergers and Small Firm Financing," Journal of Money, Credit and Banking, Dec. 2003, https://www.jstor.org/stable/3649868.

[46] United States v. Philadelphia National Bank, 374 U.S. 321, 370 (1963)

demonstrating that distress at of a single $250 billion bank would be far worse for the economy than if five $50 billion banks failed separately.[47]

Bank consolidation imparts large financial institutions an implicit government bailout guarantee exemplified in the phrase "too-big-to-fail," leading to banks that are far more willing to take dangerous risks.[48] Despite common claims that larger banks have more modern and sophisticated systems for risk management, there is little evidence to support that claim. In fact, some studies show the opposite, with the more complex business models of larger banks increasing systemic risks that they are operationally unable to monitor or manage.[49]

Before 2008, federal banking agencies largely ignored financial stability concerns in bank merger review, viewing consolidation, as, if anything, a benefit to financial stability, due to increased profits. After the 2008 financial crisis, which demonstrated the consequences of consolidation with painful clarity, Congress acted to prioritize bank mergers' financial stability risks, ordering the banking agencies to take into account "risk[s] to the stability of the United States banking or financial system" in merger review.[50] While a welcome change from the status quo, thus far the Federal Reserve's application of this standard has been questionable. Former Federal Reserve Governor Daniel Tarullo has suggested Federal Reserve regulators pay little attention to these systemic risks in bank merger review, warning that the Fed lacks a "reasonably well-developed and well-explained approach" to financial stability analysis.[51] This must change. Financial stability must be brought to the forefront of bank merger review.

This year, with the collapse of Silvergate, Signature, Silicon Valley, and First Republic Banks, it is clear that our regulators have deeply misjudged the risks of regional and midsized banks, which, though large, hardly approach the behemoth size of their Wall Street counterparts.

When approving SVB's acquisition of Boston Private Bank in 2021, the Federal Reserve stated that the bank "would not be a critical services provider or so interconnected with other firms or

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[47] Simone Varotto and Lei Zhao, "Systemic risk and bank size," Journal of International Money and Finance 82, Apr 2018, https://www.sciencedirect.com/science/article/abs/pii/S0261560617302425; Gregor N.F. Weiß et al., "Systemic risk and bank consolidation: International evidence," Journal of Banking and Finance 40, Mar 2014, https://www.sciencedirect.com/science/article/abs/pii/S0378426613004536; Amy G. Lorenc and Jeffery Y. Zhang, "The Differential Impact of Bank Size on Systemic Risk," Divisions of Research & Statistics and Monetary Affairs, Federal Reserve Board, Washington, D.C., 2018, https://www.federalreserve.gov/econres/feds/files/2018066pap.pdf.

[48] JinAh Kim, "Effects of Bank Mergers on Risk Leading Up to the 2007-2008 Mortgage Crisis," University of Pennsylvania Wharton School, 2016, https://repository.upenn.edu/cgi/viewcontent.cgi?article=1008&context=spur; Gaetano Chionsini et al., "Bank Mergers, Diversification And Risk," Banca d'Italia, Banking and Financial Supervision, 2004, https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=ee91b897f36031ddae87701899ec152e9bf47fd1.

[49] Chernobai, A., Ozdagli, A., & Wang, J. (2021). Business complexity and risk management: Evidence from operational risk events in US bank holding companies. *Journal of Monetary Economics*, *117*, 418-440, https://www.sciencedirect.com/science/article/abs/pii/S0304393220300209#:~:text=In%20particular%2C%20the%20operational%20risk,failures%20(BCBS%2C%202001)

[50] 12 U.S.C. § 1828(c)(5) (2018).

[51] Daniel K. Tarullo, "Regulators should rethink the way they assess bank mergers," The Brookings Institution, Mar 16, 2022, https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers/.

markets that it would pose significant risk to the financial system in the event of financial distress."[52] This systemic misjudgment, which has helped facilitate far too much of today's banking consolidation, must be rethought.

Financial consolidation leads to financial crises, which, in a vicious cycle, lead to even more consolidation. For example, the 2008 financial crisis, which has been identified as "a predictable consequence of excessive consolidation in the banking sector," was both the result and cause of industry consolidation.[53] The crisis, a mass concentration event itself, was the product of a wave of bank consolidation sparked by deregulation that concentrated risk, assets, and economic power in the hands of a dwindling number of larger and larger firms, each in turn taking larger and larger risks. The resolution of the financial crisis, ironically, led to further consolidation as regulators turned to emergency mergers as short-term solutions that made the biggest banks even bigger, intensifying systemic risk, entrenching their market power, and undermining financial stability in the long term.[54]

While proponents of consolidation may argue consolidation boosts stability, evidence suggests that increasing competition increases financial stability. Competition prods banks to take on more diversified risks, lessening fragility in the banking system,[55] and in local banking markets, reduces the likelihood of a financial crisis.[56] An investigation of bank competition before the 2008 financial crisis revealed that banks in competition-starved markets were more likely to engage in risky activity and more likely to fail.[57]

Merging banks also increase financial stability risk by increasing banks' penchant for risk-taking behavior, also referred to as moral hazard.[58] Like the phenomenon of "too big to fail" subsidies that distort industry competition, too big to fail size also incentivizes riskier behavior as banks may operate with an implicit government bailout guarantee.[59]

Currently, financial stability concerns about further consolidation unfortunately continue to be ignored. This must change. Earlier this year, the collapse of First Republic Bank led to its purchase by JP Morgan, the nation's largest bank, in turn inflating JP Morgan's size by $200 billion. While

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[52] Order Approving the Merger of Bank Holding Companies, the Merger of Banks, and the Establishment of Branches, Federal Reserve FRB Order No. 2021–08, Jun 10, 2021, https://www.federalreserve.gov/newsevents/pressreleases/files/orders20210610a1.pdf
[53] Kress, Reviving Bank Antitrust
[54] Prepared Remarks of CFPB Director Rohit Chopra at the 2023 American Economic Liberties Project Anti-Monopoly Summit, Washington, D.C., May 4, 2023, https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-rohit-chopra-2023-american-economic-liberties-project-anti-monopoly-summit/.
[55] Deniz Anginer et al., "How Does Competition Affect Bank Systemic Risk?" 23 Journal of Financial Intermediation, 2014, https://www.sciencedirect.com/science/article/abs/pii/S1042957313000600
[56] Klaus Schaeck, Martin Cihak & Simon Wolfe, Are Competitive Banking Systems More Stable?, 41 J. MONEY, CREDIT & BANKING 711, 713 (2009).
[57] Brian Akins, Lynn Li, Jeffrey Ng & Tjomme O. Rusticus, Bank Competition and Financial Stability: Evidence from the Financial Crisis, 51 J. FIN. & QUANTITATIVE ANALYSIS 1, 1 (2016).
[58] JinAh Kim, "Effects of Bank Mergers on Risk Leading Up to the 2007-2008 Mortgage Crisis," University of Pennsylvania Wharton School, 2016, https://repository.upenn.edu/cgi/viewcontent.cgi?article=1008&context=spur.
[59] Gaetano Chionsini et al., "Bank Mergers, Diversification And Risk," Banca d'Italia, Banking and Financial Supervision, 2004, https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=ee91b897f36031ddae87701899ec152e9bf47fd1.

the transaction received regulatory approval from the FDIC – required by law to accept the highest bid and lowest cost to the Deposit Insurance Fund – it also was approved by the OCC, which is legally obligated to consider whether the merger poses a risk to the stability of the financial system.[60] The OCC stated that "[t]he Transaction does not increase risk to the stability of the United States banking or financial system as it facilitates the orderly resolution of an insured depository institution in default."[61] Several aspects of this analysis are deeply troubling:

- By the G-SIB score metric, which estimates the impact to our financial system of large bank failures, the First Republic acquisition represented between an 800 percent and 1400 percent increase in risk to the banking system over other reported bids.[62] It is troubling that the OCC chose to approve this deal and make the country's biggest bank even bigger.
- The OCC made no mention of a determination of the managerial risks and community impacts of JP Morgan's compliance record.[63] JP Morgan has paid more than a billion dollars in fines just since 2020 for violating the law, including for market manipulation, mismanaging Americans' mortgage escrow balances, and failing to properly protect its customers from identity theft.[64]
- JP Morgan already exceeded the Riegle-Neal national deposit cap by owning more than 10% of the nation's bank deposits. But for a loophole allowing banks in violation of the cap to purchase failing banks, federal law would prohibit JP Morgan from consummating any bank merger in every other circumstance.[65]

Ultimately, federal bank regulators must properly place financial stability concerns at the forefront of bank merger review and cease the facilitation of further bank consolidation, or risk disaster.

III. Failures of Financial Regulation and Bank Merger Policy

Today's banking consolidation has been enabled by decades of systemic regulatory rollback. The 1994 Riegle-Neal Act allowed interstate bank mergers, previously prohibited, sparking a wave of mergers. The 1999 Gramm-Leach-Bliley Act repealed critical parts of Great Depression-era financial regulations known as Glass-Steagall, separating commercial banks from investment banks and insurance companies, sparking another wave of mergers and inflaming risks of conflicts of interest

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[60] 12 USC 1828(c)(5)
[61] Letter from Stephen A. Lybarger, OCC Deputy Comptroller for Licensing, to John H. Tribolati, Secretary, JPMorgan Chase Bank, May 1, 2023, https://www.occ.gov/topics/charters-and-licensing/app-by-jp-morgan-chase-bank.pdf.
[62] Anna Hrushka, "Warren blasts First Republic's 'troubling 'sale to JPMorgan," Banking Dive, May 19, 2023
[63] Letter from Stephen A. Lybarger, OCC Deputy Comptroller for Licensing, to John H. Tribolati, Secretary, JPMorgan Chase Bank, May 1, 2023, https://www.occ.gov/topics/charters-and-licensing/app-by-jp-morgan-chase-bank.pdf
[64] Abhishek Manikandan, Michelle Price, "JPMorgan to pay $920 million for manipulating precious metals, treasury market," Reuters, Sep 29, 2020, https://www.reuters.com/article/jp-morgan-spoofing-penalty/jpmorgan-to-pay-920-million-for-manipulating-precious-metals-treasury-market-idUSKBN26K325; Brian Flood, "JPMorgan Chase Settles Mortgage Escrow Interest Class Action," Bloomberg Law, May 26, 2021, https://news.bloomberglaw.com/class-action/jpmorgan-chase-settles-mortgage-escrow-interest-class-action; Matt Robinson, "JPMorgan, UBS Brokerage Units Pay SEC Fines for Anti-Identity Theft Programs," Bloomberg, Jul 27, 2022, https://www.bloomberg.com/news/articles/2022-07-27/jpmorgan-ubs-pay-sec-fines-over-anti-identity-theft-programs
[65] Polo Rocha et al., "JPMorgan Chase, FDIC put an end to First Republic's slow bleed," American Banker, May 1, 2023, https://www.americanbanker.com/news/with-first-republic-on-the-brink-all-eyes-are-on-uninsured-deposits

in finance. Even the Dodd-Frank Act, passed in the wake of the 2008 financial crisis, was partly rolled back in a 2018 bank deregulation bill – again sparking a wave of mergers. In the case of 2018 Dodd-Frank rollback, eight of the ten largest bank mergers of the past decade were announced following 2019, igniting a rush of consolidation that helped lead to the bank collapses of 2023. The collapses of 2023, like other financial crises, in turn further concentrated the industry: SVB's death vaulted purchaser First Citizens to the sixteenth-largest U.S. bank,[66] and New York Community Bank, among the top 40 in asset size, scooped up Signature Bank's assets in "the deal of a lifetime."[67] The sale of First Republic to JPMorgan, already the nation's biggest bank, allowed JPMorgan to flout the nationwide 10% deposit cap and add $200 billion in assets, the firm's "best deal in decades."[68]

Despite a track record of failure in recent decades that could lead one to assume that either the United States has no bank antitrust laws or no agencies tasked with enforcing them, American financial regulators are statutorily bound to control consolidation in the banking system and mitigate the associated risks and harms. To address consolidation in banking, Congress enacted the Bank Holding Company Act in 1956 and the Bank Merger Act in 1960, together known as the bank merger statutes. Under these statutes, authority over bank mergers review is shared between the Federal Reserve, the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Justice Department. Together, none of these agencies has blocked a bank merger in 20 years.[69]

The bank merger statutes also provide banking agencies with an analytic framework to use in evaluating proposed mergers. This framework is far stricter than is the case for our other merger laws under the Clayton Act, which also applies to banks. Let me be clear: despite the lax attitude that regulators and financiers have had towards bank mergers and consolidation, the laws of this land clearly hold consolidation of the financial sectors to a far stricter and higher standard than consolidation elsewhere.

The Bank Merger Act requires the agencies to consider several factors:

- The merger's effect on competition;
- Risks to financial stability stemming from the merger;
- The merger's impact on the public interest;
- The condition of the bank's finances and management, as well as its future prospects; and
- The merging banks' record combating money laundering.[70]

[66] Antoine Gara and Stephen Gandel, "How family-controlled First Citizens became a top-20 US bank," Financial Times, March 28, 2023, https://www.ft.com/content/b883e5f6-811e-4fbe-a522-98f7ed098270.
[67] Daniel Jones, "The Deal Of A Lifetime: New York Community Bancorp's Big Win At The Death Of Signature Bank," Seeking Alpha, March 21, 2023, https://seekingalpha.com/article/4588955-new-york-community-bancorp-big-win-signature-bank-bargain-lifetime.
[68] Breanna Bradham, "Bove Says First Republic May Be JPMorgan's Best Deal in Decades," Bloomberg, May 1, 2023, https://www.bloomberg.com/news/articles/2023-05-01/odeon-s-dick-bove-says-first-republic-may-be-jpmorgan-s-best-deal-in-decades.
[69] The last bank merger denied was Illini Corporation's attempted acquisition of Illinois Community Bank, in 2003. See Illini Corp., 89 Fed. Res. Bull. 85 (2003), https://www.federalreserve.gov/boarddocs/press/orders/2002/20021223/attachment.pdf.
[70] 12 U.S. Code § 1828.

The Bank Merger Act set forth a clear anti-monopoly mandate, requiring agencies to "take into consideration the effect of the transaction on competition (including any tendency towards monopoly)."[71]

Enforcing these laws consistently is a critical prophylactic measure necessary for regulators to adhere to, in particular given that in times of crisis more immediate concerns of financial stability often come to the fore. But even amid this year's banking tumult, consolidation should not be viewed as either a safe or positive resolution strategy, particularly given that regulators themselves have had a poor record of risk evaluation during the regular course of bank M&A.

The Dodd-Frank Act requires large banks to have resolution plans, also known as "living wills," which outline a bank's strategy for how it can safely fail without a government bailout. The largest and most systemically important U.S. banks have since 2008 frequently submitted resolution plans rejected or found lacking by the FDIC and Federal Reserve.[72] After the failures of SVB, Signature, and First Republic, FDIC board member and Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra concluded, "I don't think anyone truly believes the current plans filed by Wall Street firms are anything more than a fairy tale."[73] We agree.

President Joe Biden's 2021 Executive Order on Competition marshalled a whole-of-government approach to reinvigorating competition in the American economy, tasked bank regulators with strengthening bank merger oversight to guard against excessive market power.[74] While both the FDIC and Department of Justice responded by requesting public comment on revamping their bank merger policies, the Federal Reserve and OCC have thus far said little about how they plan to meet this responsibility.

Furthermore, the Department of Justice has signaled that it will ramp up its involvement in bank merger review and look to block bank mergers that it sees as violating the law.[75] In a recent speech, Assistant Attorney General for Antitrust Jonathan Kanter highlighted the DOJ's new approach, pointing to the DOJ's authority to directly challenge even bank mergers federal banking agencies have approved. Kanter also lamented the outdatedness of the 1995 DOJ bank merger guidelines and inappropriateness of applying them to today's banking industry, ultimately indicating a new framework was imminent.

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[71] Bank Merger Act, Pub. L. No. 86-463, 74 Stat. 129.

[72] Ryan Tracy, "Regulators Set to Reject Some Big Banks' 'Living Wills'," The Wall Street Journal, April 12, 2016, https://www.wsj.com/articles/regulators-set-to-find-flaws-in-big-u-s-banks-living-wills-1460491197.

[73] Prepared Remarks of CFPB Director Rohit Chopra at the 2023 American Economic Liberties Project Anti-Monopoly Summit, Washington, D.C., May 4, 2023, https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-rohit-chopra-2023-american-economic-liberties-project-anti-monopoly-summit/.

[74] Fact Sheet: Executive Order on Promoting Competition in the American Economy, White House, July 9, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

[75] Jonathan Kanter, "Promoting Competition in Banking," Prepared Remarks at the Brookings Institution's Center on Regulation and Markets, June 20, 2023, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution.

But legislative action is also important. In particular, last session Senator Warren and Representative Chuy García introduced the Bank Merger Review Modernization Act.[76] The Act would require bank mergers to be in the public interest, giving the CFPB oversight of mergers between consumer-facing banks, requiring that merger review discussions are made public, clear risk metrics to assess the systemic risks of bank mergers, banking regulators to make clear assessments of individual anticompetitive risks, and that only banks with strong risk management records be allowed to merge. These changes, in addition to existing statutory authority, will help fend off harmful consolidation in the banking industry.

III. Conclusion

Recent signs indicate conflicting visions of what competition in banking should be. One vision holds that banks need to get bigger – that they should swallow competitors and swell in size in a gruesome battle to become the last bank standing. When regulators like Secretary Yellen and Acting Comptroller Hsu propose facilitating this outcome they demonstrate clearly not only that they have learned nothing about policy from the 2008 financial crisis and the slow years of recovery, but that they are blind to the vast economic devastation and widespread human misery it engendered. To desire such an economy is to desire an economy that lurches from crisis to crisis, led by too big to fail banking firms abusing and cheating captive customers who have nowhere else to turn. This vision is untenable: we tried it, and it failed, crippling the economy in the process. To do so again would be insanity.

A different vision holds that we must preserve and protect the decentralized U.S. banking system, which has facilitated the world's strongest economy. That we must prioritize competition that leads to better products, better prices, and a more stable and sustainable economy – one that embraces the American tradition of a diverse array of banks serving their communities, allowing small businesses to flourish, incentivized to treat consumers with care and respect. One that battles not for size in a winner-take-all fight but to provide better banking to every American in every community in the country.

Our banking system should be built around a commitment to an equitable and fair economic system. These were the principles that precipitated the passage of, and are reflected in, the Bank Merger laws. These principles should not change, nor has there been any reason to change them. America thrives with a robust and competitive banking sector, and Congress and this subcommittee has an opportunity to ensure that the American government lives up to that mandate.

2008 taught us valuable lessons at a cost too painful to ignore. The record, littered with crime, fines, and irreparable consumer abuse, does *not* show that too big to fail banks are better at lending and facilitating commerce than their smaller counterparts. If anything, it shows that they prioritize breaking the rules to enrich themselves and ripping off their customers above improving service and access. If you believe Yellen and Hsu, *that* is what smaller banks should compete to become. We disagree.

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[76] Press Release, "Senator Warren and Rep. Chuy García Introduce the Bank Merger Review Modernization Act to End Rubber Stamping of Bank Merger Applications," Office of Senator Elizabeth Warren, September 30, 2021, https://www.warren.senate.gov/newsroom/press-releases/senator-warren-and-rep-chuy-garca-introduce-the-bank-merger-review-modernization-act-to-end-rubber-stamping-of-bank-merger-applications.

Thank you again for inviting me to be a part of today's hearing. I look forward to your questions.