THE TICKETMASTER AND LIVE NATION MERGER: WHY THEY SHOULD HAVE NEVER EVER BEEN TOGETHER

Abstract: In 2010, Live Nation, one of the nation's leading ticket sellers and concert promotors, merged with Ticketmaster, the nation's leading ticketing company, to form an entertainment colossus that handles ticket services, artist management, concert promotion, and venue ownership. Although the U.S. Department of Justice scrutinized this merger, it was ultimately approved, subject to a controversial consent decree that was subsequently extended and modified. Recently, Ticketmaster's website crashed when Taylor Swift fans attempted to purchase tickets to her first tour in four years. The uproar caused by this crash ignited renewed scrutiny of the merger by lawmakers and the Department of Justice. Ticketmaster has continued to grow into a behemoth since the 2010 merger, and attempts to challenge it as a monopoly have largely failed because of the many barriers plaintiffs face when attempting to enforce antitrust laws against a vertically integrated monopoly. This Note argues that, given the current state of the law and the Department of Justice's mild and ineffective responses to recent mergers, Congress needs to modernize and strengthen outdated federal antitrust laws to provide for steeper civil fines, equitable burden shifting that does not unduly penalize plaintiffs, and tools that will enable the Department of Justice to more effectively handle the problems caused by monopolization and anti-competitive measures in the live entertainment industry.

INTRODUCTION

On November 15, 2022, Taylor Swift fans lucky enough to procure the codes needed to buy tickets to the highly anticipated "Eras Tour" presale eagerly logged on to Ticketmaster.[1] Swift fans knew that buying the coveted tickets would be challenging given the critical acclaim and commercial success

[1] *See* Chris Morris, *These Are Your Best Bets to Get Tickets to Taylor Swift's 2023 Tour*, FORTUNE (Nov. 8, 2022), https://fortune.com/2022/11/08/taylor-swift-tour-tickets-best-practices-presale-verified-the-eras-on-sale-date/ [https://perma.cc/8KUQ-ZF8Q] (describing the procedure fans needed to utilize to obtain login codes to buy tickets prior to their sale); *see also* Julian Mark, *Taylor Swift's Ticketmaster Meltdown: What Happened? Who's to Blame?*, WASH. POST (Nov. 18, 2022), https://www.washingtonpost.com/business/2022/11/18/ticketmaster-taylor-swift-faq/ [https://perma.cc/WYM3-GFUS] (explaining how even fans who had procured codes and waited on the Ticketmaster site for hours were unable to purchase tickets). The Eras Tour is singer and songwriter Taylor Swift's first live concert tour since 2018. Morris, *supra*. Swift planned a tour called "Lover Fest" for 2020, but it was cancelled due to the COVID-19 pandemic. *See* Katie Atkinson, *Taylor Swift Officially Cancels Lover Fest Concerts*, BILLBOARD (Feb. 26, 2021), https://www.billboard.com/pro/taylor-swift-lover-fest-tour-canceled/ [https://perma.cc/5D7B-76Q2] (describing the impact of the pandemic on the upcoming Lover Fest concert).

of Swift's recent albums.[2] What fans did not anticipate were hours spent trapped in online queues, technical difficulties, and the postponement and eventual cancellation of general ticket sales.[3] Even those lucky enough to eventually get tickets did not secure the seats they wanted and were shocked to see processing fees that significantly increased the cost of attending the show.[4]

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[2] *See* Alex Portee, *How It Feels to Be a Taylor Swift Fan Right Now,* TODAY (Nov. 18, 2022), https://www.today.com/popculture/music/taylor-swift-fan-eras-tour-tickets-experiences-rcna57926 [https://perma.cc/D3RS-43QX] (noting that Swift's fans, who call themselves "Swifties," expected tickets would be hard to come by for the highly anticipated tour). During the pandemic, Swift released three original albums—*Folklore, Evermore,* and *Midnights*—and two rerecorded albums: *Fearless (Taylor's Version)* and *Red (Taylor's Version).* Jason Lipshutz, *Taylor Swift Announces U.S. Dates for 2023 Eras Tour*, BILLBOARD (Nov. 1, 2022), https://www.billboard.com/music/music-news/taylor-swift-2023-eras-north-american-tour-dates-1235164042 [https://perma.cc/62SH-LH5Q]. Swift recently rerecorded many of her previous albums so that she could own the original recordings of her songs, known as "masters." *See* Brendan Morrow, *Why Taylor Swift Keeps Releasing All Those Re-recorded Albums*, THE WEEK, https://theweek.com/briefing/1013413/why-taylor-swift-keeps-releasing-all-those-re-recorded-albums [https://perma.cc/XE84-C8UE] (May 10, 2023) (describing how artists who own the masters for their own musical work have the right to choose how and when their songs are used). Because Swift owned the rights to her compositions, she had the right to re-record her previous albums. *Id.*

[3] *See* Portee, *supra* note 2 (noting that, although fans who had gone through Ticketmaster's verification program knew the demand for tickets would be high, they did not anticipate being "sent to rainbow wheel purgatory"). The demand for tickets increased dramatically in 2022. *See* Mark, *supra* note 1 (noting that this demand was driven by the amount of music released by Swift since her previously announced "Lover Fest" tour was cancelled).

[4] *See* Matt Stevens, *Biden Calls for Limits on Ticket Fees for Concerts and Sporting Events*, N.Y. TIMES (Feb. 1, 2023), https://www.nytimes.com/2023/02/01/arts/concert-ticket-fees-biden.html [https://perma.cc/H86V-G2ZQ] (reporting on the impetus for President Joseph Biden's proposed "junk fee prevention act" that would prevent "unfair" fees for online ticket sales and the sale of other goods and services). The Biden Administration defines "junk fees" as "hidden" or "unexpected" fees that add up to as much as "hundreds of dollars" each month for the average consumer. *FACT SHEET: President Biden Highlights New Progress on His Competition Agenda*, THE WHITE HOUSE (Feb. 1, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/01/fact-sheet-president-biden-highlights-new-progress-on-his-competition-agenda [https://perma.cc/9D6S-JGGZ]. President Biden urged Congress to pass legislation that would reduce junk fees in several sectors of the economy. *Id.* Many of these junk fees are undisclosed service, delivery, and processing fees that are added to consumer's cart right before consumers purchase online tickets. *See That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment Before S. Comm. on the Judiciary*, 117th Cong. 3 (2023) [hereinafter *Ticketmaster Hearings*] (statement of Jack Groetzinger, Chief Executive Officer of SeatGeek, Inc.) (describing how fees that are over and above the face value of a ticket are not displayed until the end of the ticket purchase process and sometimes not until after consumers have entered their credit card information). A Canadian man filed a deceptive practices action against Live Nation, claiming that Ticketmaster sold "Official Platinum" seats for a July 2023 Drake concert for $789.54 each but announced the next day that a second show at the same location was being added to the tour—which immediately devalued those seats. Jon Blistein, *Ticketmaster Accused of Price Gouging Drake Tickets in New Lawsuit*, ROLLING STONE (Mar. 24, 2023), https://www.rollingstone.com/music/music-news/ticketmaster-new-lawsuit-canada-drake-tickets-1234703181 [https://perma.cc/LYM2-7WSF].

The reaction to this debacle was swift, with fans and artists expressing their frustration with Ticketmaster and its parent company, Live Nation.[5] The publicity also ignited bipartisan criticism from senators, members of the House of Representatives, state attorneys general, and President Joseph Biden.[6] Within two months, the U.S. Senate Committee on the Judiciary ("Senate Judiciary Committee") held hearings to investigate Live Nation's status as a monopoly.[7]

Prior to the rise of Live Nation and Ticketmaster, there were six distinct entities primarily involved in the concert industry: the artists, their managers and agents, concert promoters, venue operators, ticket vendors, and consumers, each representing a separate competitive market.[8] Artists were managed and

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[5] *See, e.g.*, First Amended Complaint & Demand for Jury at 1–43, Barfuss v. Live Nation Ent., Inc., No. 22STCV37958 (Cal. Super. Ct. Dec. 1, 2022) (discussing the background of an antitrust action against Live Nation filed in the Superior Court of California, which was later removed to federal court in February 2023, that alleged that prospective concert-goers were damaged by Live Nation's monopoly because they were not able to secure tickets to the Eras Tour); Mark, *supra* note 1 (describing the ticket sales procedure as "chaotic" and frustrating for fans). Criticism was not confined to fans and politicians, as artists also spoke out regarding how the Live Nation-Ticketmaster merger has affected them. *See, e.g.*, Clyde Lawrence, *Taylor Swift's Live Nation Debacle Is Just the Beginning*, N.Y. TIMES (Dec. 10, 2022), https://www.nytimes.com/2022/12/10/opinion/taylor-swift-live-nation-clyde-lawrence.html/ [https://perma.cc/JXD9-VZGS] (explaining the challenges artists face since the Ticketmaster merger with Live Nation because of the combined company's dominance in the marketplace). For a discussion of how Live Nation became Ticketmaster's parent company, see *infra* notes 16–30.

[6] *See* Stevens, *supra* note 4 (describing President Biden's call for legislation to reform concert ticket fees); Mark, *supra* note 1 (noting bipartisan reactions to Ticketmaster's sale of *Eras Tour* tickets, ranging from Democratic Representative Alexandria Ocasio-Cortez of New York to Republican Attorney General of Tennessee Jonathan Skrmetti—both of whom voiced frustration with Ticketmaster's "monopoly"). Representative Ocasio-Cortez tweeted, "Daily reminder that Ticketmaster is a monopoly, it's [sic] merger with LiveNation [sic] should never have been approved, and they need to be reigned [sic] in. Break them up." Alexandria Ocasio-Cortez (@AOC), X (Nov. 15, 2022), https://twitter.com/aoc/status/1592587226801934336?lang=en [https://perma.cc/KD3M-ASF5]; *see* Stevens, *supra* note 4 (discussing the bipartisan wrath leveled against Ticketmaster).

[7] Rachel Treisman, *The Senate's Ticketmaster Hearing Featured Plenty of Taylor Swift Puns and Protesters*, NPR (Jan. 24, 2023), https://www.npr.org/2023/01/24/1150942804/taylor-swift-ticketmaster-senate-hearing-live-nation [https://perma.cc/5R4S-VUW8]. The witnesses at this hearing were Joe Berchtold, President and Chief Financial Officer of Live Nation Entertainment, Inc.; Jack Groetzinger, Chief Executive Officer of ticket reseller SeatGeek, Inc.; Sal Nuzzo, Senior Vice President of the James Madison Institute, a think tank; Jerry Mickelson, Chief Executive Officer and President of concert promoter Jam Productions, LLC; Kathleen Bradish. Vice President for Legal Advocacy at the American Antitrust Institute; and singer-songwriter Clyde Lawrence. *Id.*; *Notice of Committee Hearing Location Change*, U.S. S. COMM. ON THE JUDICIARY (Jan. 23, 2023), https://www.judiciary.senate.gov/committee-activity/hearings/thats-the-ticket-promoting-competition-and-protecting-consumers-in-live-entertainment [https://perma.cc/4S99-TACD]. For the transcripts of these hearings, see generally *Ticketmaster Hearings*, *supra* note 4. One task of the U.S. Senate Committee on the Judiciary is to consider legislation that protects "trade and commerce" from "unlawful restraints and monopolies." STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 26 (2013).

[8] *See* Amended Complaint at 8–9, United States v. Ticketmaster Ent., Inc., No. 1:10-cv-00139-RMC (D.D.C. Jan. 29, 2010) (explaining the history of involvement of the main entities within the concert industry); *Ticketmaster Hearings*, *supra* note 4, at 1–2 (statement of Jerry Mickelson, Chief

represented by their managers and agents, who usually received a portion of the artist's income as their compensation.[9] Concerts were the realm of the concert promoters, who secured the venue and arranged for marketing and production services such as stages and sets.[10] Concert promoters typically received their compensation from ticket sales and paid the costs of putting on the concert, including the costs of marketing, logistics, and the venue.[11] Venue operators provided the venue as well as related services such as security, concessions, ushering, ticket-taking, and parking in exchange for a fixed fee, revenues from concessions and parking, and often a percentage of merchandise sales.[12] The ticketing companies sold and distributed tickets and provided the technological infrastructure for these sales.[13] Each of these entities received a portion of the ticket revenues that came from the face value of the ticket as well as other fees given names like "processing fees" and "facility fees."[14]

Executive Officer and President of Jam Productions, LLC) (describing how the live music industry has changed since Ticketmaster's merger with Live Nation).

[9] *See* JAMES D. HURWITZ, AM. ANTITRUST INST., TICKETMASTER -LIVE NATION 6 (2009) (describing the relationship between artists and their independent managers and agents who did not also work for venue operators, concert promotors, or ticketing companies); *see, e.g.*, Lawrence, *supra* note 5 (discussing how Live Nation's monopoly in the music industry affects artists). Clyde Lawrence testified before Congress shortly after penning this article. *See Ticketmaster Hearings*, *supra* note 4, at 2 (statement of Clyde Lawrence) (discussing how the merger between Live Nation and Ticketmaster has negatively affected artists' merchandising revenue, ticket sales, and net profits).

[10] *See generally* MICHAEL CLEMENTS, U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-347, EVENT TICKET SALES: MARKET CHARACTERISTICS AND CONSUMER PROTECTION ISSUES 3 n.4 (2018) (describing the structure of the live entertainment industry prior to Live Nation's merger with Ticketmaster).

[11] *See Ticketmaster Hearings*, *supra* note 4, at 1–2 (statement of Jerry Mickelson) (describing the role of concert promoters before Ticketmaster's merger with Live Nation). Mickelson went on to explain that, since the merger, Ticketmaster's market share has grown such that Ticketmaster ticketed eighty-nine percent of the tours in the top twenty-five highest grossing stadiums in 2022. *Id.* at 4.

[12] *See* Live Nation, Inc., Annual Report 6 (Form 10-K) (Mar. 1, 2021) [hereinafter 2021 Annual Report] (describing the revenue flows for venue operators).

[13] *See id.* at 5 (noting that technological advances in the ticket industry are part of the company's capital expenditures). Critics of the merger argue that Ticketmaster has no incentive to improve its technology because it has no significant competition. *See Ticketmaster Hearings*, *supra* note 4, at 7 (questions for the record for Sal Nuzzo, Senior Vice President of the James Madison Institute) (testifying that Ticketmaster's "anticompetitive and monopolistic tactics" are preventing technological solutions to ticketing challenges posed by hackers, forgeries, and bots). Senator Amy Klobuchar similarly criticized Ticketmaster, noting "it's not just Taylor Swift, it's Bad Bunny, BTS, Bruce Springsteen, Harry Styles, all of these artists have issues with ticketing, because there's no incentive when you're a monopoly." Treisman, *supra* note 7.

[14] *See* CLEMENTS, *supra* note 10, at 15–16 (noting that these fees ranged from 13% of a ticket's face value to 58%). A few months after the Taylor Swift debacle, Ticketmaster had to issue refunds to some ticket purchasers when the fees the company charged for a concert by the band The Cure surpassed the cost of the tickets themselves. Blistein, *supra* note 4. Interestingly, not even a month before the Taylor Swift ticketing disaster, President Biden called on government agencies to take action to reduce or eliminate "junk fees" assessed against consumers in the banking, airline, and ticketing industries. *See* Brian Deese, Neale Mahoney & Tim Wu, *The President's Initiative on Junk Fees and Related Pricing Practices*, THE WHITE HOUSE (Oct. 26, 2022), https://www.whitehouse.gov/briefing-

Critics of the Live Nation merger with Ticketmaster contend that, with each of these industry actors operating as separate entities, the artists had more control in negotiations because they could select from competing promoters, the promoters could select from competing venues, and the venue operators could select from competing ticketing agencies.[15]

Live Nation's earliest iteration began in 1998 as SFX Entertainment.[16] The media corporation Clear Channel Communications acquired a group of concert promoters at the time it bought SFX Entertainment in 2000 and created Clear Channel Entertainment.[17] In 2005, Clear Channel broke off its entertainment unit and called the spinoff Live Nation.[18] Live Nation then started to acquire concert venues and continued its concert promotion services.[19] In its 2008 annual report, Live Nation boasted that it was able to promote 22,000 concerts around the globe and either owned, operated, had equity interest in, or obtained the booking rights to 159 venues across six different countries.[20] Cur-

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room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices [https://perma.cc/RV4Q-9VFL] (explaining that, although there is no issue with necessary fees, fees that are included to "confuse or deceive consumers" are problematic); *see also Ticketmaster Hearings*, *supra* note 4, at 4 (statement of Clyde Lawrence) (describing how Live Nation takes a 20% commission on concert merchandise sales featuring the artists but does not provide the artist with income from other concert revenue streams such as concessions, alcohol, and parking).

[15] *See Ticketmaster Hearings*, *supra* note 4, at 2–3 (statement of Jerry Mickelson) (explaining how Ticketmaster's merger with Live Nation has had "devastating impacts" on promoters, ticketing companies, and venues because Live Nation has now eliminated its competition in several sectors). In his testimony before the Senate, Mickelson described the merger of Ticketmaster and Live Nation as "vertical integration on steroids." *Id.* at 1; *see infra* notes 63–68 and accompanying text (explaining vertical and horizontal integration).

[16] *See* Steve Morse, *SFX Deal Is Part of Industry Trend; Fallout for Concertgoers and Musicians Unclear*, BOS. GLOBE, May 5, 1998, at C1 (discussing how SFX acquired venues throughout the United States as part of a growing trend that had artists' agents concerned that the elimination of competition among promoters would create fewer "bidding wars" for artists' performances).

[17] *See Clear Channel Gives Details on Spinoff of Live Nation Unit*, WALL ST. J. (Dec. 15, 2005), https://www.wsj.com/articles/SB113460359053522836 [https://perma.cc/A442-6WNS] (reporting the creation of a new entertainment unit called "Live Nation" and noting that Clear Channel created Clear Channel Entertainment in 2000, when it not only paid nearly three billion dollars for SFX but also assumed over one billion dollars in debt).

[18] *See id.* (noting that once the company was created, Clear Channel stockholders received a single share of Live Nation's stock for every eight shares of Clear Channel stock they owned).

[19] *See id.* (noting that, at the time the article was published, Live Nation was consolidating its other operations and "pulling out of" other aspects of the company like music publishing). In its Annual Report to Shareholders, Live Nation boasted that, since 2005, its "mission" was to transform "a declining and fragmented live entertainment company into a vertical live music growth company," in part by expanding its online ticketing business to power all of its venues. Michael Rapino, *Letter to Shareholders Accompanying Live Nation 2008 Annual Report* (June 15, 2009), https://www.annualreports.com/HostedData/AnnualReportArchive/l/NYSE_LYV_2008.pdf [https://perma.cc/6UQX-LWXM].

[20] *See* Live Nation, Inc., Annual Report (Form 10-K) at 1 (June 15, 2009) (describing itself as the "largest producer of live music concerts in the world").

rently, Live Nation owns over two hundred venues in the United States alone, ranging from clubs like The House of Blues to large amphitheaters.[21]

Ticketmaster was founded in 1976 by two college students and an entrepreneur.[22] By the late 1980s, Ticketmaster became an international company providing ticketing services on three continents.[23] In 1991, Ticketmaster acquired its major competitor, Ticketron.[24] In 2001, Ticketmaster entered into a contract with Clear Channel—before it became Live Nation—to perform its ticketing services.[25] Six years later, in 2007, Ticketmaster acquired Paciolan, a company that developed and provided ticketing software primarily to colleges and universities so they could ticket their own events.[26] In 2008, Ticketmaster went public and began trading on the NASDAQ, launched mobile ticketing, and merged with the major music management company Front Line Management.[27] When the contract between Live Nation and Ticketmaster expired, Live Nation announced it would perform its own ticketing, and fans hoped that

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[21] *See* LIVE NATION, https://www.livenation.com/venues [https://perma.cc/YZT8-TS25] (listing Live Nation-controlled venues in the United States); *see also Ticketmaster Hearings*, *supra* note 4, at 4 (statement of Jack Groetzinger) (indicating that, by venue, out of the top twenty-five tours in the United States, Live Nation controls the placement of more than 73%). Mr. Groetzinger also asserted that Live Nation stifles competition by entering into long-term exclusive contracts to provide ticketing services to entertainment venues. *Ticketmaster Hearings*, *supra* note 4, at 5.

[22] *See Our History*, TICKETMASTER, https://www.ticketmaster.com/about/our-history.html [https://perma.cc/HD2M-7MM] [hereinafter Ticketmaster History] (describing how Ticketmaster was founded in 1976 in Phoenix, Arizona by two college students, Albert Leffler and Peter Gadwa, and an entrepreneur named Gordon Gunn III). Ticketmaster's first ticketed concert was Electric Light Orchestra's appearance at the University of New Mexico. *Id.* Two years later, Ticketmaster signed its first major league team, the New Orleans Jazz—now known as the Utah Jazz. *Id.*

[23] *See id.* (noting that, in the early 1980s, Ticketmaster opened an office in the United Kingdom, moved its headquarters to Los Angeles, and signed local entertainment clients such as the Los Angeles Philharmonic Orchestra, the Los Angeles Forum, the Los Angeles Lakers, and the Los Angeles Kings—thus securing contracts with both performers and venues). In 1988, Ticketmaster opened operations in Australia. *Id.*

[24] *See id.* (describing Ticketron as Ticketmaster's major competitor). Ticketron was a dominant computer ticket agency in the 1990s. Paul Farhi, *Competitor to Acquire Ticketron,* WASH. POST (Feb. 28, 1991), https://www.washingtonpost.com/archive/business/1991/02/28/competitor-to-acquire-ticketron/a9a6cb20-465a-4e1b-b218-79605e933ada [https://perma.cc/T5K7-8XJW]. At the time of the buyout, Ticketron had 750 outlets and a 40% share of the ticketing industry. Kevin Zimmerman, *International Partnership Buys Ticketron Agency from Control Data Corporation,* VARIETY, Apr. 25, 1990, at 94.

[25] *See* Ticketmaster History, *supra* note 22 (explaining that, by 2000, Ticketmaster had created a "print-at-home" delivery system for tickets).

[26] *See* HURWITZ, *supra* note 9, at 20 (describing how, between 2007 and 2009, Ticketmaster acquired not just Paciolan, but also ticket resale websites TicketsNow and GetMeIn). Hurwitz explains that companies that distribute tickets, such as Ticketmaster, receive the bulk of their fees from "convenience fees" and other service charges that are added to the face value of the ticket. *Id.* at 9.

[27] Ticketmaster History, *supra* note 22. With these mergers, Ticketmaster entered the artist management business. *Id.* In 2007, Ticketmaster's most significant client, Live Nation, had become the largest music promoter in the world but announced it would not be renewing its contract with Ticketmaster because it wished to bring its ticketing operations in-house. Jeff Leeds, *Top Concert Promoter Sets Up a Challenge to Ticketmaster*, N.Y. TIMES (Dec. 21, 2007), https://www.nytimes.com/2007/12/21/business/21music.html [https://perma.cc/7PXN-53CV].

competition between Live Nation and Ticketmaster would cause both ticket prices to drop and the reduction or elimination of "convenience fees."[28]

The anticipated price war between Live Nation and Ticketmaster never came to fruition because in 2010, Ticketmaster announced it had reached an agreement with its former rival to merge into a single entity.[29] This merger created the largest entity in the music industry, with the consolidated company managing hundreds of top marquee artists and controlling eighty percent of the ticketing market and dozens of concert venues in the United States alone.[30]

On November 19, 2022, the day the Taylor Swift tickets went on sale, Ticketmaster issued a public statement asserting that problems with the ticket sales were the result of both the unanticipated amount of bot attacks and the sheer demand for tickets, which broke parts of the website.[31] Critics charged

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[28] *See* Leeds, *supra* note 27 (discussing Live Nation's proposed entry into the ticketing industry). Ticketmaster Entertainment appeared to have removed convenience fees by building the extra charges into the face value of the ticket with "all-in" ticketing. *See* John Seabrook, *The Price of the Ticket*, NEW YORKER (Aug. 3, 2009), https://www.newyorker.com/magazine/2009/08/10/ticketmaster-live-nation-bruce-springsteen [https://perma.cc/QY2T-VZ2R] (describing the history of ticket pricing in light of the ticket scalping controversy that arose after Bruce Springsteen's "Working on a Dream" tour); *see also* Christine A. Varney, Assistant Att'y Gen., U.S. Dep't of Just. Antitrust Div., Remarks as Prepared for the South by Southwest Conference: The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective 3 (Mar. 18, 2010), https://www.justice.gov/atr/speech/ticketmaster live-nation-merger-review-and-consent-decree-perspective (observing that Live Nation presented a challenge to Ticketmaster's dominant position in the ticketing service business before the merger).

[29] *See Ticketmaster Hearings*, *supra* note 4, at 9 (statement of Jerry Mickelson) (arguing that over the years, antitrust laws have not been enforced uniformly because: (1) they often favor powerful companies instead of encouraging competition; (2) they do not uniformly protect and preserve the free market economy because they do not foster competition; and (3) they fail to protect consumers and companies from "unfair and harmful business practices"); *see also* HURWITZ, *supra* note 9, at 57 (noting that both Ticketmaster and Live Nation argued their merger would help consumers because it would eliminate inefficiencies, which would ultimately reduce costs, and that such savings would be passed on to customers).

[30] KRISTA BROWN & ZACH FREED, AM. ECON. LIBERTIES PROJECT, HOW ANTITRUST ENFORCERS HELPED CREATE A LIVE EVENTS MONSTER 3–4 (2022) (arguing that this merger demonstrates the need to revise antitrust policies because it has stifled competition).

[31] *Taylor Swift: The Eras Tour Onsale Explained,* TICKETMASTER (Nov. 19, 2022), https://business.ticketmaster.com/business-solutions/taylor-swift-the-eras-tour-onsale-explained [https://perma.cc/EN9P-QD3N]. Later in the day, on Live Nation's web page, Live Nation addressed widespread criticism and claims that it was operating as an illegal monopoly by issuing another statement in which it explained that the reason it has such a large market share is because the entity is "the undisputed market leader in ticket security and fighting bots." *A Statement from Live Nation Entertainment*, LIVE NATION (Nov. 19, 2022), https://www.livenationentertainment.com/2022/11/a-statement-from-live-nation-entertainment-2 [https://perma.cc/LS37-DVYS]. The term "bot" refers to an automated software algorithm or program that enables its user to search for and buy large blocks of tickets to live entertainment events within seconds of when they become available to the public on ticket vendor platforms such as Ticketmaster. *See* Sammi Elefant, *Beyond the Bots: Ticked-Off Over Ticket Prices or the Eternal Scamnation?*, 25 UCLA ENT. L. REV. 1, 5 (2018) (describing how online hackers can almost instantaneously acquire large blocks of tickets as soon as they are released to the public by using "ticket bots," which are aggressive computer programs that evade ticket sale site security features). An individual named Kenneth Lowson is often credited with creating the first "ticket bot."

that this situation was not an isolated incident and that ticket scalpers often secure tickets for popular events using sophisticated "bots."[32] Mass ticket purchases by these bots created a ticket shortage that subsequently drove up prices well beyond face value.[33] Ticketmaster has also been accused of not only marketing bot software to scalpers, but also creating and utilizing its own bots to acquire tickets from Ticketmaster's primary marketing platform and then selling those tickets on Ticketmaster's secondary marketing platform.[34]

Critics of Ticketmaster also alleged that, even assuming that the accusations of wrongdoing were incorrect, the lack of competition disincentivizes Ticketmaster from improving its product, which creates systemic failures.[35] These critics argue that Ticketmaster's website crashed because Ticketmaster was not prepared to protect consumers.[36] Furthermore, a few weeks later, Ticketmaster was embroiled in another scandal when an unprecedented number of counterfeit tickets were sold for the December 9, 2022 Bad Bunny con-

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See id. at 3 (describing how Lowson, who was ultimately prosecuted for wire fraud, is considered the "most successful ticket scalper in recent history"). Referred to as "scalping," the practice of buying tickets at face price and then reselling them at an inflated price due to limited supply goes back as far as the nineteenth century. *See id.* at 3–4 (describing the first recorded account of ticket scalping in a letter from opera singer Jenny Lind to promoter P.T. Barnum during the first part of Lind's New York tour).

[32] *See* James Purtill, *The Man Who Invented Ticket Bots Explains Why You Can't Get That Gig Ticket*, ABC NEWS (Oct. 16, 2017), https://www.abc.net.au/triplej/programs/hack/ticketbot-inventor-ken-lowson-explains-scalping/9055238 [https://perma.cc/7KQL-QQDD] (explaining that ticket bots have software that can bypass CAPTCHA verification systems and open multiple tabs at once to secure tickets from various open browsers). CAPTCHA stands for Completely Automated Public Turing Test to Tell Computers and Humans Apart. CLEMENTS, *supra* note 10, at 20 n.34. The CAPTCHA system, which is intended to prevent bots, generates tests designed in a way that only humans are able to pass them. *Id.* Such tests include puzzles that require the user to identify objects in a photo. *Id.*

[33] *See* John Koetsier, *E-Commerce Bots Boosting Prices, Causing Shortages, and Taking Advantage of Crises*, FORBES (Dec. 11, 2022), https://www.forbes.com/sites/johnkoetsier/2022/12/11/e-commerce-bots-boosting-prices-causing-shortages-and-taking-advantage-of-crises/ [https://perma.cc/RX6W-W2BD] (describing how ticket bots will often buy large quantities of tickets at face value and resell them at a large premium because they have created an artificial shortage). The number of organizations doing this has increased so rapidly that it has become its own industry. *Id.* Thus, if fans do not have access to an initial sale of tickets or miss their chance due to scalpers, their only option to obtain tickets is purchasing the heavily marked-up tickets from scalpers who acquired the tickets using bots. *Id.*

[34] Anastasia Tsioulcas, *Ticketmaster Has Its Own Secret 'Scalping Program,' Canadian Journalists Report*, NPR (Sept. 20, 2018), https://www.npr.org/2018/09/20/649666928/ticketmaster-has-its-own-secret-scalping-program-canadian-journalists-report [https://perma.cc/AK7E-MVNJ]. The term "primary ticket market" refers to the initial sale of tickets at their face value, and the "secondary ticket market" refers to the resale of tickets acquired on the primary market. HURWITZ, *supra* note 9, at 1–2.

[35] *See* HURWITZ, *supra* note 9, at 9–10 (arguing that the lack of competition caused by the merger of these two companies results in the diversion of primary market tickets to the resale markets, where ticket prices will become inflated); *see also* Treisman, *supra* note 7 (quoting Sal Nuzzo, who pointed out how a lack of competition has "corroded innovation and distorted the market").

[36] *See* Treisman, *supra* note 7 (quoting Senator Klobuchar's criticism of Ticketmaster's ticketing issues with the Taylor Swift and Bad Bunny concerts).

cert in Mexico.[37] The event, which was purportedly sold out, was largely empty, and many ticketholders were denied entry despite having bought legitimate tickets directly from Ticketmaster.[38] Ricardo Sheffield, the head of PROFECO (Mexico's Federal Attorney Office for Consumers), confirmed that approximately 1,600 ticket price refunds had been requested for legitimate tickets.[39] Although Ticketmaster claimed they only turned away counterfeit tickets, PROFECO alleged that Ticketmaster sold the same tickets more than once.[40] PROFECO has threatened to fine Ticketmaster up to ten percent of Ticketmaster's earnings given that many customers spent the equivalent of a month's salary on their tickets.[41]

Part I of this Note chronicles the evolution of antitrust laws and how these laws have impacted Live Nation's merger with Ticketmaster.[42] Part II of this Note addresses the current debate regarding the role of the courts and various governmental agencies in enforcing antitrust laws, particularly in light of large firm dominance and corporate expansion.[43] Part III argues that the merger between Live Nation and Ticketmaster has damaged several discrete markets within the live entertainment industry on several levels and proposes recommendations as to how to deal with this issue in the future.[44]

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[37] *See* Thania Garcia, *Ticketmaster Mexico to Be Fined Millions of Dollars for Bad Bunny Ticket Fiasco*, VARIETY (Dec. 12, 2022), https://variety.com/2022/music/news/mexico-bad-bunny-ticketmaster-1235458355 [https://perma.cc/F7FG-DXUU] (noting that extremely popular Puerto Rican artist Bad Bunny's concert was plagued by system failures). Bad Bunny's most recent tour broke the record for being the highest-grossing tour ever. Eric Frankenberg, *Bad Bunny Closes Out 2022 with Record-Breaking $435 Million in Tour Grosses*, BILLBOARD (Dec. 13, 2022), https://www.billboard.com/pro/bad-bunny-2022-concerts-earn-record-breaking-435-million [https://perma.cc/5QTY-3ATS].

[38] *See* Maria Abi-Habib, *Spending a Month's Salary to See Bad Bunny, Only to Be Turned Away*, N.Y. TIMES (Dec. 16, 2022), https://www.nytimes.com/2022/12/16/world/americas/bad-bunny-ticketmaster-mexico.html [https://perma.cc/D5YB-XPQV] (reporting that Azteca Stadium, which is one of Mexico's largest venues with a capacity of 90,000 seats, was mostly empty due to legitimate ticketholders being denied entry). This concert was predicted to be one of Mexico City's "largest concerts ever," but fans who were able to enter the stadium reported the floor seating area to be half empty because of confusion over counterfeiting despite the show being sold out. *Id.*

[39] *See* Garcia, *supra* note 37 (explaining that PROFECO, an organization of the Mexican government administered by Mexico's Attorney General, led the investigation of purchasers' claims regarding the Bad Bunny concert). The Mexican government has set up a webpage for those who had tickets to the concert and had difficulties with Ticketmaster. Gobierno de México [Government of Mexico], PROFECO Procuraduría Federal Del Consumidor [Federal Consumer Protection Agency], https://www.gob.mx/profeco [https://perma.cc/T8QQ-TZAQ].

[40] Garcia, *supra* note 37.

[41] *See id.* (describing a statement made by Ricardo Sheffield, head of Mexico's Procurador Federal Del Consumidor [Federal Attorney's Office for Consumers], to the Mexican press, in which Sheffield discussed potentially fining Ticketmaster). Sheffield was quoted saying the proportion of the fine could be up to 10% of the company's earnings in 2021. Grupo Fórmula (@Radio_Formula), X (Dec. 10, 2022), https://twitter.com/Radio_Formula/status/1601737063421726720 [https://perma.cc/8UAN-GYRA].

[42] *See infra* notes 45–151 and accompanying text.

[43] *See infra* notes 152–168 and accompanying text.

[44] *See infra* notes 169–221 and accompanying text.

I. Legal Background of the Evolution of Antitrust Laws and Their Enforcement

This Part reviews how antitrust laws have changed over time and how antitrust laws have been applied to the live entertainment industry.[45] Section A of this Part explores the evolution of antitrust law after the promulgation of the Sherman Antitrust Act, as well as how enforcement standards have changed over time.[46] Section B of this Part chronicles the merger of Live Nation and Ticketmaster and the challenges presented by that merger.[47]

A. A Brief History of Antitrust Laws

In the late nineteenth and early twentieth centuries, Congress promulgated a series of antitrust laws designed to promote competition in light of the rise of monopolies during that period.[48] Subsection 1 of this Section explores the implementation of the Sherman Antitrust Act ("Sherman Act"), the Clayton Antitrust Act ("Clayton Act"), and early cases interpreting and implementing antitrust laws.[49] Subsection 2 discusses the challenges placed on antitrust plaintiffs by the "rule of reason" and burden-shifting as interpreted by modern courts.[50] Subsection 3 examines recent developments in antitrust law relating to the direct purchaser rule and discusses the pertinent cases relating to the first purchaser rule, or direct purchaser rule, in antitrust litigation.[51] Subsection 4 reviews how courts have dealt with new antitrust issues arising from new technologies and the development of online platforms.[52]

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[45] *See infra* notes 48–151 and accompanying text.

[46] *See infra* notes 48–109 and accompanying text. The Sherman Antitrust Act was passed by Congress in 1890. Sherman Antitrust Act, 15 U.S.C. §§ 1–38. The term "antitrust" arose from the practice of creating monopolies by creating trusts that held the stock of two separate corporations as a means of combining the two companies. Nathan B. Grzegorek, Note, *The Price of Admission: How Inconsistent Enforcement of Antitrust Laws in America's Live Entertainment Sector Hurts the Average Consumer*, 44 J. MARSHALL L. REV. 261, 265 (2010).

[47] *See infra* notes 74–135 and accompanying text.

[48] *See* Grzegorek, *supra* note 46, at 263–65 (discussing how monopolies threatened competition and the free-market system, which gave rise to antitrust legislation). The government and private sector's lack of response to the growth of monopolies in the live entertainment sector and weak enforcement of antitrust laws has negatively impacted consumers. *Id.* at 283.

[49] *See infra* notes 53–73 and accompanying text.

[50] *See infra* notes 74–79 and accompanying text (discussing the "rule of reason" and burden shifting). The "rule of reason" requires that plaintiffs demonstrate that the defendant's conduct creates an unreasonable restraint on trade. Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49–50 (1977).

[51] *See infra* notes 79–98 and accompanying text.

[52] *See infra* notes 99–109 and accompanying text.

1. The Early Development of Antitrust Laws

Section 1 of the Sherman Act prohibits actions or conspiracies that monopolize trade or commerce.[53] The Sherman Act is enforceable through civil actions that may be brought by the U.S. Department of Justice, private parties, or state attorneys general, who may seek both damages and injunctive relief.[54] To provide further support for the Sherman Act, Congress passed the Clayton Act, which provides greater specificity as to the types of proscribed antitrust behaviors and also allows for private remedies of treble damages.[55]

In 1911, in *Standard Oil Co. v. United States*, the U.S. Supreme Court ordered the dissolution of companies owned by John D. Rockefeller after finding his company, Standard Oil, monopolized the petroleum industry in violation of the Sherman Act.[56] Standard Oil was broken into thirty-four separate, smaller entities.[57] The Court found that Standard Oil attempted to control every aspect of the oil business, from production to shipping to sales, and was therefore able

[53] *See* 15 U.S.C. § 2 (prohibiting monopolies "or attempt[s] 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"). The Sherman Act further provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade" is illegal. *Id.* § 1.

[54] *See id.* §§ 4, 15, 26 (describing how antitrust laws may be enforced by different types of plaintiffs such as the Department of Justice, private individuals who have been injured, and state attorneys general). State attorneys general may bring *parens patriae* and class actions seeking treble damages. *Id.* § 15c. The term *parens patriae* refers to the act of the government, as a quasi-sovereign, stepping into the shoes of the public and assuming standing to promote a public interest. *See* Lexi Zerrillo, Note, *Who's Your Sovereign?: The Standing Doctrine of* Parens Patriae *& State Lawsuits Defending Sanctuary Policies*, 27 WM. & MARY BILL RTS. J. 573, 575 (2018) (noting that *parens patriae* is a doctrine through which states can bring lawsuits on behalf of their citizens). The *parens patriae* aspect of the Sherman Act has become more important in recent years as courts have increasingly limited the ability of private plaintiffs to bring antitrust actions. *See, e.g.*, Ill. Brick Co. v. Illinois, 431 U.S. 720, 758–59 (1977) (holding that plaintiffs could not state a claim against a monopoly if there was a "middleman" who passed on the additional costs to the plaintiff).

[55] *See* Office of the Historian & Office of the Clerk of the Office of Art and Archives, *The Clayton Antitrust Act*, U.S. HOUSE OF REPS. HISTORY, ART & ARCHIVES, https://history.house.gov/Historical Highlight/Detail/15032424979 [https://perma.cc/8BPS-D3QJ] (providing historical background on the promulgation of the Clayton Antitrust Act ("Clayton Act")). The Clayton Act was enacted to enhance the Sherman Act and includes provisions that prohibit anticompetitive mergers. *See* Heidi M. Silton, Craig S. Davis & Hallis Praggins, *Congressional Antitrust Bills Seek to Regulate a New Internet*, 36 ANTITRUST ABA 26, 26 (2022) (noting that Congress passed the Clayton Act in 1914). The Federal Trade Commission Act ("FTC Act") was created, in part, to enforce the Clayton Act. 15 U.S.C §§ 41–58.

[56] *See* Standard Oil Co. v. United States, 221 U.S. 1, 78 (1911) (discussing the petroleum industry's anti-competitive policies). In *Standard Oil*, the Supreme Court noted the "public outcry" against monopolies and the injury they cause the public through price fixing, limiting production, and deterioration of the quality of the monopolized product or service. *Id.* at 52. The Court, however, was careful to limit its analysis to determining whether Standard Oil's conduct amounted to an "unreasonable" restraint on trade, which would be determined on a case-by-case basis. *Id.* at 97.

[57] *Id.* at 34 n.1.

to engage in price fixing and restrain trade.[58] Even though Standard Oil did not control one hundred percent of the petroleum market, the Court found it retained "substantial power" over the petroleum market, which was sufficient to amount to a Sherman Act violation.[59] The Court did not explicitly state what it meant by "substantial power," but it did determine that the language of the Sherman Act could not be taken literally because every contract, to some extent, was a restraint on trade.[60] Thus, since its early days, the Sherman Act has been interpreted based on concerns about unreasonable restraints on trade.[61] This rule is frequently referred to as the "rule of reason."[62]

There are two types of monopolies: vertical monopolies and horizontal monopolies.[63] A vertical monopoly occurs when a company comes to dominate an entire supply chain, whereas a horizontal monopoly occurs when a company eliminates competition in its own sector.[64] When determining whether a company is engaged in vertical integration, courts examine: (1) the company's "purpose or intent" at the time it was formed, and (2) the ability or power of the company to pursue this intent and abuse its power.[65] Because size is often correlated with the ability to stifle competition and abuses of economic power, a company's size is often correlated with its power and is seen as an indicator

[58] *See id.* at 33 (noting that because Standard Oil controlled all aspects of the oil industry—including production, refining, shipping, and sales—it could set the cost of petroleum and petroleum services and monopolize all interstate commerce relating to petroleum and petroleum services).

[59] *Id.* at 77. The Court was not persuaded by Standard Oil's argument that there was no monopoly because a small percentage of the crude oil produced was not controlled by the combined trusts. *Id.*

[60] *Id.* at 63. The Sherman Act provides that "[e]very contract . . . in restraint of trade . . . is declared to be illegal." 15 U.S.C. § 1. Finding this language overly broad, the Supreme Court adopted what came to be known as the "rule of reason," which adds a reasonableness standard that applies when determining cases under the Sherman Act. *Standard Oil Co.*, 221 U.S. at 62. The Court opined that Congress must have intended a "standard of reason" to apply when determining whether a defendant's conduct amounted to that which is prohibited by the statute. *Id.* at 60.

[61] *See* Connor Leydecker, Note, *A Different Curse: Improving the Antitrust Debate About "Bigness,"* 18 N.Y.U. J.L. & BUS. 845, 846–48, 853 (2022) (describing the "Neo-Brandeisian" movement among antitrust scholars who wish to reform current antitrust laws).

[62] Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49–50 (1977). One hundred years after *Standard Oil Co.*, the Supreme Court explained that there are two categories of reasonableness in antitrust cases: unreasonable per se and unreasonable under the "rule of reason." Ohio v. Am. Express Co., 138 S. Ct. 2274, 2277 (2018). For a discussion of the modern interpretation of the "rule of reason," see *infra* notes 74–77.

[63] *See* Val D. Ricks & R. Chet Loftis, *Seeing the Diagonal Clearly: Telling Vertical from Horizontal in Antitrust Law*, 28 U. TOL. L. REV. 151, 156, 159–77 (1996) (providing a comprehensive overview of the differences between vertical and horizontal integration in antitrust law).

[64] *See id.* at 156 (explaining that horizontal restraints on trade arise when competitors at the same market level agree to restrain trade, and vertical restraints result when persons or companies at varying market status in a product's chain of distribution conspire to restrain trade).

[65] United States v. Paramount Pictures, Inc., 334 U.S. 131, 174 (1948). This requirement is often referred to as the company's "bigness" in antitrust literature. *See, e.g.*, Leydecker, *supra* note 61, at 845 (explaining that the concept of "bigness" in antitrust law arises from an essay by Louis Brandeis entitled "A Curse of Bigness").

of monopoly status and the ability to crush competition.[66] Another consideration, particularly in earlier antitrust cases, is the degree to which a vertical monopoly exerts leverage on the market within its specific industry.[67] By contrast, horizontal price-fixing occurs when competitors who are on the same market structure level agree to fix or otherwise stabilize prices charged to customers or paid to suppliers.[68]

Monopolies expanded beyond the turn of the nineteenth-century robber barons and started to include the entertainment industry.[69] In the 1940s, the five major studios—Paramount Pictures, Loew's, RKO, Warner Brothers, and Twentieth Century-Fox—dominated the film industry through a vertical scheme by not only producing motion pictures, but also owning subsidiaries that distributed and exhibited the films.[70] In 1948, in *United States v. Paramount Pictures, Inc.*, the U.S. Supreme Court examined this vertical corporate structure that studios used to control the film industry from production to exhibition and found that the practice of granting licenses only to the studios' theaters was an exclusionary practice that stifled competition and violated the Sherman Act.[71] The Court found that the studios had a monopoly because they had not only the ability and power to avoid competition, but also the intention to do so.[72]

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[66] Leydecker, *supra* note 61, at 864, 866. The term "bigness" is not necessarily the size of the company or its market share, but rather its ability to influence politicians and dominate smaller competitors. *Id.* Leydecker's Note argues that "neo-Brandeisians" also seek to reform antitrust laws so that plaintiffs may bring private antitrust actions without facing the procedural hurdles they now face because of burdens of proof that favor defendants and standing requirements that do not reflect the modern marketplace. *Id.* at 867–869. In *Paramount Pictures*, the Court observed that a company's size can be an "earmark of monopoly power" particularly when it is used to "crush" competition. 334 U.S. at 174.

[67] *See Paramount Pictures*, 334 U.S. at 174 (noting that the monopoly analysis requires a review of how vertical integration exerts leverage on the entire market).

[68] *See generally* WILLIAM C. HOLMES & MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK §§ 2:11–:12 (2022) (providing a comprehensive background on the concepts of horizontal and vertical restraints).

[69] *See Paramount Pictures*, 334 U.S. at 140 (involving the application of the Sherman Act to the motion picture industry); *see also* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (noting that the Sherman Act "was designed to be a comprehensive charter of economic liberty" intended to advance free trade and competition).

[70] *See Paramount Pictures*, 334 U.S. at 141 (finding that defendants engaged in a vertical integration model because they produced, distributed, and exhibited motion pictures).

[71] *See id.* at 170–71 (noting that the exclusionary practices used by companies in the film industry that sought to have vertical monopolies were "designed to strengthen their hold on the exhibition field").

[72] *See id.* at 171 (noting that, although a specific intent to create a monopoly is not required to establish the requisite intent, intentional conduct that creates a monopoly is sufficient). In 2020, in *United States v. Paramount Pictures, Inc.*, the U.S. District Court for the Southern District of New York granted the federal government's motion to terminate the consent decrees that regulated the motion picture industry after the *Paramount Pictures* case. *See* United States v. Paramount Pictures,

2. Growing Limitations for Antitrust Plaintiffs from the Rule of Reason

Over time, antitrust analysis became more subjective as the "rule of reason" became more dependent on a factfinder's view of a particular case.[73] In 2018, in *Ohio v. American Express*, the U.S. Supreme Court explained the test for determining illegal monopolies under the "rule of reason" as it had developed over the one hundred years since *Standard Oil*.[74] The Court noted there were two ways a restraint on trade could be unreasonable: by being unreasonable per se or by applying the fact-specific test for the "rule of reason."[75] Only horizontal restraints on trade, according to the Court in *American Express*, could be unreasonable per se.[76] Demonstrating a departure from the standard applied in *Paramount Pictures* seventy years earlier, the Court noted that, when there is vertical restraint, "a three-step, burden-shifting framework applies" based on an analysis of whether the restraints are procompetitive or anticompetitive to the applicable market.[77] This alternative framework for vertical restraints has had a chilling effect on plaintiffs because it has increased the cost of litigation.[78]

Inc., No. 19 Misc. 544(AT), 2020 WL 4573069, at *1 (S.D.NY. Aug. 7, 2020) (noting that, in the past seventy years, the Supreme Court reviewed vertical integration cases utilizing a different standard).

[73] *See, e.g.*, Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988) (defining the "rule of reason" as when a factfinder weighs the "circumstances of a case" and decides if the contested practice creates an "unreasonable restraint on competition" (quoting Cont. T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977))); *see also* Nicole McGuire, Note, *An Antitrust Narcotic: How the Rule of Reason Is Lulling Vertical Enforcement to Sleep*, 45 LOY. L.A. L. REV. 1225, 1282 (2012) (arguing that the vague nature of this standard lends itself to unpredictable results when the "rule of reason" is applied).

[74] *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) (explaining that there is "a three-step[] burden-shifting framework" that places the initial burden of proving that the conduct in questions causes "substantial" anticompetitive consequences that harm "consumers in the relevant market").

[75] *Id.* at 2283–84; *see also* Kenneth L. Glazer & Brian R. Henry, *Coercive vs. Incentivizing Conduct: A Way Out of the Section 2 Impasse?*, 18 ANTITRUST 45, 49 (2003) (arguing that it should be a given that the goal of every firm in every industry is to drive out competition because that is the "bedrock of capitalism").

[76] 138 S. Ct. at 2283–84. The Court defined a horizontal restraint as a restraint "imposed by agreement between competitors." *Id.* (quoting *Bus. Elecs. Corp.*, 485 U.S. at 730 (1988)). Many commentators have noted that the modern application of the "rule of reason" has become a hurdle few plaintiffs can overcome. *See, e.g.*, Herbert Hovenkamp, *Antitrust and Platform Monopoly,* 130 YALE L.J. 1952, 2004 (2021) (noting that federal courts have made it unreasonably difficult for plaintiffs to present a prima facie case due to a "lingering antienforcement bias held by the judiciary").

[77] *See American Express*, 138 S. Ct. at 2284 (describing a three-step "framework" for determining if "a restraint violates the rule of reason") This three-step process requires: (1) that the plaintiff first proves that "the challenged restraint has a substantial anticompetitive effect that harms consumers"; (2) that the defendant demonstrates a "procompetitive rationale for the restraint"; and, if the defendant does so, (3) that the plaintiff makes a showing that the procompetitive benefits could be accomplished utilizing less anticompetitive methods. *Id.* This approach is different from the process the Court utilized in 1948 in *Paramount Pictures*, where the Court focused on the company's power and intent when it came to vertical integration. 334 U.S. at 174.

[78] Ricks & Loftis, *supra* note 63, at 155.

3. Growing Limitations for Plaintiffs Arising from the Direct Purchaser Rule

Another barrier for antitrust plaintiffs is standing to sue under the direct purchaser rule, which prohibits parties that are more than one step removed from monopolies from asserting a claim against the monopoly.[79] In 1968, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, the Supreme Court held that a defendant's liability could not be limited or reduced in antitrust litigation if a plaintiff purchased a product directly from the monopolist or defendant.[80] Later, in 1977, in *Illinois Brick Co. v. Illinois*, the Supreme Court held that plaintiffs could not state a claim against a monopoly if there was a "middleman" who passed on the additional costs to the plaintiff.[81]

In vertical integration cases, and in cases where there are modern technology platforms, the existence of a middleman is difficult to ascertain and is often a distinction without a difference.[82] Since *Illinois Brick*, courts have extended liability to defendants who rely on the passing-on defense and have extended some leniency to plaintiffs who were one or more steps removed from the defendant.[83]

In *Hanover Shoe*, a shoe manufacturer filed a claim against the defendant, a manufacturer and lessor of complex shoe-making machinery, for damages under the Clayton Act, alleging that the defendant had an unlawful monopoly over shoe manufacturing machinery because it only leased and refused to sell

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[79] Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2019) (noting that "indirect purchasers who are two or more steps removed from the violator" may not sue for antitrust violations).

[80] 392 U.S. 481, 494 (1968). The defendant argued that the plaintiff suffered no damages because the plaintiff could simply pass on the overcharges to its customers. *Id.*

[81] 431 U.S. 720, 744 (1977). This concept is often referred to as the "pass-on" or "passing on" defense. *Id.* at 724 n.2. The defense has been used by both plaintiffs and defendants to prove increased costs were "passed along the chain of distribution." *Id.* at 749 (Brennan, J., dissenting). In his dissent, Justice Brennan disagreed with the majority's narrow interpretation of *Hanover Shoe* and reasoned that the passing-on defense should be treated differently, noting that indirect purchaser plaintiffs who sue for damages for their injuries and utilize the passing-on defense offensively have different interests at stake than defendants who cite *Hanover Shoe* to support a passing-on defense. *Id.* at 753. There are different buyers that acquire goods along the chain of distribution. Comment, Mangano *and Ultimate-Consumer Standing: The Misuse of the* Hanover *Doctrine*, 72 COLUM. L. REV. 394, 395 (1972). There is the "middleman consumer" who purchases the goods from the manufacturer and then either modifies the product into another product, as is the case when the goods are parts for a larger item, or resells them. *Id.* There are also end-users who purchase the finished goods, which either contain a part from the original product or are the original product. *Id.*

[82] *See* Jacob Mitchell, *A New Understanding of Who Is a Direct Purchaser Based on* Apple Inc. v. Pepper, 2020 B.C. INTEL. PROP. & TECH F. 1, 2 (discussing application of the direct purchaser rule to online platforms operating as storefronts for products supplied to the consumer by third parties).

[83] *Id.* at 3–4. The Court upheld lower court decisions that chose to interpret *Hanover Shoe* as relevant to both plaintiffs and defendants. *See* Edward D. Cavanagh, Illinois Brick*: A Look Back and a Look Ahead,* 17 LOY. CONSUMER L. REV. 1, 8 n.26 (2004) (describing the split among the federal circuit courts); Comment, *supra* note 81, at 405–07 (summarizing the application of *Hanover Shoe* in the U.S. Court of Appeals for the Third Circuit).

its machinery to shoe manufacturers.[84] The defendant claimed that, even if its lease-only policy did constitute an unlawful monopolistic practice, there was no identifiable damage because the plaintiff could "pass on" its increased costs to its own customers.[85] The Supreme Court rejected the defendant's passing-on defense and held it could not be used by accused monopolists to circumvent liability.[86] The Court reasoned that allowing a passing-on defense would negatively impact each affected party's ability to recover the amount of damages, which would essentially distribute the monopolies' liability throughout the entire supply chain and therefore leave smaller and smaller amounts for those injured to recover.[87] The Court reasoned that, eventually, consumers affected would have little to no ability to recover, so much so that bringing a suit would be almost impossible.[88] Additionally, the Court addressed the unsustainable and difficult practice of determining the amount of damages to allot to each party throughout the chain of consumers.[89] Consequently, the Court held that the first direct link or consumer could sue for all possible damages to act as a deterrent for parties hoping to engage in monopolistic activities, as well as to create a more efficient way for courts to rule on similar antitrust cases and aid in the difficult process of awarding damages.[90]

In *Illinois Brick*, Illinois, along with seven hundred other local government entities, sued concrete block manufacturers, claiming they had engaged in a price-fixing scheme.[91] Plaintiffs alleged that the price-fixing occurred when defendants increased bid prices after they won local and state govern-

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[84] *Hanover Shoe*, 392 U.S. at 483–84. The issue before the Court was whether "the practice of leasing and refusing to sell specialized equipment was an instrument of monopolization." *Id.* at 484. The defendant's lease-only policy was deemed an illegal monopoly based on findings of fact in the lower court on a different case brought by the government. *Id.* at 486–87.

[85] *Id.* at 487–88. Additionally, the U.S. District Court for the Middle District of Pennsylvania found the plaintiff would have sustained significant savings if given the chance to have purchased the equipment from the onset, rather than continuing to lease machinery from the defendant. *Id.*

[86] *Id.* at 494. The Court held that, when a buyer demonstrates both that "the price paid by him for materials purchased for use in his business is illegally high" and "the amount of the overcharge," the buyer has "made out a prima facie case of injury and damage within the meaning of § 4 [of the Clayton Act]." *Id.* at 489. Additionally, the Court reasoned that buyers are not barred from damages if they choose to raise the price for their own product if the seller continues to charge "the illegal price" because the seller is taking "more than the law allows." *Id.*

[87] *Id.* at 494. The Court observed that the ultimate customer in this case would be the buyer of a single pair of shoes, who would have little interest in bringing a class action. *Id.*

[88] *Id.* The Court recognized the difficulty of demonstrating damages if ultimate end users were the only possible plaintiffs in these cases because they would need to demonstrate the impact on the final cost. *Id.*

[89] *Id.* at 492–93.

[90] *Id.* at 494. The Court reasoned that, if subsequent buyers further down the supply chain brought the action, monopolies would be able to "retain the fruits of their illegality" because of the difficulty in demonstrating damages, and the damages would be diluted by each level of passing-on. *Id.* at 493–94.

[91] *Ill. Brick*, 431 U.S. at 726–27 (1977). The defendants sold concrete blocks to masonry contractors, who then used the blocks to build masonry structures. *Id.* at 726.

ment contracts.[92] As a result, Illinois and the other plaintiffs sought damages due to the increased bid prices.[93] The defendant, however, argued that, under *Hanover Shoe*, Illinois did not have standing because the state represented the interests of indirect purchasers, and the contractors were the true direct purchasers of the concrete blocks.[94] The defendants further argued that, under *Hanover Shoe*, only the construction contractors—who were the direct purchasers—had standing to file a claim against them and, because they were one step removed from the monopolization, the plaintiffs were barred from bringing the suit.[95] The Court found for the defendants, reasoning that *Hanover Shoe*'s holding only allows direct purchasers to pursue this passing-on defense.[96] Rather than overturning *Hanover Shoe*, the Court decided to bar indirect purchasers from bringing a claim—whereas *Hanover Shoe* gave indirect purchasers protection—and restricted indirect purchasers' ability to use a passing-on defense.[97] The decision made by the Court was predominantly based on policy considerations: if the passing-on defense could not be used by a monopolist against a consumer to restrict damages from an indirect purchaser, it should not be used offensively for an indirect purchaser to recover damages.[98]

4. Antitrust Challenges Arising from Technology and Online Platforms

In 2019, in *Apple Inc. v. Pepper*, the U.S. Supreme Court held that, under *Illinois Brick*, consumers who purchased apps from the Apple App Store were direct purchasers.[99] In *Apple*, consumers brought a claim against Apple alleg-

[92] *Id*. at 726; *see also* Mitchell, *supra* note 82, at 4–5 (describing the factual background of *Illinois Brick*).

[93] *Ill. Brick*, 431 U.S. at 726–27. The Court held that only a direct purchaser had standing to bring a suit. *Id.* The Court rejected the plaintiffs' attempt to use the passing-on defense as an offensive move to receive damages. *Id.* This was due to the Court's concern that allowing offensive use of the passing-on defense would create "a serious risk" of recovery by different plaintiffs in multiple lawsuits against the defendants because it would open the door for both intermediate and ultimate purchasers to sue the same defendant. *Id.* at 730.

[94] *Id.* at 728 n.7. The Court did not address this issue, noting that the question of who has been injured is "analytically distinct" from the question of standing. *Id.* Indirect purchasers are defined as "two or more steps removed from the violator in a distribution chain." Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2019).

[95] *Ill. Brick*, 431 U.S. at 728 n.7. The Court acknowledged that direct purchasers would "sometimes" fear retaliation for bringing an antitrust action for treble-damages because such a suit would jeopardize their relationship with their only supplier. *Id.* at 746.

[96] *Id.* at 746–48.

[97] *Id.* at 736.

[98] *See id.* at 728–29 (explaining that certiorari was granted because of a conflict between the federal courts of appeals regarding the offensive use of a "passing on" defense). Critics of *Illinois Brick* argue that the policy assumptions made by the Court were incorrect because the direct purchaser who passes-on the cost often has little incentive to sue the monopolist. Gregory K. Leonard, *The* Illinois Brick *Damages Edifice: Demolition or Deconstruction?*, 84 ANTITRUST L.J. 315, 322–23 (2022).

[99] *Apple*, 139 S. Ct. at 1519. The Apple App Store is an app that comes predownloaded on Apple devices through which consumers of Apple products can download applications for their devices ei-

ing that the manufacturer had a monopoly over the smartphone app market.[100] Apple filed a motion to dismiss, arguing that iPhone owners were not direct purchasers under *Illinois Brick*.[101] Although the U.S. District Court for the Northern District of California agreed with Apple, the U.S. Court of Appeals for the Ninth Circuit reversed, finding that iPhone owners were direct purchasers of Apple because they purchased the apps directly from the Apple App Store.[102] Further, the Supreme Court rejected Apple's argument that consumers are restricted to filing a claim only against the party that sets a retail price for a product.[103] Recognizing the difference in circumstances caused by the rise of the digital marketplace, the Court recognized that applying *Illinois Brick* solely based on which entity set the price enables monopolists to set up their business in a manner that would allow them to escape liability under antitrust litigation from consumers.[104]

In his dissenting opinion, Justice Neil Gorsuch suggested that the majority's ruling was incorrect because there was no proximate cause for damages and injuries.[105] Additionally, Justice Gorsuch agreed with Apple's position that it was acting merely as a provider through its app store and that app purchasers are not direct purchasers.[106] Further, because developers oversee setting the price, any change in commission on behalf of Apple is then inherited by the

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ther for free or for a fee. *Id.* at 1517. Downloading applications from the Apple App Store is the only legal way Apple product users may buy and download apps. *Id.* Typically, apps are created by independent developers under contracts with Apple. *Id.* Apple charges app developers an annual "membership fee" and a 30% commission on every app sale, but it allows the developers to determine the retail price for their products. *Id.* at 1517, 1519. For the purposes of the Court's antitrust analysis, the Court defined "direct purchasers" as those who purchase a "product directly from the "alleged monopolist." *Id.* at 1520.

[100] *Id.* at 1518.

[101] *Id.*

[102] *Id.*; *see also id.* at 1520 (noting that the statutory language in Section 2 of the Sherman Act and Section 4 of the Clayton Act proved that iPhone owners who buy apps directly from the Apple-owned App Store fall directly into the direct purchasers category). The Court relied on the statutory language dictating that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . the defendant . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a).

[103] *See Apple,* 139 S. Ct. at 1521–22 (describing the "problems" the Court had with Apple's argument that a claim may be made only against the party that sets a retail price).

[104] *Id.* at 1522–23.

[105] *Id.* at 1527 (Gorsuch, J., dissenting) (noting that the majority was disregarding the proximate cause requirement established previously in *Lexmark International, Inc. v. Static Control Components, Inc.,* 572 U.S. 118 (2014)). In *Illinois Brick*, the Court noted that, although the definition of the rule of proximate cause varies, it usually can be defined utilizing two tests: one that is more restrictive and focuses on the "directness of the injury," and one, described by the Court as more "liberal" and "widely accepted," that determines if a plaintiff is in the "target area" of the illegal conduct. Ill. Brick Co. v. Illinois, 431 U.S. 720, 760 (1977).

[106] *Apple*, 139 S. Ct. at 1527 (Gorsuch, J., dissenting); *see supra* notes 91–98 and accompanying text (providing a detailed discussion of *Illinois Brick*).

user.[107] Justice Gorsuch pointed out that app developers may choose whether or not they wish to pay the cost of Apple's marked up price, and it is this decision—to ultimately pass on the increased price to the purchasers—that is the true cause of consumers' injuries.[108] Justice Gorsuch opined that these situations, where the cost exacted by monopolies is passed on to consumers, are exactly the situations in which the *Illinois Brick* test should be applied.[109]

B. Challenges to Live Nation and Ticketmaster as Monopolists

There have been several challenges to the merger of Live Nation and Ticketmaster over the years, and critics argue that none of them have altered Live Nation and Ticketmaster's monopolistic practices.[110] Subsection 1 of this Section discusses the antitrust action taken directly against Ticketmaster.[111] Subsection 2 of this Section describes the action taken in response to Ticketmaster's merger with Live Nation.[112] Subsection 3 of this Section addresses attempts to resolve the issues in the live entertainment industry through legislation.[113]

1. *Campos v. Ticketmaster Corp.*: An Early Ticketmaster Challenge

In 1998, in *Campos v. Ticketmaster Corp.*, the U.S. Court of Appeals for the Eighth Circuit held that the plaintiff ticket purchasers did not have standing to sue Ticketmaster for excess fees and anticompetitive behavior under Section 4 of the Clayton Act because they were not direct purchasers within the *Illinois Brick* standard.[114] In *Campos*, plaintiffs were ticketholders who sued Ticketmaster, claiming that the company had participated in anticompetitive conduct by conspiring with promoters and concert venues to enforce monopoly ticket prices and boycotted performers who did not want to participate in the monopoly.[115] Ticketmaster would typically contract with venues and manage their ticket sales and manage distribution to purchasers, such as the plaintiffs, for a venue fee.[116] Notably, this action was filed in 1998, before Ticketmaster's merger with Live Nation.[117]

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[107] *Apple*, 139 S. Ct. at 1527 (Gorsuch, J., dissenting).

[108] *Id.* at 1527–28.

[109] *See id.* at 1526 (stating that *Illinois Brick* is the "other side of the coin" of the pass-on theory).

[110] *See Ticketmaster Hearings*, *supra* note 4, at 6 (statement of Jerry Mickelson) (describing that, although the Department of Justice promulgated a consent decree, the merger between Live Nation and Ticketmaster has had a host of negative impacts on the music industry).

[111] *See infra* notes 114–124 and accompanying text.

[112] *See infra* notes 125–137 and accompanying text.

[113] *See infra* notes 138–152 and accompanying text.

[114] 140 F.3d 1166, 1174 (8th Cir. 1998).

[115] *Id.* at 1168.

[116] *Id.*

[117] *See supra* notes 29–30 and accompanying text (indicating that the merger was in 2010).

The district court dismissed the case, finding that the increased fees paid by the ticket purchasers were a result of Ticketmaster's monopoly but were not enough to state a claim under Section 4 of the Clayton Act.[118] The court found that venues and promoters were the true direct purchasers and would therefore be the rightful plaintiffs if a proper suit was to be filed.[119] The plaintiffs appealed, and the Eighth Circuit affirmed the lower court's dismissal in part.[120]

The Eighth Circuit rejected the plaintiffs' argument that ticket purchasers were direct purchasers and characterized the fees paid for the ticket as an "antecedent transaction" that occurred after the direct transaction.[121] Additionally, the court noted that indirect purchaser status does not bar plaintiffs from seeking injunctive relief under Section 16 of the Clayton Act.[122] In sum, the *Campos* decision limited consumers' ability to seek a remedy when there was a third party between the buyer and seller.[123] Some believe that if *Campos* were heard today, after the ruling in *Apple*, the ticket purchasers in *Campos* would have standing.[124]

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[118] *In re* Ticketmaster Corp. Antitrust Litig., 929 F. Supp. 1272, 1277 (E.D. Mo. 1996) (stating that, even though the ticket purchaser plaintiffs suffered damages, they had no standing because the venues were the "target" of the anticompetitive activity, not the ticket purchaser plaintiffs), *aff'd in part, vacated in part, rev'd in part sub nom.* Campos v. Ticketmaster Corp., 140 F.3d 1166 (8th Cir. 1998).

[119] *Campos*, 140 F.3d at 1171. The court noted that indirect purchaser status bars a plaintiff from seeking monetary damages, but it does not bar plaintiffs from seeking injunctive relief under Section 16 of the Clayton Act. *Id.* at 1172.

[120] *Id.* at 1171–72.

[121] *Id.* at 1169 (defining an "antecedent transaction" as one made by an indirect purchaser who assumes the strain of a monopoly overcharge further down the chain of production due to the prior exchange connecting the monopolist and another independent direct purchaser). In his dissent, Judge Morris Sheppard Arnold criticized the use of the term "antecedent transaction" because it was not used in any other authorities and should not turn all buyers of monopolized products into indirect purchasers under *Illinois Brick. Id.* at 1174 (Arnold, J., dissenting).

[122] *Id.* at 1172 (majority opinion). This standard has been applied by lower courts to disincentivize commercial antitrust enforcement. *See* Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of* Illinois Brick *in Modern Antitrust Standing Analysis*, 68 GEO. WASH. L. REV. 1, 18–27 (1999) (explaining how lower courts differ as to whether a plaintiff has a right to injunctive relief under Section 16 of the Clayton Act based on the courts' geographic locations, which can determine whether they choose to interpret the *Illinois Brick* standard narrowly or broadly).

[123] *See* Richard Hardack, *What They Don't Want You to Hear: Beltone, Ticketmaster, and Exclusive Dealing*, 9 B.U. J. SCI. & TECH. L. 284, 313–14 (2003) (mentioning that the holding in *Campos* enables monopolist companies to continue monopolistic practices as long as the anticompetitive practices incorporate an agreement joining vertical non-competitors).

[124] *See* Mitchell, *supra* note 82, at 6, 12–14 (arguing that the reasoning utilized in *Apple* would have led to a different outcome in *Campos* had the case been brought today, such that it would not have been dismissed for lack of consumer standing).

2. Challenges to the Ticketmaster Merger with Live Nation

On January 25, 2010, the Department of Justice and nineteen states challenged the proposed merger of Live Nation and Ticketmaster.[125] The plaintiffs argued that the proposed merger would violate Section 7 of the Clayton Act because it would substantially reduce competition among those providing primary ticketing services to major concert venues.[126] In their complaints, the plaintiffs stated, and the Department of Justice predicted, that the merger would eliminate competition for primary ticketing services at major concert venues.[127]

Despite their initial objections, the plaintiffs agreed to a consent decree and judgment.[128] The consent decree, which was binding for only ten years, required that Ticketmaster grant a perpetual license to its self-ticketing software and divest its entire Paciolan business to two independent companies.[129] Theoretically, this divestiture would create separate businesses that would compete with Live Nation in primary ticket sales to major concert venues.[130] Live Nation also agreed it would not use its dominance in the market to penalize venue owners who used a ticketing service other than Ticketmaster.[131] Those who objected to the merger predicted that the merged companies' dominant position would be so powerful that no competitor would have a chance to succeed.[132]

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[125] Amended Complaint at 5, United States v. Ticketmaster Ent., Inc., No. 1:10-cv-00139-RMC (D.D.C. Jan. 28, 2010).

[126] *See id.* (noting the high concentration of ticketing in major concert venues); *see also supra* note 55 and accompanying text (discussing the restrictions set out in the Clayton Act).

[127] Amended Complaint, *supra* note 125, at 5.

[128] *See* United States v. Ticketmaster Ent., Inc., No. 1:10-cv-00139-RMC, 2020 WL 1061445, at *1 (D.D.C. Jan. 28, 2020). A consent decree in an antitrust action is a proposed resolution that includes structural and behavioral remedies before a judicial determination of liability; essentially, it serves as a settlement. *See* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent* (noting that the Federal Trade Commission ("FTC") has settled 93% of its competition cases since 1995 by way of consent decrees), *in* 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE—*LIBER AMERICORUM* 177–78 (Nicholas Charbit, Elisa Ramundo, Anna Chehtova & Abigail Slater eds., 2013).

[129] *See Ticketmaster Ent., Inc.*, 2020 WL 1061445, at *3 (noting that the divestment of Paciolan into two independent companies included the divestment of all tangible assets that made up the Paciolan line of business and all intangible assets used in the "development, distribution, production, servicing and sale" of the Paciolan software).

[130] *See id.* (explaining that the consent decree set out clear rules, such as prohibiting the two companies from exclusively working together as a single unit providing both venues and ticketing services).

[131] *See id.* (arguing that the consent decree prevented Ticketmaster from competing to provide primary ticketing services to venues, including venues managed by the Ticketmaster Host Platform Acquirer other than those for which the Ticketmaster Host Platform Acquirer controls the rights to select the primary ticketing services provider by virtue of an ownership interest).

[132] *See, e.g.*, Objection to Proposed Consent Judgment at 2–3, United States v. Ticketmaster Ent., Inc., No. 1:10-cv-00139-RMC (D.D.C. June 21, 2010) (arguing that Live Nation was wielding the power derived from its market share so much more fiercely than its competitors that other companies in the same market could not gain footholds in the industry).

Prior to the end of the ten-year term of the original consent decree, the Department of Justice alleged that Live Nation repeatedly violated the decree by retaliating against concert venues that used other ticketing companies.[133] The Department of Justice tried to correct these problems by amending the existing consent decree ("Amended Ticketmaster Consent Decree"), which had been set to expire in 2020, by extending it five more years, appointing a "monitoring trustee," and imposing monetary penalties.[134] Despite the amendment and extension of the original consent decree, however, critics continue to express concern about the challenges to competition presented by Live Nation's grip on the music industry.[135]

3. Attempts to Legislate Solutions to the Problems in the Live Entertainment Industry

Most legislation dealing with the live entertainment industry has addressed issues that primarily affect the ticket end-user, such as ticket scalping.[136] Early attempts by states to regulate ticket scalping were initially unsuccessful and struck down as unconstitutional.[137] Nonetheless, in 1965, in *Gold v. DiCarlo,* the U.S. Supreme Court upheld a decision by the U.S. District Court for the Southern District of New York that New York's anti-scalping law was

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[133] *See* Dave Clark, *Despite Multiple Consent Decree Violations, Live Nation Gets Slap on Wrist from DOJ*, TICKETNEWS (Jan. 14, 2020), https://www.ticketnews.com/2020/01/live-nation-consent-decree-doj-slap-on-wrist [https://perma.cc/WMY5-V5F9] (describing how Live Nation's use of economic duress forced musicians and venue owners to work with the company).

[134] *See Ticketmaster Ent., Inc.*, 2020 WL 106445, at *13–14 (explaining that a "monitoring trustee" is a referee appointed to monitor whether Live Nation and Ticketmaster were complying with the terms of the Amended Consent Decree).

[135] *See* Clark, *supra* note 133. The consent decree was modified in several ways, including an extension of the expiration date of the final judgment to 2025 and a requirement that Live Nation not retaliate against venues that choose a different primary ticketing company. *See Ticketmaster Ent., Inc.*, 2020 WL 1061445, at *8–13 (revising the prior consent decree from 2010).

[136] *See, e.g.*, Better On-line Ticket Sales Act of 2014 ("BOTS Act"), H.R. 708, 114th Cong. (2015) (prohibiting the sale or use of any type of software created to evade a ticket seller's security measures); *see also infra* notes 142–143 and accompanying text (discussing the BOTS Act); *infra* notes 137–140 and accompanying text (discussing state legislation designed to limit scalping).

[137] *See* Tyson & Bro.-United Theatre Ticket Offs. v. Banton, 273 U.S. 418, 429, 445 (1927) (holding that New York did not have the power to regulate the resale prices of entertainment events because the state did not have a "public interest" in such prices), *overruled in part by* Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236 (1941). The *Tyson* Court reasoned that the scalpers, as owners of the tickets, had rights to such property under the due process clauses of the Fifth and Fourteenth Amendments. *Id.* at 429–30. In 1944, in *Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n*, the U.S. Supreme Court criticized the *Tyson* standard, indicating that it had been "discarded" because it was "not susceptible of definition" and was an "unsatisfactory test" for determining when legislation regarding business practices and prices affects the public interest. 313 U.S. 236, 245–46 (1944) (quoting *Nebbia v. New York*, 291 U.S. 502, 531–38 (1934), a case that found that regulation of the dairy industry did not violate the Fourteenth Amendment).

constitutional because regulating entertainment ticket sale prices was a constitutionally permissible objective.[138]

When scalpers moved from the street corners to the internet, various states, including California, Colorado, Minnesota, New York, Oregon, and Tennessee, passed legislation designed to discourage the use of bots.[139] State enforcement, however, proved to be difficult because many scalpers and bots crossed state lines.[140]

In 2016, Congress sought to regulate ticket sales through legislation by amending the Federal Trade Commission Act ("FTC Act"), which prohibits unfair competition methods or acts that affect commerce and gives the Federal Trade Commission ("FTC") the ability to enforce these prohibitions.[141] The FTC Act was amended to include the Better Online Ticket Sales Act ("BOTS Act"), which attempted to prevent the use of bots to purchase tickets on primary market ticket sale platforms by criminalizing the use of bots.[142] Unfortu-

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[138] *See* Gold v. DiCarlo, 380 U.S. 520, 520 (1965) (affirming the decision of the U.S. District Court for the Southern District of New York that the anti-scalping law was constitutional). After *Gold*, courts applied a different test to evaluate laws governing the resale of tickets. *See* Elefant, *supra* note 31, at 20–21 (discussing how most state courts now hold that most anti-scalping laws are both constitutional and enforceable because such laws are "rationally related to legitimate public concern").

[139] *See* CAL. BUS. & PROF. CODE § 22505.5 (West 2023) (prohibiting the use of programs designed to circumvent ticket sellers' security measures); COLO. REV. STAT. § 6-1-720(1)(a*)* (2023) (assessing civil penalties for those who trade or sell software that circumvents ticket sellers' security measures); MINN. STAT. § 609.806 (2023) (making it a misdemeanor to intentionally use or sell software to circumvent "an equitable ticket buying process"); N.Y. ARTS & CULT. AFF. LAW § 25.24 (McKinney 2023) (prohibiting the use of ticket purchasing software to acquire tickets from a primary ticket marketing platform); TENN. CODE ANN. § 39-17-1104(b) (2023) (making it a misdemeanor punishable by fine for anyone to use software that interferes with internet ticket sales); OR. REV. STAT. § 646A.115(2) (2022) (prohibiting the use of software that interferes with the sale of tickets to entertainment events).

[140] *See* Zachary S. Sturman, Note, *Where's the Consumer Harm? The BOTS Act: A Fruitless Boogeyman Hunt,* 22 VAND. J. ENT. & TECH. L. 951, 973 (2020) (discussing how easily online scalpers can evade capture); CLEMENTS, *supra* note 10, at 48 (noting the jurisdictional issues with using state laws to prosecute ticket scalpers who operate over the internet and across state lines).

[141] *See generally* 15 U.S.C. §§ 41–58 (providing for the creation of the FTC). This Act was originally promulgated in 1914 and created the FTC, a body of commissioners appointed by the president for seven-year terms. *Id.* § 41. The FTC is empowered to prevent certain persons and entities from "using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." *Id.* § 45(a)(2). The FTC's predecessor was the Bureau of Corporations, which was created in 1903. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 2 (2003).

[142] *See* 15 U.S.C. § 45c(a)(1) (providing that it is a crime "to circumvent a security measure, access control system, or other technological control or measure on an Internet website . . . used by the ticket issuer to enforce posted event ticket purchasing limits or to maintain . . . purchasing order rules"). The BOTS Act also provides the FTC with the authority to severely fine violators. *Id.* § 45c(b).

nately, this did little to discourage scalpers from utilizing sophisticated bots that can easily evade ticket seller security measures and detection.[143]

Other legislative initiatives have focused on the excess fees—known as "junk fees"—charged by both primary and secondary ticket sellers.[144] For example, the state of Washington recently introduced the Ticket Sales Warrant Integrity, Fairness, and Transparency for Consumer Protection Act ("TSWIFT Consumer Protection Act") that would ban the use of bots and require disclosure of all fees above the ticket's face value.[145]

One piece of legislation designed to modernize antitrust laws and reverse modern trends that have strengthened anti-competitive activity is the Competition and Antitrust Law Enforcement Reform Act of 2021 ("CALERA").[146] CALERA would transfer the burden of demonstrating that the potential merger is not anticompetitive to the merging entities when mergers are valued at more than five billion dollars, when the merger would significantly increase market concentration, or when the acquiring company dominates the market.[147] CALERA would also provide a new standard for determining whether to approve or deny a merger in order to prohibit any mergers that "create an appreciable risk of materially lessening competition."[148] Not only does CALERA deal with

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[143] *See* Sturman, *supra* note 140, at 973 (discussing how easily CAPTCHA technology can be evaded); CLEMENTS, *supra* note 10, at 51 (same); *see also* Press Release, U.S. Department of Justice, Justice Department and FTC Announce First Enforcement Actions for Violations of the Better Online Ticket Sales Act (Jan. 22, 2021), https://www.justice.gov/opa/pr/justice-department-and-ftc-announce-first-enforcement-actions-violations-better-online-ticket [https://perma.cc/7X9S-Z53G] (announcing—more than four years after the BOTS Act was enacted—that the Department of Justice and FTC were bringing enforcement actions under the Act). In its press release, the Department of Justice described how "thousands of tickets" were purchased and resold for "millions of dollars in revenues" by "creating accounts in the names of family members, friends, and fictitious individuals" utilizing "hundreds of credit cards." Press Release, *supra*.

[144] *See, e.g.*, Bourgeois v. Live Nation Ent., Inc., 59 A.3d 509, 530–31 (Md. 2013) (holding that Ticketmaster violated a Baltimore city ordinance that regulated fees charged for ticket sales). The court in *Bourgeois* noted that, at that time, at least eight states had laws like the Baltimore ordinance that regulated fees charged for ticket sales and prohibited charging an amount greater than the face value of the ticket. *Id.* at 515. Notably, after the Maryland Court of Appeals issued this decision, Baltimore's city council repealed the law and replaced it with a new ordinance that permitted entities like Ticketmaster to impose service charges provided they made appropriate disclosures. *See* Bourgeois v. Live Nation Ent., Inc., 3 F. Supp. 3d 423, 433 n.12 (D. Md. 2014) (providing the subsequent history of the case after it had been sent to the Maryland Court of Appeals by the federal court for certification), *as corrected* (Mar. 20, 2014). The Maryland Court of Appeals issued its opinion after the plaintiff filed an action in federal court, which requested certification on issues of first impression. *Id.* at 427, 431–34.

[145] H.B. 1648, 68th Leg., Reg. Sess. (Wash. 2023).

[146] Competition and Antitrust Law Enforcement Reform Act of 2021 ("CALERA"), S. 225, 117th Cong. (2021).

[147] *Id.* §§ 2(b)(4) & 4(b); *see also* Silton et al., *supra* note 55, at 29 (explaining that limiting this rule to high value mergers would apply burden shifting to those entities and provide the government with more flexibility in enforcing the Clayton Act).

[148] *See* S. 225, 117th Cong. § 4(b)(1) (modifying the current standard, which is to deny a merger only if it would substantially lessen competition or create a monopoly). By reducing the burden of

proposed mergers, but it also addresses monopsony conduct that affects labor markets and end users by driving up the cost of labor.[149] Additionally, the ambiguities in the Clayton Act that have led courts to change their standards over the years would be eliminated in that "exclusionary conduct" would be more specifically defined.[150] These modifications would directly impact enforcement of the Ticketmaster-Live Nation consent decree.[151]

II. THE DIVERGING VIEWS ON MODERN ANTITRUST LAW

Routinely, antitrust remedies designed to address monopolies are either structural or behavioral.[152] Behavioral remedies, which are sometimes referred to as conduct remedies, try to force the monopolist to either stop engaging in a particular course of conduct or encourage a monopolist to pursue a particular course of action.[153] For example, the provisions in the Amended Ticketmaster Consent Decree that require Live Nation not retaliate against a venue owner for contracting with another ticketing service are behavioral remedies.[154] On the other hand, structural remedies include actions to force a company to relocate assets or break itself into more than one piece.[155]

Both the Department of Justice and the FTC, two of the major antitrust enforcers, have indicated their predilection for structural remedies because of their relative success rate and uncomplicated nature, as well as such remedies'

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proof on plaintiffs, enforcement authorities would have more discretion to block potentially anticompetitive mergers. Silton et al., *supra* note 55, at 29. Another clarification of current law would be an amendment of the Clayton Act that would prohibit a dominant firm from engaging in conduct that creates an "appreciable risk of harming competition." *See* S. 225, 117th Cong. § 9(a) (amending 15 U.S.C. § 26A(b)(a)).

[149] *See id.* § 2(a)(8) (defining monopsony power). Monopsony arises when there are restraints on employees who have covenants not to compete or "no-poach" provisions in their contracts because these agreements tend to cause stagnant wages and concentrate labor markets. Silton et al., *supra* note 55, at 30. Some legal scholars have expressed concern that some antitrust remedies create or entrench employer monopsony. *See* Hiba Hafiz, *Rethinking Breakups,* 71 DUKE L.J. 1491, 1497–98, 1500 (2022) (urging improvements in antitrust litigation that also take labor concerns into account).

[150] S. 225, 117th Cong. § 2(b)(3) (defining exclusionary conduct as "conduct that (i) materially disadvantages 1 or more actual or potential competitors; or (ii) tends to foreclose or limit the ability or incentive of 1 or more actual or potential competitors to compete").

[151] *See Ticketmaster Hearings*, *supra* note 4, at 8 (statement of Kathleen Bradish, Vice President for Legal Advocacy, American Antitrust Institute) (urging senators to adopt CALERA and stronger enforcement remedies that would address the concerns raised in her testimony).

[152] *See* Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 1961 (2020) (advocating breakups as a favored remedy).

[153] *See* John E. Kwoka, Jr., *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 ANTITRUST L.J. 619, 636 (2013) (describing remedies that instruct entities how to react in the market rather than breaking them up).

[154] United States v. Ticketmaster Ent., Inc., No. 1.10-cv-00139-RMC, 2020 WL 1061445, at *8–9 (D.D.C. Jan. 28, 2020).

[155] *See* ANTITRUST DIV.: U.S. DEP'T OF JUST., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 6 (2011) (explaining that the ultimate structural remedy is breaking up the company).

general avoidance of involvement by other agencies that could further implicate the market.[156]

This Part looks at the different ways antitrust cases have been decided, including enforcement trends and more recent landmark decisions.[157] Section A of this Part discusses support for the current laws and policies of antitrust enforcement.[158] Section B discusses the growing criticism directed towards doctrines that bar plaintiffs from bringing actions because the law applies to outdated business models and does not recognize new online frameworks.[159]

A. Concerns About Aggressive Enforcement of Antitrust Law

There is no shortage of criticism for recent decisions that have expanded the definition of direct purchaser.[160] One such argument is that the *Apple* Court failed to include economic modeling in its assessment of the market.[161] Citing *American Express,* this argument posits that there is no harm posed by vertical restraints on trade if the entity has no market power.[162] Another argument in favor of more lenient antitrust enforcement is that breaking apart assets can harm consumers when such break-ups result in the loss of economies of scale and harm workers.[163] Critics of aggressive enforcement argue that no activity

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[156] *Id.*; *see* Varney, *supra* note 29, at 2 (stating that the monopoly was a market trend).

[157] *See infra* notes 160–161 and accompanying text; ANTITRUST DIV.: U.S. DEP'T OF JUST., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 7 (2004) [hereinafter 2004 MERGER POLICY GUIDE] (describing enforcement philosophy).

[158] *See infra* notes 160–164 and accompanying text.

[159] *See infra* notes 165–168 and accompanying text.

[160] *See, e.g.*, Geoffrey A. Manne & Kristian Stout, *The Evolution of Antitrust Doctrine After* Ohio v. Amex *and the* Apple v. Pepper *Decision That Should Have Been,* 98 NEB. L. REV. 425, 454 (2019) (arguing that the determination in *Apple* was in direct contravention with the holding in *American Express* and that the Court should have both considered the "novel business relationships" between the parties and reconsidered the substantive and procedural antitrust doctrines it applied); *cf.* Mitchell, *supra* note 82, at 1–3 (hailing *Apple* as the appropriate approach to new developments in the digital marketplace).

[161] Manne & Stout, *supra* note 160, at 430, 446–47, 459 (arguing that the Court failed to understand that Apple had a "two-sided business model," with one market being the app user and the other market being the app developer—with Apple's App Store in the middle).

[162] *See id.* (citing Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284–85 (2018)). Applying this concept to *Apple,* it is difficult to imagine how one could argue that Apple does not have market power given that the company has the "ability to lessen or destroy competition," which is the standard set forth in *American Express*. 138. S. Ct. at 2285 (quoting Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965)).

[163] Hovenkamp, *supra* note 76, at 2009–10. Professor Hovenkamp argues that breaking up units of a single company that do not compete with one another does nothing to further competition and creates inefficiencies after the breakup of the constituent parts that may increase costs for consumers. *Id.* at 2010. As an example, Professor Hovenkamp notes that, if a company made 75% of the blenders in the world and 80% of the toasters in the world, breaking apart the two divisions would not change the market share of the two new companies. *Id.* Although monopolies often lead to monopsony given the concentration and firm dominance of monopolistic corporations, this is not always the case, particularly when workers have been able to unionize. *See* Hafiz, *supra* note 149, at 1527, 1541–45 (cit-

other than expanding supply will eliminate consumers' frustration when they are unable to secure tickets to sold-out events.[164]

B. Calls for More Aggressive Enforcement of Antitrust Laws

There is a growing group of critics who argue that the current approach to antitrust law contributes to an imbalance in the market and a pro-defendant bias in the law.[165] Those who hold this view call for the modification of procedural burdens and standards of proof and adopting evidentiary presumptions that would allow consumers to fight predatory practices that come from "monopoly leveraging."[166] One of the roadblocks to advancing more aggressive antitrust policy is "interest-group biases."[167] Yet another problem that has been suggested is that the "rule of reason" should not be confined to horizontal integration cases alone, because there are situations in which a less restrictive test is appropriate to evaluate vertical restraints.[168]

III. PROPOSED SOLUTIONS

This Note concludes that pure reliance on the decision by the U.S. Supreme Court in *Illinois Brick* does not and should not work when dealing with vertical integration.[169] Section A of this Part suggests that, since Ticketmaster's merger with Live Nation, the end user is no longer an indirect purchaser, and, therefore, the standing argument used in *Campos* may no longer apply.[170] Section B of this Part suggests that, because the law has changed since the *Apple* decision, *Campos* may have been decided differently if the reasoning from the *Apple* decision is applied.[171] Section C of this Part discusses why the reasoning

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ing the example of the Bell System breakup in 1984 as contributing to the destruction of the telecommunication workers' union).

[164] *See* CLEMENTS, *supra* note 10, at 51 (noting that lack of supply is the source of much consumer dissatisfaction).

[165] Leydecker, *supra* note 61, at 848 (describing the "Neo-Brandeisian" movement among antitrust scholars who wish to reform current antitrust concepts that have led to pro-defendant biases and limited enforcement).

[166] *Id.* at 867. Critics point to empirical studies that indicate that, in the past thirty years, many mergers have resulted in increased prices. *See* Silton et al., supra note 55, at 28 (citing a study that indicated that, in seventy-five percent of recent merger transactions, prices have increased instead of decreased, and there has been no increase in the quality of the goods or services that would warrant such an increase).

[167] *See* Hovenkamp, *supra* note 76, at 2049 (indicating that consumers are not as well organized as large monopolies and, individually, have less to gain than corporations have to lose).

[168] *Id.* at 2004.

[169] *See infra* notes 174–221 and accompanying text (discussing why *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), a case in which the Supreme Court found that plaintiffs who dealt with a "middleman" could not prevail in an antitrust action, created an outdated standard).

[170] *See infra* notes 174–200 and accompanying text.

[171] See *infra* notes 201–208 and accompanying text.

used in *Illinois Brick* should not be applied in modern vertical integration cases.[172] Section D of this Part sets forth proposed legislative changes.[173]

*A. The Post-*Campos *Merger*

In 1998, in *Campos*, the plaintiffs lacked standing under the court's holding that they were not direct purchasers of Ticketmaster.[174] Nonetheless, since the 2010 merger, the concert venues that the Eighth Circuit suggested could be the true plaintiffs to take on Ticketmaster as direct purchasers have become the same entity the original plaintiffs were attempting to sue.[175] Given that seventy percent of major concert venues are now under Live Nation Entertainment, it follows that the next direct purchaser in the chain would become ticket purchasers.[176]

Accordingly, had the plaintiffs in the *Campos* case filed their action after the merger, the *Illinois Brick* standard would no longer be a barrier to standing because the plaintiffs purchased the tickets from the same entity that owned the concert venue, namely Live Nation.[177] The change in venue ownership eliminated the argument that the venue owner was a "middleman" between the end user and Ticketmaster.[178] Nonetheless, when an entity dominates an industry

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[172] *See infra* notes 209–216 and accompanying text.

[173] *See infra* notes 216–221 and accompanying text.

[174] *See* Campos v. Ticketmaster Corp., 140 F.3d 1166, 1171 (8th Cir. 1998) (reasoning that the plaintiffs had no standing because the end-user's inability to buy tickets from someone other than Ticketmaster was the result of the venues' inability to buy Ticketmaster's services from anyone else first), *cert. denied*, 525 U.S. 1102 (1999) (mem.). At the time of the *Campos* ruling, Ticketmaster had exclusive rights to telephonically distribute tickets at retail outlets and at the venue, but these venues were not owned by Ticketmaster. *Id.* Notably, this was before Ticketmaster had developed its "print-at-home" technology, and, therefore, tickets could only be procured in this manner. *See supra* note 25 and accompanying text (discussing the development of "print-at-home" technology).

[175] *See Campos*, 140 F.3d at 1171 (emphasizing that standing was based on direct purchasing and not "derivative dealing," which the court described as an indicator of indirect purchaser status). The court went on to opine that direct purchaser status is a threshold requirement for a plaintiff to bring suit under the antitrust laws. *Id.*

[176] Corrado Rizzi, *Live Nation, Ticketmaster Hit with Antitrust Class Action Over Alleged Market 'Stranglehold,'* CLASSACTION.ORG (Jan. 7, 2022), https://www.classaction.org/news/live-nation-ticketmaster-hit-with-antitrust-class-action-over-alleged-market-stranglehold [https://perma.cc/58DA-MTTT].

[177] *See Campos*, 140 F.3d at 1171 (relying on separate ownership by the venue owners to deny standing); *supra* notes 19–21 and accompanying text (discussing Live Nation's venue acquisitions).

[178] *See id.* (reasoning that venue owners were the middlemen between Ticketmaster and end users). This reasoning was advanced by the *Campos* court even though the plaintiff paid Ticketmaster directly for the tickets. *Id.* The dissent in *Campos* disagreed with the majority's logic, noting that, under *Illinois Brick*, a defendant can challenge standing only if the "antecedent transaction" in a direct vertical chain of transactions results in a passing on of monopoly damages from the direct purchaser to the indirect purchasers. *Id.* at 1174 (Arnold, J., dissenting).

through vertical integration, it creates a market dynamic that pushes competitors out of the market and makes the market anticompetitive.[179]

The problems with vertical integration, particularly in the entertainment industry, are demonstrated by the similarities between Live Nation's current dominance over the live entertainment industry and the studio system of the 1940s.[180] The studio system controlled the supply chain from creation of a film through distribution and then to the sale of tickets to consumers at the studio-owned theaters.[181] Similarly, Live Nation manages many artists, promotes their concerts, controls the venues, and ultimately sells the tickets to consumers.[182] One difference between the studio system and the Live Nation monopoly is that consumers suffer from variation in concert ticket prices.[183] The studio system created a monopoly that impaired competition in the movie industry, and Live Nation's merger with Ticketmaster has created a monopoly that has impaired competition in the live entertainment industry, damaging not only consumers, but also artists, promoters and venue owners.[184]

Live Nation's 2021 Annual Report set out its position regarding competition in the entertainment market.[185] Although the report names certain companies that compete in the promotion industry, companies that operate competitive venues, and companies that engage in secondary ticketing, none of these

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[179] *See* T.J. Hunt, Note, *Increasing Competition in Live Music: The Case for Better Enforcement of the Live Nation Entertainment Consent Decree,* 71 CLEV. ST. L. REV. 269, 280 (2022) (addressing the CEO of Ticketmaster's comment on the merger, which he described as filling in obvious supply chain inefficiencies); Alfred Branch, Jr., *Ticketmaster/Live Nation Merger: Companies Grilled by Skeptical Senators*, TICKETNEWS, https://www.ticketnews.com/2009/02/ticketmasterlive-nation-merger-companies-grilled-by-skeptical-senators [https://perma.cc/3Q2J-XKKB] (Jan. 27, 2010) (describing concerns regarding the complete vertical integration model presented by the merger).

[180] *See* Micah Loweinger, "*Too Big to Fail?*", WNYC STUDIOS (Feb. 3, 2023), https://www.wnycstudios.org/podcasts/otm/episodes/on-the-media-too-big-fail [https://perma.cc/XUE3-XZL4] (discussing the similarities between the antitrust issues of movie studios during the "golden age of Hollywood" and the recent Ticketmaster-Live Nation issue). In the 1930s and 1940s, studios would own theaters and show their own films in these locations, but independent theaters were forced to buy films from the studios in blocks that would contain one popular film and a number of other films with unknown actors and questionable plots. *Id.* This practice was referred to as "block booking" and was prohibited by the 1948 Paramount Decrees. *Id.* By putting an end to "block booking," each film had to compete on its own merits, and film quality generally improved. *Id.*

[181] *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 140 (1948) (describing the studio system of the 1940s). World War II slowed down the progress of the *Paramount Pictures* case, which is why it took ten years for the case to reach the U.S. Supreme Court. Loweinger, *supra* note 180.

[182] *See* Hunt, *supra* note 179, at 283 (arguing that Live Nation's control of artists, promoters, venues, and ticket sales has created a vertical integration).

[183] *Id.* at 278–79 (explaining that tickets to Bruce Springsteen's 2009 concert ranged from $200 to $5,000 when they had a face value of $54).

[184] *Id.* at 283 (describing how the merger created music supply chain inefficiencies because artists were forced into long-term agreements for management and promotion, which then compelled them to enter into exclusive contracts with Live Nation for venues with exclusive ticketing agreements with Ticketmaster).

[185] 2021 Annual Report, *supra* note 12, at 10–11.

companies do business in more than one of these sectors.[186] Live Nation says in their mission statement that they are the biggest live music manufacturer on the planet due to their exclusive booking rights for, or equity interest in, 289 venues.[187] Add to that their claim to be the world's best live entertainment ticketing sales and marketing company, and the elements of vertical integration come into focus.[188]

Live Nation has vertically integrated by acquiring the live music industry's entire supply chain, and this development may well remove the standing barriers that prohibited the *Campos* plaintiffs from proceeding because the ticket purchaser is now buying directly from Ticketmaster.[189] By capturing vast swaths of the market from management, to promotion, to venue ownership, and ticket sales, Live Nation touches every aspect of the concert business between the artist and the consumer.[190] Although its market share is not one hundred percent, its vast size is enough to crush its competition.[191] Further, there are no other companies that can compete because no other company has acquired any level of vertical integration even rivaling that of Live Nation.[192]

Live Nation's monopoly over the concert industry has created an issue not only for new artists beginning their careers, but also for major acts who experience artificial inflation of their shows' ticket prices on the secondary market, where they do not necessarily reap the benefits of the price inflation.[193] Artists who want to perform at larger stadiums or large arenas to accommodate their fan base may find themselves forced to perform in smaller venues owned by

[186] *See id.* (listing competitors who did not have control of any other stage of the live entertainment industry). Vertical integration is defined as the acquisition of control over business operations that involve each phase of a product's creation. Hunt, *supra* note 179, at 282.

[187] *See* 2021 Annual Report, *supra* note 12, at 5–6 (describing Live Nation's goal of dominating every phase of the live entertainment business).

[188] *See id.* at 5 (claiming to be one of the world's leading artist managers).

[189] *See* Mitchell, *supra* note 82, at 6 (noting that the ticket purchasers that buy their tickets directly from Ticketmaster may be direct purchasers under the *Apple* analysis).

[190] *See* HURWITZ, *supra* note 9, at 20 (explaining how the music industry operates); *supra* notes 8–15 and accompanying text (explaining how the live music industry operated before and after the merger). In 2016, in *It's My Party, Inc. v. Live Nation, Inc.*, the plaintiff, a regional concert promoter, alleged that Live Nation systematically used its dominant market power to require that artists perform at its venues and that such a practice was a monopolistic tying arrangement. 811 F.3d 676, 680–81 (4th Cir. 2016).

[191] *Ticketmaster Hearings*, *supra* note 4, at 8–9 (statement of Jerry Mickelson) (discussing how Ticketmaster can crush competition by managing each aspect of the live entertainment business).

[192] *See id.* at 4 (statement of Kathleen Bradish) (testifying that Live Nation's concert promotion market share has grown to 60% since the merger and Ticketmaster has maintained an 80% ticketing market share).

[193] *See, e.g.*, Lawrence, *supra* note 5 (explaining that most artists do not have the benefit of setting their ideal price point for shows, nor do they get more money when a consumer has to buy a severely marked up ticket from a secondary market).

Live Nation.[194] This monopoly forces newer artists to make deals that are often barely profitable.[195]

If current enforcers of antitrust laws, such as the Department of Justice or the FTC, decide to pursue action, they could do so through several different protocols.[196] First, the Department of Justice's Antitrust Division could claim the 2010 merger was illegal and assert that the initial merger enabled a monopoly in the ticket service industry.[197] Although the Antitrust Division did not choose to block the merger in 2010, this does not bar them from looking into legal action currently, particularly if investigation yields findings of abuse of the current Consent Decree.[198]

Another option would involve the FTC filing an action under Section 5 of the FTC Act, which prevents unfair methods of competition.[199] A recent policy statement from the FTC asserts that, if conduct does not quite constitute a vio-

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[194] *Id.* In *It's My Party*, the court observed that national promoters will sometimes structure artist compensation based on the number of shows booked, whereas local promoters will provide the artist with a percentage of ticket sales. 811 F.3d at 680–81. Holding in favor of Live Nation, the court opined that Live Nation's grip on every aspect of the entertainment industry created "synergies" that benefited the public. *Id.* at 690; *Ticketmaster Hearings, supra* note 4, at 1 (statement of Joe Berchtold, President and Chief Financial Officer, Live Nation Entertainment, Inc.).

[195] *See Ticketmaster Hearings, supra* note 4, at 2 (statement of Clyde Lawrence) (describing the profit structure for artists). Mr. Lawrence explained that Live Nation takes rent and facility fees that they are free to set as they wish because the line between venue and promotor is blurred, and, therefore, there is no negotiation to get the best price for the venue. *Id.* After receiving a percentage of sales from Live Nation, artists still have touring costs such as crew, travel, insurance, and accommodations. *Id.* Further, Ticketmaster also taxes a large portion of artists' merchandise sales. *Id.*

[196] *See* Van Loo, *supra* note 152, at 1962 (referencing the Department of Justice's 2004 guidance document, which indicated that the Department of Justice prefers structural remedies because they are less costly and complex than behavioral remedies); *see also* 2004 MERGER POLICY GUIDE, *supra* note 157, at 8 (stating that structural remedies are preferred because of their efficacy, speed, certainty, and cost).

[197] *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 625 (1957) (holding that an enforcement agency may seek a divestiture even decades after an acquisition). In *du Pont*, the Court held that, over thirty years after du Pont acquired stock in General Motors, the government could maintain an action against du Pont under Section 7 of the Clayton Act. *Id*. The term "divestiture" refers to the process of dividing up the business or assets of an entity. *See* Van Loo, *supra* note 152, at 1959 (noting that private divestitures occur frequently in the corporate world when companies spin off a particular division and, although divestiture seems radical in the antitrust context, it is commonplace in the corporate sector).

[198] *See* David McCabe & Ben Sisario, *Justice Dept. Is Said to Investigate Ticketmaster's Parent Company,* N.Y. TIMES, https://www.nytimes.com/2022/11/18/technology/live-nation-ticketmaster-investigation-taylor-swift.html [https://perma.cc/HZ8C-BFRG] (Jan. 24, 2023) (reporting that the Department of Justice opened an antitrust investigation and is looking into Live Nation's practices).

[199] *See* FED. TRADE COMM'N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION 9 (2022) (stating that, pursuant to Section 5 of the FTC Act, the FTC determined it had authority to take action to prevent unfair conduct that negatively affected competition). The FTC's shared jurisdiction over antitrust matters sometimes leads to a clash between the two agencies. *See generally* Kimberly H. Anker, Note, *Best Frenemies: Evaluating the Dual Jurisdiction of the Federal Antitrust Agencies*, 63 B.C. L. REV. 255 (2022).

lation of the Sherman Act, action could be taken under Section 5 when it is coercive or involves economic power of a similar exploitative nature.[200]

B. Reexamining Direct Purchaser Standing Requirements

Analyzing *Campos* in light of the *Apple* decision illuminates just how much the perspective has shifted regarding antitrust doctrine.[201] Arguably, under the *Apple* decision, the *Campos* plaintiffs would have been considered direct purchasers.[202] In *Campos*, the plaintiffs alleged they had direct purchaser status because they purchased tickets directly from Ticketmaster, the ticketing service, and paid Ticketmaster's convenience and service fees.[203] The plaintiffs also asserted that Ticketmaster's exclusive contracts with promoters and concert venues gave them control over the most popular music concerts or venues even if they did not have an exclusive contract with the specific venue.[204]

Likewise, in *Apple*, the plaintiffs argued that they were direct purchasers of Apple products because they paid Apple directly through the Apple App Store for the purchase and download of the apps.[205] As in *Campos*, the monopoly defendant in *Apple* had exclusive control over the product (the iPhone apps), and plaintiffs could not purchase the product anywhere else.[206] Another similarity between *Campos* and *Apple* is that Ticketmaster, like Apple, receives a portion of the purchaser's money.[207] Consequently, it would follow that, under the *Apple* analysis, consumers who purchased tickets from Ticketmaster would qualify as direct purchasers. [208]

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[200] *See* FED. TRADE COMM'N, *supra* note 199, at 9 (explaining that there are two key factors to contemplate when analyzing if conduct exceeds competition on the merits). The FTC recently took incremental action by publishing a request for public comment on a proposed rule that would prohibit "unfair or deceptive practices" relating to junk fees. *See generally* Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77420 (Nov. 9, 2023) (to be codified at 16 C.F.R. pt. 464).

[201] *Compare* Campos v. Ticketmaster Corp., 140 F.3d 1166, 1171 (8th Cir. 1998) (finding that even though the end users—ticket holders—acquired tickets directly from Ticketmaster, they were not direct purchasers), *cert. denied*, 525 U.S. 1102 (1999) (mem.), *with* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2019) (finding that iPhone owners who bought apps directly from the Apple App Store were direct purchasers).

[202] *See* Mitchell, *supra* note 82, at 12 (noting that the similarities between Ticketmaster and Apple's pricing schemes would have established standing for the plaintiffs in *Campos* as direct purchasers).

[203] *Campos*, 140 F.3d at 1171.

[204] *Id.* at 1168–69.

[205] *Apple*, 139 S. Ct. at 1519.

[206] *Id.* at 1520.

[207] *Id.* (noting that Apple received a thirty percent commission on each sale of an app).

[208] *Id.* at 1521. The Court noted in *Apple* that the iPhone customers were not on the bottom rung of a "vertical distribution chain" trying to sue a manufacturer who was "two or more steps removed" from the alleged monopolist. *Id.* The Court also noted that there was "no intermediary between" the iPhone app purchaser and Apple and that this fact was "dispositive." *Id.* at 1521–22. Notably, although the ticket purchasers paid Ticketmaster directly, the court in *Campos* was not persuaded. 140 F.3d at 1171.

C. A New Approach to Vertical Integration Cases

The Court's analysis in *Apple* expanded consumer rights within the *Illinois Brick* standard for antitrust litigation.[209] Although this shift is a positive one for those who wish to combat Live Nation Entertainment's monopoly, it is important to recognize why the *Illinois Brick* test needed adjustment.[210]

Under the *Illinois Brick* analysis, direct purchasers are the only plaintiffs who may file an antitrust suit.[211] The reasoning is reliant on the premise that allowing offensive use of the pass-on defense produced a critical risk of multiple liability for defendants.[212] Additionally, courts such as the *Campos* court pointed to the immense difficulty courts would face regarding the incidence analysis without the *Illinois Brick* standard.[213] The incidence analysis deals with distributing the economic burden between the indirect purchaser and the direct purchaser and determining which one should both be allowed to receive damages.[214] Nonetheless, within a vertical integration, the direct purchaser often feels as much injury as the indirect purchaser down the line.[215] If *Illinois Brick* was less of the standard and more of a defense available to consumers against vertical integration monopolies, courts would not have to dissect the incidence analysis, which involves the very difficult job of calculating how much damages should go to consumers. [216]

D. Proposed Legislative Changes

The Department of Justice's decision to extend the consent order, rather than address the anticompetitive conduct Live Nation Entertainment has engaged in since the 2010 merger, further demonstrates the need for legislative

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[209] *See Apple*, 139 S. Ct. at 1525 (noting that "protecting consumers from monopoly prices" is the primary purpose of antitrust law (citation omitted)).

[210] *See* Daniel R. Karon, "*Your Honor, Tear Down That* Illinois Brick *Wall!" The National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice*, 30 WM. MITCHELL L. REV. 1351, 1355 (2004) (discussing how consumer rights under the Sherman Act were eroded by the holdings in *Hanover Shoe* and *Illinois Brick*).

[211] Ill. Brick Co. v. Illinois, 431 U.S. 720, 724–26 (1977).

[212] *See id.* at 730 (reasoning that multiple defendants could use the same argument to sue for the same offense).

[213] Campos v. Ticketmaster Corp., 140 F.3d 1166, 1172 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999) (mem.).

[214] *Id.* at 1170.

[215] *See id.* (finding that, when a monopoly overcharges for its products, such overcharges damage "those who deal directly and those who deal derivatively with the monopolist").

[216] *See* Hardack, *supra* note 123, at 318 (noting that courts need to speak to real, rather than conceptual, market conditions that arise from vertical restraints in the marketplace). Ticketmaster's monopoly lies with its long-term exclusivity contracts with venues, which prevent all competition. *See id.* at 317 (finding that "[g]iven the way Ticketmaster structures its vertical monopolies, anticompetitive collusion only makes sense with vertical non-competitors").

action.[217] Most legislation directed at the ticket industry has only addressed how bots and excess fees have increased the end-price for consumers, without taking into account the anti-competitive nature of the live entertainment industry.[218] Currently, there is legislation being proposed by Senator Amy Klobuchar—the aforementioned Competition and Antitrust Enforcement Reform Act ("CALERA")—that advocates for modernized legal standards regarding mergers that recognize the complexities of the online marketplace.[219] This would shift the burden of proving the merger would not violate antitrust laws and protocols to the parties seeking to obtain the proposed merger.[220] Additionally, adoption of this bill would require monetary fines for violations incurred, as well as an annual reporting review be sent to the FTC after mergers of certain sizes occur.[221]

CONCLUSION

The Department of Justice should not have allowed the merger that created Live Nation Entertainment. The live music and entertainment industry is evolving and becoming increasingly busy as people attempt to return to pre-pandemic activities. Ensuring that there is viable competition through antitrust standards in the industry has never been more important given the increasing demand for live entertainment. If Taylor Swift's "Eras Tour" ticket fiasco proved anything, it is that the restrictions placed on the merger have not been sufficient in preventing Live Nation Entertainment from forcibly pushing out competitors, creating a vertical monopoly that has limited consumers ability to choose from whom they buy tickets and forced artists and promoters to go into business with the company. This behavior is hampering consumers' ability to access art and limiting artists' ability to receive compensation in return for their hard work.

Congress should enact legislation that gives more enforcement power to agencies such as the FTC and the Department of Justice. Additionally, legislation would ensure that the burden is on merging companies to prove they are capable of merging without violating antitrust laws. This sort of legislation is in the best interest of consumers, artists, and the public, as it ensures the prices

[217] *See Ticketmaster Hearings*, *supra* note 4, at 2, 8 (statement of Kathleen Bradish) (urging members of the Senate Judiciary Committee to update, clarify, and strengthen existing antitrust laws to support more aggressive enforcement).

[218] *See supra* notes 136–132 (discussing legislative action taken to date).

[219] *See* Competition and Antitrust Law Enforcement Reform Act of 2021 ("CALERA"), S. 225, 117th Cong. § 2(a)(15) (2021) (acknowledging that recent court decisions and enforcement policies have weakened the Clayton Act).

[220] *Id.* § 2(b)(4).

[221] *Id.* § 2(b)(6).

of attending live entertainment are not inflated by anticompetitive practices resulting from improper enforcement of antitrust laws.

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