Solving the Housing Puzzle

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This Comment analyzes the entrance of institutional investors into the single-family rental market after the Great Recession of 2008. The collapse of the housing market during the Great Recession fundamentally changed the ownership structure of U.S. single-family homes in two distinct ways. First, the number of families renting single-family homes soared. And second, institutional investors entered the single-family home market, buying many homes and converting them into rental properties. This postrecession reality has introduced a housing puzzle: the pricing trends of single-family rentals in the decade after the Great Recession suggest that institutional investors have captured monopolistic power over the single-family rental market despite owning a relatively small market share. Thus, this Comment evaluates the housing puzzle through the lens of antitrust law.

While a potential antitrust case appears to suffer from the critical weaknesses of low entry barriers and market shares, analyzing institutional entrance into the single-family rental market under antitrust merger doctrine reveals that the case is stronger than it may initially seem. Although it is hard to envision a successful antitrust lawsuit against institutional investors today, there are reasons to believe these weaknesses will disappear if these market trends continue tomorrow. Furthermore, scrutinizing the entrance under alternative merger theories, such as the unilateral or coordinated effects theories, illustrates that a Clayton Act case would be more impactful than originally thought.

After evaluating the antitrust case, this Comment considers how the housing market can instruct antitrust doctrine's further evolution, since commentators across academia, the media, and politics all criticize institutional entrance. By highlighting how unique market facts in housing obfuscate market power, this Comment suggests expanding the merger analysis to include not just levels and changes in concentration, but also orders of magnitude.

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INTRODUCTION

Ownership of the single-family home is the linchpin of the American Dream. The symbolic importance of individuals purchasing their own single-family homes has led lawmakers to enact a myriad of laws promoting and protecting the practice, often at the expense of other land-use arrangements, such as renting.[1] Lawmakers have zoned large swaths of land exclusively for single-family homes;[2] passed regulatory schemes lowering taxes for homeowners;[3] and enacted legislation to offer prospective homeowners low fixed mortgage rates.[4] The conceptual importance of, and the perceived financial security provided by, homeownership

[1] *See generally* Sarah Schindler & Kellen Zale, *The Anti-Tenancy Doctrine*, 171 U. PA. L. REV. 267 (2023) (canvassing the various laws that privilege ownership relative to tenancy and the origin of those policies).

[2] *See id.* at 277–78.

[3] *See id.* at 339–43.

[4] *See id.* at 286–90.

contributed to the growth and subsequent popping of the housing bubble in the late 2000s.[5]

Although certain scholars take issue with legislators' preference for single-family home ownership, most agree that this legislation has succeeded in its goal to reinforce the importance of these homes.[6] Recent research has found that "owner-occupied housing was the most important household asset in the average portfolio breakdown for all households . . . accounting for 26.9 percent of total assets."[7] In fact, homeownership has long been recognized as one of the most effective ways to build lifelong wealth.[8]

The collapse of the housing market during the Great Recession fundamentally changed the ownership structure of U.S. single-family homes in two distinct ways. First, the number of families renting single-family homes soared, jumping nearly 17% from 11.3 million renters in 2007 to 13.2 million renters in 2011.[9] Second, institutional investors entered the single-family home market, buying many homes and converting them into rental properties.[10] This led to a significant drop in real estate–owned inventories by the end of the Great Recession.[11] Although house prices before the recession were wildly inflated, a group of institutional investors believed that the depressed prices at the end of

5 *See* Marius Jurgilas & Kevin J. Lansing, *Housing Bubbles and Homeownership Returns*, FED. RSRV. BANK OF S.F. 3 (June 25, 2012), https://perma.cc/L6W3-GKFG (describing how optimism driven by consumer belief that housing prices would continue to skyrocket led to the Great Recession).

6 *See, e.g.*, Schindler & Zale, *supra* note 1, at 288–89 (reporting the observation of one realtor that "[i]t's a terrible time to buy, but it's an even worse time to rent").

7 Edward N. Wolff, *Household Wealth Trends in the United States, 1962 to 2019: Median Wealth Rebounds . . . But Not Enough*, 14, 25 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28383, 2021).

8 *See, e.g.*, Jenny Schuetz, *Rethinking Homeownership Incentives to Improve Household Financial Security and Shrink the Racial Wealth Gap*, BROOKINGS INST. (Dec. 9, 2020), https://perma.cc/W3V7-JU5S ("Since the mid-20th century, the U.S. has primarily relied on homeownership as a strategy for middle-income households to build wealth. For households in the three middle-income quintiles, home equity is the largest single financial asset, representing between 50% and 70% of net wealth.").

9 *See* Calvin Schnure, Single Family Rentals: Demographic, Structural and Financial Forces Driving the New Business Model 19 (Mar. 31, 2014) (unpublished paper) (available on SSRN). On this point, there was notable variation across the United States in the increase in renters' share of single-family homes. For example, from 2007 to 2010, single-family home rentals increased by almost 50% in Phoenix, Arizona, but dropped 2% in Jacksonville, Florida. *See id.* at 20.

10 *See* James Mills, Raven Molloy & Rebecca Zarutskie, *Large-Scale Buy-to-Rent Investors in the Single-Family Housing Market: The Emergence of a New Asset Class*, 47 REAL EST. ECON. 399, 406–08 (2019).

11 *See* Sam Khater, *The Rise of Institutional Investors and the Decline of REOs*, 2 THE MARKETPULSE, no. 3, Mar. 2013, at 3, 3.

the downturn represented a historic buy-low opportunity.[12] Following the housing market collapse, these opportunistic institutional investors began buying up large numbers of these single-family properties, adopting a novel business model to convert these homes into rental properties. These dual forces created a new reality for the real estate economy.

This post-recession reality has introduced a housing puzzle. The pricing trends of single-family rentals in the decade after the Great Recession suggest that institutional investors have captured monopolistic power over the single-family rental market despite owning a relatively small market share.[13] Additionally, institutions also seem to have monopsonistic power in the single-family purchasing market because it has become difficult for individuals to afford single-family homes.[14] Those worried about monopoly power in the single-family rental market point to skyrocketing rents in single-family home rentals after institutions entered the market.[15] Yet the simple story of heightened demand for rentals outpacing supply presents just a partial explanation; additional research suggests that this is due to market power accumulated by the institutional investors who purchased these homes.[16] As defenders of these institutions point out, however, institutional investors own a relatively small share of single-family rentals

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12 *See* Walter D'Lima & Paul Schultz, *Buy-to-Rent Investors and the Market for Single Family Homes*, 64 J. REAL EST. FIN. & ECON. 116, 118–20 (2022).

13 *See, e.g.*, Umit G. Gurun, Jiabin Wu, Steven Chong Xiao & Serena Wenjing Xiao, *Do Wall Street Landlords Undermine Renters' Welfare?*, 36 REV. FIN. STUD. 70, 75 (2022).

14 *See* Ronda Kaysen & Ella Koeze, *What Happens When Wall Street Buys Most of the Homes On Your Block?*, N.Y. TIMES (Sept. 16, 2023), https://www.nytimes.com/interactive/2023/09/16/realestate/home-sales-north-carolina-wall-street.html ("'It's a thing of scale—they're reaching near monopoly in some places,' said Madeline Bankson, a housing research coordinator at the nonprofit Private Equity Stakeholder Project. 'They're shutting people out of the home-buying process.'"). This trend may help these institutions entrench their market power in the former market.

15 *See* Jonathan O'Connell, Peter Whoriskey & Kevin Schaul, *At Invitation Homes, Unpermitted Work Leaves Leaky Plumbing, Faulty Repairs, Renters Say*, WASH. POST (July 12, 2022), https://perma.cc/S857-C9JJ.

16 *See, e.g.*, Jacob Linger, Hal Singer & Ted Tatos, Does Lack of Competition Exacerbate Inflation? A Case Study of Florida Rental Markets 18 (Dec. 6, 2022) (unpublished paper) (available on SSRN); Elora Raymond, Richard Duckworth, Ben Miller, Michael Lucas & Shiraj Pokharel, *Corporate Landlords, Institutional Investors, and Displacement: Eviction Rates in Single-Family Rentals* 3–6 (Fed. Rsrv. Bank of Atlanta, Cmty. & Econ. Dev. Discussion Paper No. 04-16, 2016); Lauren Lambie-Hanson, Wenli Li & Michael Slonkosky, *Leaving Households Behind: Institutional Investors and the U.S. Housing Recovery* 17–18 (Fed. Rsrv. Bank of Phila., Working Paper No. 19-01, 2019).

compared to the market share typically enjoyed by traditional monopolies or oligopolies.[17] This apparent paradox has prompted Invitation Homes, the largest institutional player in the single-family home market nationally, to prophylactically disclaim any notion of market power in 2021.[18]

Much has changed in the two years since Invitation Homes issued that disclaimer. Whereas previously, the company owned less than 1% of the single-family homes in any metropolitan area, it now owns roughly 10% of the single-family rentals in metro Atlanta.[19] Atlanta is notable because institutional entrance has transformed the city's single-family housing market perhaps more than any other area in the country. Still, despite these trends, the market shares of these institutional investors appear too low to suggest monopolistic power.[20] These trends reinforce the housing puzzle: How can these institutions demonstrate such profitable market power despite their relatively low market shares?

The paradox of perceived market power at low market shares presents a dilemma for judges and policymakers. Antitrust law is

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[17] *See* Alexander Hermann, *8 Facts About Investor Activity in the Single-Family Rental Market*, JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV. (July 18, 2023), https://perma.cc/VH3R-LW54 ("[I]nvestors with at least 1,000 properties owned just 2 percent of small rental properties (single-family homes and multifamily structures with 2–4 units), though 12 percent of properties owned by some corporate entity.").

[18] *Our Share of the U.S. Housing Market*, INVITATION HOMES (May 7, 2021), https://perma.cc/78BT-BJKU:

> We are occasionally asked if the size of our portfolio has an impact on the housing prices and availability in our markets. The reality is that we own just a small percentage of the rental options and an even smaller percentage of the overall housing units in any market. In fact, we own less than 1% of the single-family detached homes in every market we operate in. Going deeper, comparing our home count to the total number of single-family detached homes per U.S. Census data, our homes make up anywhere from 0.1%–0.8% of single-family detached homes in the 16 markets we operate in.

[19] *See* Brian Eason & John Perry, *American Dream for Rent: Investors Elbow Out Individual Home Buyers*, ATLANTA J.-CONST. (Feb. 9, 2023), https://perma.cc/9PWQ-CAK4. This article states that 5.6% of all single-family houses in the Atlanta metro area were owned by investment firms. Note, however, that over half of all single-family homes are rentals, implying that around 10% of single-family rentals in the Atlanta area are institutionally owned. *See* Emily Maracle, *Atlanta Single-Family Rental Forecast 2023*, VIRTUANCE MKT. FORECASTS (Feb. 8, 2023), https://perma.cc/CQ3Y-RUS3 ("In February 2023, it's estimated that 55% of homes in Atlanta were renter-occupied.").

[20] Contrast the roughly 10% number with the 30% threshold proposed by the Supreme Court. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 364 (1963) ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.").

the traditional legal tool used to combat consumer harm stemming from rising market power. However, to sustain an antitrust case under modern doctrine, a plaintiff often needs to demonstrate that the defendant possesses a large share of the market.[21] As a result, if a firm wields market power with low market share, antitrust doctrine may not provide a remedy. In the single-family rental context, low entry barriers and lower market shares represent two critical weaknesses in an antitrust case. This result is unsatisfying because institutional entrance into housing represents, in many ways, the exact situation in which one might want the law to act to protect consumers' interests.

Defenders of modern antitrust doctrine and those of institutional ownership both argue that the inapplicability of antitrust law in the market for single-family homes is a feature rather than a bug. They argue that antitrust law is a poor fit for the evolving single-family home market because rising rents stem from economic phenomena other than the acquisition of market power.[22] While market power is one reason prices may increase, increases in demand or decreases in supply also represent possible explanations. Furthermore, both alternative explanations find support in the housing-market data.[23]

Despite these defenses, market power appears to play a role in rising single-family rents. There is a budding literature documenting the impacts of market concentration on these highly localized housing markets,[24] including a causal link between high market concentration and rising rents.[25] Thus, this Comment explores why the single-family housing market may require a different approach to assessing monopolistic power than traditional antitrust doctrine. Specifically, housing's unique market structure exposes the single-family rental market to monopolistic power at lower market shares. Markets are far narrower than de-

21 *See infra* Part II.

22 *See infra* Part I.A.3.

23 *See infra* Part IV.A.

24 Market concentration measures the distribution of market shares between firms in an industry, representing a proxy for competition between firms. An industry of two firms each controlling 50% of the market is far more concentrated—and thus less competitive—than an industry with five firms each with 20% of the market. One popular example of a market concentration measure is the Herfindahl-Hirschman Index, which measures market concentration by summing the squares of the market shares of each firm. *Herfindahl-Hirschman Index*, ANTITRUST DIV., U.S. DEP'T OF JUST. (Jan. 17, 2024), https://perma.cc/D7GM-Z5LX.

25 This evidence is catalogued in the background section in Part I.A.

fenders of institutional investors imply: while the market analysis is often done at the national or metro area level, research on migration trends in the United States suggest that the relevant geographic markets are much smaller.[26] Additionally, the structure of the housing market also obfuscates institutions' monopoly power altogether by allowing them to exercise control over traditional notions of supply and demand. The single-family housing market differs from typical markets because institutions interact with consumers across two dimensions. In the first stage, institutions compete with individuals in the home-buying market. Afterward, in the second stage, institutions turn around and immediately rent these homes to consumers.

Evaluating the housing puzzle through the lens of antitrust is additionally important because current trends suggest that antitrust violations may be cognizable in the not-so-distant future. Consider again the fact that Invitation Homes' market share of the Atlanta metro area single-family rental market has gone from less than 1% in 2021 to about 10% today.[27] This order-of-magnitude jump is only the beginning. Industry experts now believe that by 2030, institutional ownership of single-family homes may jump to 40%, multiplying their existing market share by a factor of eight.[28] Additionally, the recent judgment against the National Association of Realtors—for violating § 1 of the Sherman Act[29] by agreeing to fix prices by setting member agents' commissions between 5% and 6%[30]—indicates an appetite for housing-based antitrust cases by plaintiffs and a willingness to entertain these cases by judges and juries.

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26 *See infra* Part III.B.1.

27 *See supra* note 19 and accompanying text.

28 *See* JEFF ADLER, PAUL FIORILLA, DOUG RESSLER & CASEY COBB, YARDIMATRIX, BUILD-TO-RENT FUELS GROWTH IN INSTITUTIONAL SINGLE-FAMILY RENTAL MARKET 1 (2022) (reporting on MetLife Investment Management's projection "that by 2030, institutions will increase [single-family rental (SFR)] holdings to 7.6 million homes, more than 40% of all SFRs"); *see also* Carlos Waters, *Wall Street Has Purchased Hundreds of Thousands of Single-Family Homes Since the Great Recession. Here's What that Means for Rental Prices*, CNBC (Feb. 21, 2023), https://perma.cc/6M26-RLTA (noting that, according to MetLife Investment Management, "[l]arge institutions owned roughly 5% of the 14 million single-family rentals nationally in early 2022").

29 15 U.S.C. §§ 1–7.

30 *See* Jury Verdict, Burnett v. Nat'l Ass'n of Realtors, 2023 WL 11666529 (W.D. Mo. Oct. 31, 2023); Debra Kamin, *Home Sellers Win $1.8 Billion After Jury Finds Conspiracy Among Realtors*, N.Y. TIMES (Oct. 31, 2023), https://www.nytimes.com/2023/10/31/realestate/nar-antitrust-lawsuit.html.

Finally, while researchers[31] and legislators[32] have formulated policy solutions to address these growing concerns, antitrust law represents a vehicle to redress the already-realized consumer harm resulting from the anticompetitive effects of market concentration. These potential injuries go beyond mere price hikes. For example, a report by the Federal Reserve Bank of Atlanta in 2016 found that large corporate owners of single-family rentals are 8% more likely to file eviction notices.[33] This is especially consequential because eviction courts frequently mistreat tenants.[34] Additionally, an antitrust claim might warn institutional investors to exercise caution when participating in markets that involve the essential needs of individuals. Such a warning could prophylactically protect other essential markets in the future.[35]

The housing puzzle can instruct future development in antitrust doctrine. Policymakers and legal advocates can scrutinize what exactly makes commentators across industries so uncomfortable with the current reality of the single-family housing market and remedy weaknesses currently plaguing the doctrine. In this way, the housing puzzle can help instruct the current discourse regarding the new merger guidelines issued by the Federal Trade Commission (FTC) and Department of Justice (DOJ) articulating the government's approach to antitrust cases in mergers and acquisitions.[36] On one hand, the housing puzzle represents a clear example of monopolistic power in environments of lower market shares. At the same time, the housing puzzle also gives

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31 *See* INGRID GOULD ELLEN & LAURIE GOODMAN, HAMILTON PROJECT, SINGLE-FAMILY RENTALS: TRENDS AND POLICY RECOMMENDATIONS 17–21 (2023) (recommending adoption and enforcement of rental registries, increased requirements on large investors, and improving renovation financing for owner-occupants).

32 For example, there are bills in both the House and the Senate to address these problems. *See* End Hedge Fund Control of American Homes Act, S. 5151, 117th Cong. (2022); Stop Wall Street Landlords Act of 2022, H.R. 9246, 117th Cong. (2022).

33 *See* Raymond et al., *supra* note 16, at 17.

34 *See* Judith Fox, *The High Cost of Eviction: Struggling to Contain a Growing Social Problem*, 41 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 167, 185–87 (2020) (mentioning that tenants in small claims eviction courts have as little as two to three minutes to defend themselves).

35 *See, e.g.*, John M. Barrios & Thomas G. Wollmann, *A New Era of Midnight Mergers: Antitrust Risk and Investors Disclosures* 26–27 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29655, 2022) (documenting institutional investor entrance in essential markets such as grocery stores, building maintenance companies, and collection agencies).

36 U.S DEP'T OF JUST. & FED. TRADE COMM'N, 2023 MERGER GUIDELINES (2023) [hereinafter DOJ & FTC, 2023 MERGER GUIDELINES]; *Justice Department and Federal Trade Commission Release 2023 Merger Guidelines*, U.S DEP'T OF JUST. (Dec. 18, 2023), https://perma.cc/6UAV-ZMVL ("[T]he 2023 Merger Guidelines are not themselves legally binding, but [they] provide transparency into the agencies' decision-making process.").

credence to the argument that concentration is important but that courts should look at concentration more expansively. It emphasizes the need to update the conception of market concentration in the doctrine, adopting one that goes beyond levels and deltas but looks at changes in orders of magnitude: a firm that consolidates a large market share in an industry of only dispersed competitors changes that market more than one that consolidates the same market share in an industry of big players.

The rest of this Comment is structured as follows. Part I provides background and an overview of the single-family housing market and explains the origin of the housing puzzle, focusing mainly on Atlanta as a case study. Part II details the history and purpose of antitrust law and lays out the primary causes of action under the statutes. Part III analyzes the potential antitrust claims against the institutions and discusses their viability. Finally, Part IV analyzes other possible economic-based explanations for the housing puzzle.

I. THE SINGLE-FAMILY HOUSING MARKET

This Part catalogs the history of the modern housing market. While single-family rentals existed before the Great Recession, an unprecedented amount of owner-occupied single-family homes were converted into rentals during the housing crisis. Part I.A documents this change by providing background on why and how institutional investors entered the single-family rental market. Part I.B then describes the state of the single-family rental market today. Part I.C subsequently lays out the housing puzzle—where institutional investors counterintuitively wield market power at low market shares—and Part I.D looks to the Atlanta metro area as a case study.

A. How the Great Recession Changed the Housing Market

Throughout most of U.S. history, single-family homes have been occupied by their owners.[37] This trend continued until the Great Recession: only about 10% of single-family homes were rented out to tenants in 2007, before the 2008 housing crisis began.[38] Almost all of these rentals were managed not by institu-

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[37] *See generally* Schnure, *supra* note 9.

[38] *See id.* at 1.

tions, but by individuals who purchased a second home to leverage as an investment good.[39] Until 2011, no institutional or individual investor owned more than one thousand single-family homes.[40] As a result, much of the research into single-family homes focused on the individual's choice to buy or rent.[41] Although the single-family housing market had experienced decades of stability up until the late 2000s, the combination of the Great Recession and technological advancement changed individuals' and investors' approaches and perceptions of the market.

1. The entrance of institutional investors in the single-family housing market.

The Great Recession was the engine driving the change in the single-family home market, starting with homeowners nationwide foreclosing on loans they could no longer afford.[42] Furthermore, the crisis converted many homeowners into home renters, driving up demand in the rental market.[43] After all, "[e]ach distressed single-family liquidation creates a potential renter household, as well as a potential single-family rental unit."[44] Where there was a crisis, however, investors saw an opportunity. Housing prices in the United States dropped about 33% during the recession.[45] In particular, Stephen Schwarzman, CEO of the Blackstone Group, identified the U.S. single-family home as a uniquely profitable asset at near historically low prices: "The basic math of the opportunity seemed straightforward—and unprecedented. Here

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39 *See id.* at 6. This Comment will refer to these individuals who purchase and then rent out second properties as "individual investors." These are defined as individuals who own under ten such properties.

40 *See* Neroli Austin, Keeping Up with the Blackstones: Institutional Investors and Gentrification 5 (Nov. 29, 2022) (unpublished paper) (available on SSRN) (citing Brett Christophers, *How and Why U.S. Single-Family Housing Became an Investor Asset Class*, 49 J. URB. HIST. 430, 435 (2023)).

41 The seminal paper in the economics literature in this area translates the question of owning versus renting into an objective function maximizing over the choices of housing consumption and housing investment. *See* J.V. Henderson & Y.M. Ioannides, *A Model of Housing Tenure Choice*, 73 AM. ECON. REV. 98 (1983).

42 *See* Michele Lerner, *10 Years Later: How the Housing Market Has Changed Since the Crash*, WASH. POST (Oct. 4, 2018), https://perma.cc/W7S3-8MD4.

43 Schnure, *supra* note 28, at 19 tbl.1 (showing a decrease in homeownership and an increase in renting from 2007 (pre-recession) to 2011 (during the recession)).

44 OLIVER CHANG, VISHWANATH TIRUPATTUR & JAMES EGAN, MORGAN STANLEY, HOUSING MARKET INSIGHTS: A RENTERSHIP SOCIETY 1 (2011).

45 Lerner, *supra* note 42.

was the biggest asset class in the world . . . trading at historic lows."[46]

Not only had prices bottomed out, but the recession created a critical mass of distressed assets in single-family homes: "One of the main explanations for financial investors not having historically bought into single-family housing is that ordinarily the economics of such acquisition are terribly inefficient. [Large asset managers] do not generally deal in thousands or even millions of dollars; they deal in tens or hundreds of millions."[47] Thus, the recession produced something that had previously not existed. For-sale single-family homes were so plentiful that U.S. investors were able to purchase large stocks of homes simultaneously, allowing these companies to generate economies of scale and offload the risk that previously prevented them from entering the market.[48] Companies such as Invitation Homes, a Blackstone subsidiary and one of the largest institutional players in the single-family home market, would participate in large state-run real estate auctions[49]; these auctions sold off thousands of single-family homes in one fell swoop, often called "Super Tuesday[s]."[50] Estimating returns of over 50%, investors jumped on these rock-bottom prices by purchasing thousands of homes. By 2016, Invitation Homes owned almost fifty thousand homes in the United States.[51] This trend has continued throughout the decade after the Great Recession, well into the 2020s.[52]

Scale was not the only reason institutions entered the market. At the same time as many underpriced assets flooded the market, funds such as Blackstone sat on millions of dollars in cash while mortgage rates skyrocketed. Institutions therefore gained a determinative competitive advantage because they were able to buy up homes in all-cash offers. Professor Brett Christophers has explained the importance of the advantage of being able to make an all-cash offer on demand:

> The advantages to being a cash buyer in the post-financial crisis U.S. conjuncture were twofold. One was being able to

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[46] STEPHEN A. SCHWARZMAN, WHAT IT TAKES: LESSONS IN THE PURSUIT OF EXCELLENCE 275 (2019).

[47] Christophers, *supra* note 40, at 435.

[48] *See id.* at 435–36.

[49] *See id.* at 432–37.

[50] *Id.* at 433.

[51] *See id.* at 446.

[52] *See, e.g.*, Eason & Perry, *supra* note 19.

> buy at foreclosure auctions, where purchases had to be made with cash. The other had to do with the fear then stalking the market: sellers preferred buyers whose offers were not contingent on mortgage approval, which could delay the whole process, and potentially even derail it if an appraisal came in lower than the purchase price.[53]

Thus, institutions were able to purchase many single-family homes, and their cash-on-hand delivered these assets at huge discounts. This channel has been empirically validated by researchers at the Federal Reserve, including James Mills, Raven Molloy, and Rebecca Zarutskie, who showed that institutions were able to purchase more homes in neighborhoods of residents with lower credit scores—illustrating the importance of the mortgage rate market on the institutional buy-up.[54] Institutions had a comparative advantage in neighborhoods where residents had trouble accessing credit to secure funds.

Mills and his coauthors have identified one final factor that aided institutions in their market entrance: technological innovation.[55] Technological advancement enabled institutional investors to manage newly acquired portfolios of dispersed rental properties by reducing costs on two dimensions. First, technology lowers property acquisition costs by helping firms identify attractive investment opportunity properties quickly. Second, technology has delivered institutions increased returns to scale due to ease of communication and the collection and analysis of information.[56] These technological advantages, paired with their ability to move quickly with all-cash offers, allow institutional investors to purchase single-family homes in bulk.

2. The impact of institutional investor entrance.

In many ways, institutional entrance into the single-family housing market helped prop up a collapsing housing market. Professors Walter D'Lima and Paul Schultz found that the entrance of institutional investors into a neighborhood increased the

[53] Christophers, *supra* note 47, at 436; *accord* Patrick Smith & Crocker Liu, *Institutional Investment, Asset Illiquidity and Post-Crash Housing Market Dynamics*, 48 REAL EST. ECON. 673, 695 (2020); Marcus Allen, Jessica Rutherford, Ronald Rutherford & Abdullah Yavas, *Impact of Investors in Distressed Housing Markets*, 56 J. REAL EST. FIN. & ECON. 622, 628 (2018); Mills et al., *supra* note 10, at 399–402.

[54] Mills et al., *supra* note 10, at 420.

[55] *See id.* at 421.

[56] *Id.* at 421–22.

value of nearby properties within the same price range by 10.5% more than comparable properties.[57] Those increases persisted over time.[58] These findings suggest that positive supply-side externalities follow the entrance of institutions into the single-family real estate market.[59] Additionally, the authors suggested that lenders have become more willing to give attractive mortgage rates, knowing that a foreclosed house is likely to be bought up quickly by an institutional entity.[60] This result dovetails nicely with the suggestion from the Mills study, which highlights institutional investors' market advantage over individuals because institutions are less dependent on the mortgage market to secure funds for purchase.[61] Between providing more homes for rent—which helps to meet the increased demand for rental housing—and generating positive externalities for homeowners and purchasers in the market, the literature has noted many positive effects that arise from the entrance of institutional investors into the single-family home market.[62]

Of course, what is an increase in value to a current homeowner is also an increase in price for an aspiring one. Since the Great Recession, the rate of rent increases across all property types has increased, with rents more than doubling between 2013 and 2023.[63] According to the U.S. Census Bureau, the median average asking rent in the United States rose from $718 in the first quarter of 2013 to $1,462 in the first quarter of 2023, a 104% increase.[64] In comparison, rents increased by 48.6% in the decade leading up to the Great Recession, as the median average asking rent in the United States rose from $457 in the first quarter of 1998 to $679 in the first quarter of 2008.[65] These rent increases are especially prominent in the single-family rental market. In

57 Walter D'Lima & Paul Schultz, *Buy-to-Rent Investors and the Market for Single Family Homes*, 64 J. REAL EST. FIN. ECON. 116, 117 (2022).

58 *See id.* at 128–31.

59 *See id.* at 141.

60 *See id.* at 146–51.

61 *See* Mills et al., *supra* note 10, at 416–20.

62 *See* Schnure, *supra* note 9, at 18 (surveying data to conclude that institutional single-family rentals "may have helped prevent an even greater degree of housing stress").

63 U.S. CENSUS BUREAU, U.S. DEP'T OF COM., QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, FOURTH QUARTER 2023, at 2 fig.2 (2024) (showing the median asking rent in the United States increased from $718 in the first quarter of 2013 to $1,462 in the first quarter of 2023); *Housing Vacancies and Homeownership (CPS/HVS)*, U.S. CENSUS BUREAU tbl.11A/B (accessed Mar. 24, 2024), https://www.census.gov/housing/hvs/data/histtabs.html.

64 *Housing Vacancies and Homeownership (CPS/HVS)*, *supra* note 63, at tbl.11A/B.

65 *Id.*

particular, the publicly available housing data from Zillow indicate that rents of single-family homes have increased by more than rents overall:[66] from January 31, 2015, until December 31, 2023,[67] national rents of all types have increased 59.3%,[68] while national rents for single-family rentals have increased 69.1% over the same time horizon.[69]

3. Budding literature links market concentration and rising rents.

Building on these contemporaneous national trends, recent research suggests that the relationship between market concentration of single-family rentals and rents may be causal. Specifically, a budding literature documents early evidence that increased "concentration is contributing to higher rental prices and higher rental inflation."[70] Most notably, Professors Umit Gurun, Jiabin Wu, Steven Chong Xiao, and Serena Wenjing Xiao have recently deployed a difference-in-differences design[71] to illustrate that neighborhoods that saw increased concentrations of institutionally owned single-family rentals also saw small (0.51%) but statistically significant increases in rent prices when compared to those neighborhoods that did not.[72] While other papers have

66 *Housing Data*, ZILLOW (last updated Apr. 12, 2024), https://www.zillow.com/research/data (comparing the Zillow Observed Rental Index (ZORI) of the data sets "All Homes Plus Multifamily Time Series" and "Single Family Residence Time Series").

67 These dates match the period for which the Zillow data are available.

68 This number was calculated through the following calculation: $1,997.39/$1,253.45, which are national rents for rentals of all types from the "ZORI (Smoothed): All Homes Plus Multifamily Time Series." *See Housing Data*, *supra* note 66.

69 This number was calculated through the following calculation: $2,217.59/$1,311.23, which are national rents for single-family rentals from the "ZORI (Smoothed): Single Family Residence Time Series." *See id.*

70 Linger et al., *supra* note 16, at 18; *see also* Lambie-Hanson et al., *supra* note 16, at 17–18.

71 A difference-in-differences design is an empirical technique that allows researchers to, under certain assumptions, measure a causal relationship while controlling for broader industry trends. *See Difference-in-Difference Estimation*, COLUMBIA MAILMAN SCH. OF PUB. HEALTH, https://perma.cc/XEJ4-56RT. In this case, the authors are able to use the assumptions of the empirical techniques to rule out other drivers of increased rents of single-family homes outside of increased concentration and, importantly, other characteristics impacted by the increase in concentration. *See* Gurun et al., *supra* note 13, at 86–90. For example, one interesting phenomenon that the researchers found was that increased concentration reduced neighborhood crime. *See id.* at 93–96. Thus, it is hard to tell whether the increase in concentration came from increasing market power or demand increases from decreasing crime.

72 *See* Gurun et al., *supra* note 13, at 77.

linked increased ownership concentration with higher rent increases,[73] the paper by Professor Gurun and his colleagues focused explicitly on single-family rentals and is understood by the literature "to be the most robust in producing causal estimates."[74]

However, many commentators reject the characterization that rents have increased due to heightened concentration stemming from institutional entrance.[75] Instead, they point out that institutional conversion of owner-occupied homes to rental homes helps keep rents down under a traditional economic analysis by increasing rental supply.[76] Defenders additionally point to other explanations for skyrocketing single-family rents, such as increasing demand[77] and mounting housing costs.[78]

While the mechanism of the price increases remains under debate, what is clear is that the increased financial burden of rent increases has taken an economic toll on residents. These personal costs are important because they contextualize the stakes in a potential antitrust case. Not only do they represent potential harms that antitrust law seeks to mitigate, but they also may represent the damages a plaintiff may recover via suit.[79] For example, a report by the Federal Reserve Bank of Atlanta in 2016 found that

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73 *See* Linger et al., *supra* note 70, at 18; Renee Tapp & Richard Peiser, *An Antitrust Framework for Housing*, 55 ENV'T & PLAN. A: ECON. & SPACE 562, 569–74 (2023); C. Luke Watson & Oren Ziv, *Is the Rent Too High? Land Ownership and Monopoly Power* 14–19 (CESifo, Working Paper No. 8864, 2023); *see also* Lambie-Hanson et al., *supra* note 16, at 17–18.

74 Linger et al., *supra* note 70, at 5.

75 *See, e.g.*, Jenny Schuetz, *Corporate Landlords Aren't the Real Culprit*, THE ATLANTIC (Feb. 15, 2020), https://www.theatlantic.com/ideas/archive/2020/02/rich-investors-make-easy-scapegoat-rising-rents/606607/ (attributing the potential for "landlords of any sort [to] mistreat tenants" to the effect of land-use regulation on housing costs).

76 *See* Marc Francke, Lianne Hans, Matthijs Korevaar & Sjoerd van Bekkum, Buy-to-Live vs. Buy-to-Let: The Impact of Real Estate Investors on Housing Costs and Neighborhoods 35–40 (June 15, 2023) (unpublished paper) (available on SSRN).

77 *See, e.g.*, Hermann, *supra* note 17 ("Demand for single-family living increased during the pandemic and has been sustained. . . . At the same time, rising interest rates and home prices have made homebuying less affordable, making single-family rentals an attractive option to many households priced out of homeownership.").

78 *See, e.g.*, Michael Kolomatsky, *Home Maintenance Inflation Is Real*, N.Y. TIMES (Apr. 20, 2023), https://www.nytimes.com/2023/04/20/realestate/home-maintenance-costs.html.

79 Antitrust damages are the economic losses associated with the direct result of an antitrust injury. For example, in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), the Supreme Court held that a plaintiff could maintain an action for unreimbursed psychologist therapy fees that were incurred due to an alleged § 1 violation of the Sherman Act. The defendant Blue Shield allegedly violated the Sherman Act by agreeing with psychiatrists to exclude psychologists from the health insurance plan. *Id.* at 465–70. The unreimbursed fees represented an economic harm directly associated with that violation. *Id.* at 482–84. This case helps demonstrate a broader interpretation of an antitrust injury so

large corporate owners of single-family rentals are 8% more likely to file eviction notices.[80] Furthermore, not all institutional landlords are created equal. While many institutions bought many foreclosed properties that had fallen into significant disrepair, some institutions became "milkers," a term used for (usually out-of-state) investors who pair predatory contractual relationships and dilapidated properties to fool and extract outsized rents from unsophisticated renters.[81] One such relationship is the "rent-to-own" contract:

> The contracts place all the burdens of homeownership—taxes, insurance, and maintenance—on the 'buyer', but none of the benefits. Miss one payment and you are a renter who can be quickly evicted. In many states, missing one payment also means losing all your equity and the value of improvements you may have put into the property.[82]

The damages caused by increased evictions or the increasingly common predatory rent-to-own contract represent some potential injuries to renters when institutional investors moved in.

B. The Single-Family Housing Market Today

Today, the market for single-family homes looks far different than it did before the Great Recession. Despite skyrocketing rents, there has been an increase of more than 3.5 million single-family home renters between 2001 and 2021.[83] Not only have renters made up a larger portion of single-family home residents, but single-family home residents also make up a slightly larger portion of the renting economy, jumping from under 30% of all renters in 2001 to about 33% in 2021.[84] This trend is more dramatic in certain portions of the country, particularly the Sun Belt.

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long as an individual can demonstrate it directly relates to an antitrust violation. Contrast *McCready* with *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), in which the Supreme Court refused to reward the plaintiff corporation damages because their injuries were the result of an increase in competition, which is not an antitrust injury. Although the defendant's actions arguably ran afoul of the antitrust laws, the injury caused was not the of type that the antitrust laws were intended to prevent. *Id.* at 489. Thus, if a plaintiff can show that their eviction directly resulted from the price increase brought on by an antitrust violation, they could arguably recover these costs. *See* 4 ANTITRUST COUNSELING AND LITIGATION TECHNIQUES § 42.03 (2023).

[80] *See* Raymond et al., *supra* note 16, at 16.

[81] Fox, *supra* note 34, at 179–81.

[82] *Id.* at 179.

[83] *See* Hermann, *supra* note 17.

[84] *Id.*

In cities such as Phoenix, Atlanta, and Tampa Bay, the number of single-family homeowners dropped by 29% or more during the Great Recession.[85]

While the transformation of single-family homeowners into single-family-home renters is notable, it pales in comparison to the concurrent investor change. Whereas before the Great Recession, no singular investor owned more than one thousand single-family homes nationwide,[86] there are now at least eight private equity firms (representing just one type of institutional investor) that each own over one thousand single-family homes.[87] Invitation Homes, a publicly traded company spun out of a private equity firm, itself owns nearly eighty thousand homes across sixteen housing markets in the United States.[88] All in, as of 2022 institutional investors own around 700,000 single-family homes.[89]

This change is especially observable when one zooms in to the neighborhood level. For example, investors have purchased over 50% of properties for sale in Bradfield Farms, a small Charlotte-area community containing mostly single-family starter homes.[90] Investors making cash offers are buying up Sun Belt homes at unprecedented levels.[91] Blackstone and Invitation Homes have admitted that acquiring clusters of homes in smaller geographic areas was crucial to their business strategies.[92]

The consolidation of the market will likely continue. While institutional investors only owned about 2% of single-family

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85 *See* Schnure, *supra* note 9.

86 Austin, *supra* note 40, at 5.

87 AMS. FOR FIN. REFORM, ESTIMATE OF PRIVATE EQUITY OWNERSHIP OF HOUSING UNITS 2 (2022).

88 *See Our Share of the U.S. Housing Market*, *supra* note 18.

89 *See Institutional Investors Outbid Individual Homebuyers*, OFF. OF POL'Y DEV. & RSCH., U.S. DEP'T OF HOUS. & URB. DEV. (2023), https://perma.cc/4DQ4-69SB. It is unclear how many institutions this is summed across.

90 Kaysen & Koeze, *supra* note 14.

91 *See* Dana Anderson & Sheharyar Bokhari, *Real Estate Investors Are Buying a Record Share of U.S. Homes,* REDFIN NEWS (Feb. 16, 2022), https://perma.cc/Y3BF-7DDZ ("Investors had the biggest market share in relatively affordable Sun Belt metros. In Atlanta, 32.7% of homes that sold in the fourth quarter [of 2021] were bought by investors, the biggest share of the 40 U.S. metros in this analysis, and in Charlotte it was 32.1%."); *see also*, Ryan Dezember, *Blackstone Moves Out of Rental-Home Wager with a Big Game*, WALL ST. J. (Nov. 21, 2019), https://www.wsj.com/articles/blackstone-moves-out-of-rental-home-wager-with-a-big-gain-11574345608.

92 *See* Christophers, *supra* note 47, at 437 ("In its listing prospectus, for instance, Invitation Homes highlighted that more than 95 percent of its revenue was earned in local markets where it owned at least two thousand homes—this was a selling point.").

homes as of 2018,[93] this number increased to about 5% in the following five years.[94] Industry experts now believe that institutional ownership of single-family homes will increase eight-fold to 40% by just 2030.[95] The projected continuation and extension of the mass buy-up of single-family homes promises the further accumulation of market power by these institutions. Although these corporations routinely disavow any notion of market power in the popular press, this assertion is contradicted by researchers, tenants, and even their own words, which this Comment details in the next Section.

C. The Housing Puzzle

Many professionals who scrutinize the single-family housing market believe that the institutions purchasing these properties wield either monopolistic power in the rental market, monopsonistic power (buyer-side monopoly power) in the home-buying market, or both.[96] Outside of the budding literature documenting the impact of ownership concentration on rents,[97] with perhaps the most robust statistical evidence coming from the single-family rental industry itself, housing advocates and policymakers point to a laundry list of anecdotes and articles in popular media that seemingly align with their suspicions.[98] For example, institutions have been claimed to wield "near-oligopolistic power over some local housing [rental] markets" by researchers such as Professor Suzanne Lanyi Charles.[99] Monopolistic and oligopolistic power are best understood as extreme forms of market power, allowing sellers to set prices above their marginal costs.[100] Monopolistic

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93 Hermann, *supra* note 17.

94 *See* Adler et al., *supra* note 28 (reporting on MetLife Investment Management's projection "that by 2030, institutions will increase SFR holdings to 7.6 million homes, more than 40% of all SFRs"); *see also* Waters, *supra* note 28.

95 Waters, *supra* note 28.

96 *See, e.g.*, Kaysen & Koeze, *supra* note 14.

97 *See supra* Part I.C; *see also* Gurun et al., *supra* note 13, at 77; Linger et al., *supra* note 16, at 18; Tapp & Peiser, *supra* note 73, at 569–74; Watson & Ziv, *supra* note 73, at 14–19; Lambie-Hanson et al., *supra* note 16, at 17–18.

98 *See, e.g.*, Kaysen & Koeze, *supra* note 14; Eason & Perry, *supra* note 19; Waters, *supra* note 28.

99 Suzanne Lanyi Charles, *The Financialization of Single-Family Rental Housing: An Examination of Real Estate Investment Trusts' Ownership of Single-Family Houses in the Atlanta Metropolitan Area*, 42 J. URB. AFFS. 1321, 1322 (2019).

100 *See, e.g.*, William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 939 (1980).

power merely represents the market power wielded by an industry with only one firm, while oligopolistic power represents that of an industry with only a few firms. Both have the same effect—to increase prices for consumers and extract profits for sellers.

This assertion has been bolstered by taking Invitation Homes at its word. While the company has repeatedly disavowed any notion of market power, in a quarterly earnings report, then-Executive Vice President and CEO Charles Young explicitly stated in 2018 that "pricing power remain[ed] strong."[101] These assertions are often supported by tenants. Despite these companies routinely skirting upkeep and maintenance regulations, single-family tenants feel they cannot leave their homes, leaving some to say in interviews, "[w]e're paying $4,000 a month to live in hell."[102] Furthermore, there are often constraints outside of pure costs that dictate whether one can move. One renter reported that they renewed their lease "because they felt they had to: [t]he company owns so much of the available housing in their neighborhoods that they had no alternatives if they wanted to keep their kids in the same school, or remain close to jobs or relatives."[103]

While many critics are quick to point to the indicators of institutional monopolistic power, from rising prices to increased evictions, defenders of institutional investment in single-family homes argue that these institutions cannot wield monopolistic power. Defenders emphasize that the fact that institutional ownership of single-family housing is projected to increase from 5–40% by 2030[104] illustrates that institutions cannot have monopolistic power now. After all, 5% is vastly lower than the legal standards for monopolist power in both Sherman Act cases, which demand at least a 50% market share,[105] and in Clayton Act[106]

[101] *Invitation Homes Inc. (INVH) Q2 2018 Earnings Conference Call Transcript*, MOTLEY FOOL (Aug. 10, 2018), https://perma.cc/3VUP-Q22V; *see also* Christophers, *supra* note 40, at 437.

[102] *See* O'Connell et al., *supra* note 15.

[103] Michelle Conlin, *Spiders, Sewage and a Flurry of Fees—The Other Side of Renting a House from Wall Street*, REUTERS (July 27, 2018), https://www.reuters.com/investigates/special-report/usa-housing-invitation/.

[104] *See supra* note 27 and accompanying text.

[105] *Compare* United States v. U.S. Steel Corp., 251 U.S. 417, 444 (1920) (finding that a firm with under 50% of market share cannot be a monopoly), *with* United States v. Int'l Harvester Co., 274 U.S. 693, 695–97 (1927) (finding that a firm with 85% market share can be found to be a monopoly).

[106] 15 U.S.C. § 12 et seq.

cases, where the lower bound is usually 30%.[107] Furthermore, the pricing and eviction trends continued for most of the 2010s, when institutional ownership represented less than 2% of the single-family home stock.[108] Thus, defenders argue, institutional investors are being made into a scapegoat when the problems lie elsewhere. They see this as especially problematic because critics target the same entities that saved the housing market from collapse during the Great Recession by converting foreclosed homes into single-family rentals, thus increasing supply.[109]

Thus, we return to the puzzle laid out at the outset of this Section: Why do some believe these institutions wield monopolistic power despite their relatively low market shares? What else can explain the pricing trends observed in the single-family rental market since the Great Recession? The following Section attempts to answer this question by detailing the Atlanta single-family housing market. Atlanta represents a good case study to analyze the puzzle because institutional entrance has transformed the Atlanta single-family housing market—perhaps more than any large metro area in the country. This transformation has garnered large amounts of researcher and media attention, generating a bevy of market facts for this Section to analyze.

D. Atlanta's Single-Family Housing Market

The literature has focused predominantly on Sun Belt cities, which have been the most affected by institutional entrance. Thus, this Comment focuses on Atlanta's single-family housing market to investigate the housing puzzle. There are about one million single-family homes in the Atlanta metro area.[110] Of these approximately one million homes, various institutions estimate that around 55% are rental properties, making for a rental-home population of about 550,000 to 605,000 structures.[111]

Eleven firms own at least one thousand single-family homes in the Atlanta metro area as of February 2023.[112] Altogether,

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107 *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 364 (1963); *see also* infra Part II.

108 *See, e.g.*, Hermann, *supra* note 17.

109 *See, e.g.*, D'Lima, *supra* note 57, at 117.

110 *See* Eason & Perry, *supra* note 19.

111 *See* Maracle, *supra* note 19.

112 Eason & Perry, *supra* note 19. These are, in order of largest to smallest: (1) Invitation Homes, with 11,141 homes; (2) Progress Residential, with 10,607; (3) Main Street Renewal, with 5,743; (4) Tricon Residential, with 5,201; (5) American Homes 4 Rent, with

these institutions own roughly 53,354 homes, representing about 5% of the approximately one million single-family homes in the Atlanta metro area.[113] Because about half of the single-family housing stock is renter occupied,[114] a back-of-the-envelope calculation indicates nearly 10% of all single-family rentals in the Atlanta area are owned by institutional investors. Their presence becomes even more pronounced at the neighborhood level: "The [Atlanta Journal-Constitution's] analysis found that large companies own at least 20% of the homes in nine metro Atlanta census tracts."[115]

At the same time as institutional entrance into the market, rents and evictions at these properties and similar properties in the area have increased. Single-family home rents and home purchasing prices in the Atlanta metro area increased 65% and 98%, respectively, between 2010 and 2019,[116] putting Atlanta in the top ten priciest metro areas analyzed by RentCafe for these two categories.[117] For comparison, rents increased only 36% nationally over the same period, and national home prices jumped only 31%.[118] The Atlanta metro area's relatively significant increase in housing prices also applies specifically to the rents of single-family homes. Even moving away from the housing dip caused by the Great Recession, single-family home rents in the Atlanta metro area have specifically increased from $1,103.17 in January 2015 to $2,089.10 in December 2023, representing an 89% increase in rents, far outpacing the national average.[119]

These market facts deepen the mystery of the housing puzzle. At first glance, Atlanta should be the prime example of antitrust injury to single-family home renters, if such injury exists. There is at least circumstantial evidence of consumer harm: Prices are

5,153; (6) FirstKey Homes, with 4,975; (7) Starwood Capital, with 4,337; (8) Home Partners of America, with 2,477; (9) Opendoor, with 1,492; (10) Global Atlantic Financial, with 1,130; and (11) Divvy Homes, with 1,098. *See id.*

113 *See id.*

114 Jarred Schenke, *The Single-Family Rental Surge Is Squeezing Atlanta's Housing Market*, BISNOW (Feb. 14, 2022), https://perma.cc/Q3NW-MS86.

115 Eason & Perry, *supra* note 19.

116 *See* Courtney Kueppers, *A Look at How Atlanta's Rent Prices Have Changed in the Past Decade*, ATLANTA J.-CONST. (Dec. 19, 2019), https://perma.cc/58BF-J8UQ.

117 *See* Irina Lupa, *The Decade in Housing Trends: High-Earning Renters, High-End Apartments and Thriving Construction*, RENTCAFE (Dec. 16, 2019), https://www.rentcafe.com/blog/rental-market/market-snapshots/renting-america-housing-changed-past-decade.

118 *Id.*

119 *Housing Data, supra* note 66 (documenting quarterly rental data in the "Rental ZORI (Smoothed): Single Family Residence Time Series" for the "Metro & U.S." geography).

skyrocketing, homes are becoming harder to buy, and there is social science evidence that institutional entrance has caused evictions to increase.[120] Even supposing the evictions are legal, if a tenant can prove they could not pay their rent due to an anticompetitive rent hike, they might be able to argue in court that their eviction was a cognizable antitrust injury depending on whether they could prove their inability to make rent was due to the artificially inflated prices.

And yet, as Invitation Homes and other defenders of institutional entrance point out, these corporations together only wield about 10% of the market share for single-family rentals in the region.[121] Even the combined 20% estimation regarding certain census tracks is notably below the standard 30% share required under the Clayton Act[122] and even further below what is necessary under a Sherman Act claim.[123] Due to the low market share values, the current levels of market concentration do not give rise to agency enforcement even under the new, more flexible antitrust standards promulgated by the updated Merger Guidelines. Again, this begs the question: What are the economic forces underlying these contemporaneous dynamics in single-family rents, home prices, and evictions? Suppose the explanation truly is one of increased concentration and market power. How do these institutions wield market power in a world where they dominate a relatively small portion of the market?

II. Legal Framework of Antitrust Law

Congress constructed the modern framework of antitrust law in response to the increasing power of monopolies in the U.S. economy. In antitrust law, there are generally three causes of action under which an individual or the government—through either the DOJ or FTC—can bring a case: § 1 and § 2 of the Sherman Antitrust Act and § 7 of the supplementing Clayton Act. Under the antitrust analysis of either statute, a court must first define the relevant market. In defining the market, courts follow *Brown Shoe Co. v. United States*,[124] which breaks the inquiry into (1) the relevant "lines of commerce" and (2) the relevant

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[120] *See supra* Part I.C.

[121] *See supra* note 19 and accompanying text.

[122] *See Phila. Nat'l Bank*, 374 U.S. at 364.

[123] See Part II for a discussion on the market share thresholds for different types of antitrust claims.

[124] 370 U.S. 294 (1962).

geographic markets.[125] The geographic markets can be as broad as the national economy,[126] or as narrow as a specific town or neighborhood.[127]

This Part lays out the different antitrust statutes and the causes of action under each. Section A discusses the Sherman Act, including what is required for a violation under the per se rule and the rule of reason. Section B then introduces the supplementing Clayton Act, which addresses the antitrust merger doctrine.

A. The Sherman Act

The Sherman Act was passed in 1890 to protect competitive markets from the growing anathema to monopolistic power. The Sherman Act can roughly be broken up into two parts: § 1, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce,"[128] and § 2, which punishes "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."[129]

1. The per se rule under § 1.

To show a § 1 violation, a plaintiff must show that a firm (or combination of firms) has engaged in conscious conduct that unreasonably restricts trade.[130] Of course, "[e]very agreement concerning trade . . . restrains" in some way,[131] so courts often look to the Sherman Act's legislative history to determine what activities are prohibited. The covered activities are perhaps best summarized by Justice Hugo Black:

> [The Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our

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125 *Id.* at 366–69 (Harlan, J., concurring in part and dissenting in part).

126 *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 166–67 (1940).

127 *See, e.g.*, Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1388 (7th Cir. 1986).

128 15 U.S.C. § 1.

129 *Id.* § 2.

130 *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59–60 (1911) (explaining that the statute protects against contracts, trust formation, and conspiracies that "unduly restrain" commerce).

131 Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).

> democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the [Sherman] Act is competition.[132]

Based on this premise, naked restraints of trade, such as price fixing, output limitations, or volume restrictions, are per se illegal.[133] However, courts apply the rule of reason test for other horizontal agreements.[134] Under the rule of reason test, a defendant must have monopolistic power, or the ability to raise prices above marginal cost, in order to cause an anticompetitive injury to consumers.[135]

2. Monopoly power under § 1 (the rule of reason) and § 2.

While § 1 of the Sherman Act predominantly focuses on firm conduct, § 2 focuses on whether the market structure allows for monopolistic power.[136] "[M]onopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised."[137] Monopolization requires that the defendant(s), first, have some market power and, second, use said market power to engage in exclusionary conduct.[138]

In cases where the per se rule does not apply, courts look for monopolistic power, both under a rule of reason analysis under § 1 or under a monopolization theory under § 2. However, it is often difficult to observe where prices are set above marginal costs—often used as the definition of market power in the legal context[139]—due to the difficulty of analyzing the latter. When direct evidence of monopolistic power is unavailable, courts impute the structural presumption that market share represents market

132 N. Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

133 *See, e.g.*, *Socony-Vacuum*, 310 U.S. at 219–20; *see also* United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945); *Standard Oil*, 221 U.S. at 89–90 (Harlan, J., concurring in part and dissenting in part) ("Congress determined to [create] an absolute, statutory prohibition of 'every contract, combination in the form of trust or otherwise, in restraint of trade or commerce.'" (quoting 15 U.S.C. § 1)).

134 *See, e.g.*, Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 885–87 (2007).

135 *See, e.g.*, NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103 (1984).

136 *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272–73 (2d Cir. 1979).

137 United States v. Griffith, 334 U.S. 100, 107 (1948).

138 *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602–03 (1985); *Aluminum Co. of Am.*, 148 F.2d at 431–32.

139 *See, e.g.*, Eric A. Posner, *Toward a Market Power Standard for Merger Review*, PROMARKET (Apr. 7, 2023), https://perma.cc/PM28-R3M8.

power.[140] In both § 1 and § 2 Sherman Act cases, courts generally look for market shares over 50%.[141] With such a degree of market share, courts believe that a firm can flex its muscle over the market, extracting inflated profits. For this reason, Congress has passed statutes not just combatting the exercise of monopolistic power but also preventing mergers that result in the creation of a monopoly.

B. The Clayton Act

The Clayton Act was passed in 1914 to supplement and clarify the Sherman Act, after the latter was deemed underinclusive. As a remedy, Congress passed the Clayton Act to address problems stemming from price discrimination, exclusive-dealing arrangements, and—most importantly for the purpose of this Comment—mergers.[142] The Clayton Act's specific section on mergers and acquisitions, § 7, prohibits a company from "acquir[ing], directly or indirectly, . . . the assets of another person . . . [where] the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[143] The housing market is a good candidate for a potential Clayton Act violation—even though it may not initially seem like it. One can conceptualize the pre–Great Recession single-family home rental market as one in which many individual noninstitutional home investors rent to nonowners. In fact, until recently, this scenario accounted for the vast majority of rentals. Thus, every home purchase by an institution can be seen as a horizontal merger between a large organization and a small business, consolidating the housing market. As the scale increases, there are also conceptual vertical mergers, consolidating companies at different portions of the supply chain instead of competitors. Consider, for example, an institutional home renter hiring previously independent contract workers such as plumbers and electricians. The reduction of the supply of home

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[140] *See Aluminum Co. of Am.*, 148 F.2d at 430 (quoting United States v. Swift & Co., 286 U.S. 106, 116 (1932)) ("[M]ere size . . . is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly . . . but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past.").

[141] *See, e.g.*, *id.* at 424 (noting that even a 60% market share might not constitute a monopoly).

[142] *See Clayton Act*, BLACK'S LAW DICTIONARY (12th ed. 2024); *Clayton Antitrust Act*, CORNELL L. SCH. LEGAL INFO. INST., https://perma.cc/3FGE-G668.

[143] 15 U.S.C. § 18.

maintenance services is likely to increase the cost of homeownership for owner-occupants.[144]

When evaluating a merger under the Clayton Act, courts often start with the structural presumption.[145] This again entails looking at the market share of the combining corporations before and after the proposed merger. Courts generally look for an aggregated market share of over 30% in order to invoke the structural presumption and find an antitrust violation in horizontal merger cases. Over time, this has evolved to analyzing the Herfindahl-Hirschman Index (HHI) before and after the horizontal merger. The HHI is a measure of market concentration that sums the squares of the market shares of each firm, thus resulting in a number between 0 and 10,000.[146] The DOJ and FTC Merger Guidelines presumptively call for agency enforcement of the antitrust laws when a merger exceeds both (1) a change threshold and (2) a level threshold. Specifically, agencies give close scrutiny to transactions that (1) increase the HHI of an industry by over 100 and (2) occur in industries where the final HHI is over 1800.[147]

Courts often look to legal theories beyond the degree of market concentration when evaluating mergers under the Clayton Act. These theories involve the unilateral effects analysis, which analyzes the reduction in competition between the merging firms,[148] and coordinated effects analysis, which scrutinizes whether the proposed merger will make it easier for industry players to coordinate their behavior and engage in anticompetitive practices such as parallel pricing, conscious parallelism, or tacit (nonexplicit) collusion.[149] The Sherman Act does not forbid these parallel actions due to the nature of competition.[150] However, the Clayton Act allows courts to forbid a merger that enables

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144 *See, e.g.*, Kolomatsky, *supra* note 78; Laura Daily, *Why It's Hard to Hire a Handyman or Contractor—And What to Do About It*, WASH. POST (May 16, 2023), https://www.washingtonpost.com/home/2023/05/16/getting-contractors-to-return-calls/.

145 *See, e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963) ("[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, . . . must be enjoined [absent] evidence clearly showing that the merger is not likely to [lessen competition].").

146 *See, e.g.*, *Herfindahl-Hirschman Index*, *supra* note 24.

147 DOJ & FTC, 2023 MERGER GUIDELINES, *supra* note 36.

148 *See, e.g.*, United States v. Anthem, Inc., 236 F. Supp. 3d 171, 216 (D.D.C. 2017).

149 *See, e.g.*, *Hosp. Corp. of Am.*, 807 F.2d at 1387.

150 For example, all firms in a theoretical, perfectly competitive market with nondifferentiated goods should offer the same price.

industry players to coordinate parallel pricing more easily in recognition of these potential harms.[151]

If the proposed anticompetitive effects or consumer harms outweigh the efficiency gains, and distinct market barriers prevent entry into the market, courts will demand divesture of problematic assets or, in extreme cases, step in to prevent the merger.[152]

III. How Modern Antitrust Doctrine Allows for Institutional Entrance

This Part proceeds in Section A by discussing the best cause of action to pursue an antitrust claim—the Clayton Act. While Section B explains that a potential case under the Clayton Act appears to suffer from the critical weaknesses of low entry barriers and market shares, analyzing institutional entrance into the single-family rental market under the antitrust merger doctrine reveals that the case is stronger than it may initially seem. Although it is hard to envision a successful antitrust lawsuit against institutional investors *today*, there are reasons to believe these weaknesses will disappear if these market trends continue *tomorrow*. Furthermore, scrutinizing the entrance of institutional investors under alternative merger theories, such as the unilateral or coordinated effects theories, illustrates that a Clayton Act case would be more impactful than originally thought.

These nagging complications raise a deeper question about the current doctrine: Even if an antitrust case does not exist under these facts, should it? Should the displacement of homeowners into home renters and evidence of monopoly pricing in such an essential industry help instruct future developments in the law?

A. Choosing the Legal Framework

The Clayton Act likely represents the best vehicle for pursuing an antitrust case against institutional investors who have entered the single-family home market. By conceptualizing the institutional purchases of single-family homes as a merger between a would-be individual landlord and a large corporation, the FTC or would-be plaintiffs can access the legal standards nested

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[151] *Hosp. Corp. of Am.*, 807 F.2d at 1385.

[152] *See, e.g.*, United States v. Vail Resorts, Inc., No. 97-B-10, at 5 (D. Colo. July 25, 1997) (ordering divesture of assets as part of a final judgment agreement).

within the Clayton Act.[153] Analyzing institutional entrance as a horizontal merger under the Clayton Act is likely their best and only path forward at this juncture.

One can immediately rule out a § 2 Sherman Act case because even in Atlanta, one of the metro areas most impacted by institutional investment, no individual firm has more than a 10% share of the single-family homes in a market.[154] Courts have been unwilling to find a monopoly when a singular firm wields under 50% market share.[155] Because the firms *together* do not even rise to the 30% market share that *United States v. Philadelphia National Bank*[156] requires, a merger case, an antitrust case under a monopolization theory, and a case brought on an attempted-monopolization theory are all unavailing.[157]

Additionally, unless more concrete evidence related to collusion or some agreement between firms surfaces, a claim under § 1 of the Sherman Act is also likely to be unavailing to plaintiffs. While single-family home rental prices have increased, particularly in neighborhoods with higher institutional investment,[158] a plaintiff would have to prove the existence of an agreement or restraint because parallel rent increases alone are not enough to sustain a § 1 claim.[159] That is not to say that such a claim is impossible. For example, the increased institutionalization of single-family homes may lead to the adoption of technology that

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153 Only direct purchasers who suffer an antitrust injury have standing in a private suit. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 746–47 (1977). Since renters directly contract with institutions, they would have standing. This case extended the reasoning in *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). The *Hanover* Court held a defendant could not claim the plaintiff, who served as an intermediatory between the defendant and the final customers, passed on its inflated prices when selling to its own consumers. *Id.* at 491–94. The Court came to this conclusion by holding that only direct purchases were relevant in an antitrust analysis. *Id.* at 487. Thus, those who would rent from individual landlords at inflated prices due to the changing market conditions would not be able to find relief. Of course, the government can bring a case for any antitrust violation it perceives. *See* 15 U.S.C. § 4.

154 *See supra* note 19 and accompanying text.

155 *See supra* note 105.

156 374 U.S. 321 (1963).

157 For similar reasons, a court is additionally unlikely to be willing to buy an attempted monopolization theory under the same statute section.

158 *See* Gurun et al., *supra* note 13, at 79.

159 *See, e.g.*, *In re* Text Messaging Antitrust Litig., 630 F.3d 622, 628–29 (7th Cir. 2010) (invoking lemonade stands to demonstrate that parallel pricing behavior alone is not enough to sustain an antitrust claim under the Sherman Act).

facilitates coordination. For instance, the complaints in the multidistrict lawsuit *In re RealPage, Inc., Rental Software Antitrust Litigation*[160]

> alleged collusion by RealPage and numerous lessors of multifamily residential real estate across the country to fix, raise, maintain, and stabilize lease prices. . . . [D]efendants all employed revenue management software provided by RealPage . . . [,] which gathered real-time pricing and vacancy data from the lessors and made unit-specific pricing and vacancy recommendations—which the lessors allegedly agreed to adhere to, on the understanding that competing lessors would do the same—with the intent and effect of raising lease prices above competitive levels.[161]

Similarly, the finding in *Burnett v. National Association of Realtors*[162] that the National Association of Realtors ran afoul of the antitrust laws by setting member commissions between 5% and 6% suggests that these types of Sherman Act–violating agreements are not unprecedented in the housing market.[163] However, this Comment will refrain from speculating on hypothetical agreements and thus omit an analysis under § 1 of the Sherman Act.

Returning to the Clayton Act analysis, the existence of alternative explanations for rising rents in the single-family rental industry, rooted in supply and demand, rule out the possibility of a court finding direct evidence of monopolistic pricing. While the spiking rental prices in the single-family market are notable, there is clear evidence that demand and housing maintenance costs have increased over the same time horizon. As a result, the claim must be scrutinized by analyzing the structural presumption (i.e., by looking into the market share of the merging firms) or by analyzing the unilateral and coordinated effects resulting from the merger.

B. Scrutinizing an Antitrust Claim Under the Clayton Act

In analyzing a potential antitrust case under the Clayton Act, one must first define the relevant market. To that end, this Section follows the procedure articulated by *Brown Shoe Co. v.*

160 2023 WL 2875737 (J.P.M.L. Apr. 10, 2023).

161 *Id.* at 1373.

162 615 F. Supp. 3d 948 (W.D. Mo. 2022), *aff'd*, 75 F.4th 975 (8th Cir. 2023), *cert. denied*, 144 S. Ct. 1347 (2024).

163 *See supra* note 30.

United States, which breaks the inquiry into (1) the relevant "lines of commerce" and (2) the relevant geographic markets.[164] An individual bringing an antitrust action against institutional investors of single-family homes will want to establish that the market defined by defenders of institutional investors and the media is too broad on both dimensions. Consider again Invitation Homes's 2018 post disclaiming market power.[165] Here, Invitation Homes implicitly defined the relevant lines of commerce as "rental options" or "housing units" and the markets as entire metro areas. However, scrutiny of the facts suggests that the markets are narrower on both dimensions.

1. Market definition.

Starting with the relevant lines of commerce, this Section will first narrow its focus to the single-family rental market.[166] Although part of a larger housing ecosystem, including the home-buying market, the case law does not have a suitable method to analyze markets across these verticals.

The Supreme Court in *Brown Shoe* articulated that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[167] Such an analysis allows for the existence of a submarket within the larger housing market,[168] so long as consumers are not so sensitive to small price changes that they would leave the proposed submarket for another similar good.[169] The relevant submarket can be set by scrutinizing the "practical indicia as industry or public recognition of the submarket as a separate economic entity."[170]

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164 *Id.* at 366–69 (Harlan, J., concurring in part and dissenting in part).

165 *See Our Share of the U.S. Housing Market*, *supra* note 18.

166 While the buying strategies employed by institutional investors and the purchasing dynamics between them and homeowners remains interesting, it likely complicates the analysis in a manner unproductive to this exercise at this time.

167 *Brown Shoe*, 370 U.S. at 325.

168 *See, e.g.*, Kason D. Kerr, Comment, *A Judicial Analysis of the Satellite Radio Merger: Creation of the Next Led Zepplin or Simple Garage Band?*, 45 HOUS. L. REV. 1345, 1355–56 (2008) (using the cross-elasticity of demand, amongst other tests, to scrutinize whether satellite radio and AM/FM radio fall within the same market).

169 *See, e.g.*, FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1, 16 (D.D.C. 2007), *rev'd on other grounds*, 533 F.3d 869 (D.C. Cir. 2008) *and* 548 F.3d 1028 (D.C. Cir. 2008).

170 *Brown Shoe*, 370 U.S. at 325.

To aid in this analysis, the Merger Guidelines, promogulated by the DOJ and the FTC, recommend conducting the Hypothetical Monopolist Test (HMT).[171] Although the Merger Guidelines are not binding law, they have been broadly accepted by courts as an important authority for guiding legal analysis.[172] Under the HMT, a court asks whether it would be profitable for a hypothetical monopolist of some product to raise prices over the group of goods. If the hypothetical monopolist would gain profits from the price increase, these products constitute a market. However, if consumers leave for other goods outside of the hypothetical monopolist's control, then the market likely has been set too narrowly.[173] The HMT is often conducted by analyzing consumer behavior in response to a "small but significant and non-transitory increase in price" (SSNIP), using a number that typically floats around 5%.[174]

Applying this approach, industry recognition points in favor of single-family rentals representing a market of their own. Zillow housing research data specifically breaks single-family rentals into their own category,[175] and nearly all real estate search websites offer single-family rentals as a separate housing category.[176] Furthermore, the HMT is likely to align with this intuition, as although rents for single-family homes have increased relative to their multi-family counterparts, demand for single-family rentals has also increased, suggesting that these increases are profit-maximizing for a hypothetical monopolist.

Turning to geographic markets, industry and public recognition paired with the HMT suggest that geographic markets are relatively narrow. Starting with industry recognition, nearly every real estate website allows individuals to search for single-family rental homes by town or city, which appears to be the standard unit on popular websites such as Zillow and Redfin.[177] Some sites even have individual pages for neighborhood-specific

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171 DOJ & FTC, 2023 MERGER GUIDELINES, *supra* note 36, at 41.

172 Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 808–09 (2006) (documenting the rise in positive judicial references of DOJ guidelines).

173 DOJ & FTC, 2023 MERGER GUIDELINES, *supra* note 36, at 42, 44–46.

174 *Id.* at 43.

175 *See, e.g.*, *Housing Data*, *supra* note 66.

176 *See, e.g.*, *Houses for Rent in Wilmette, IL*, REDFIN, https://perma.cc/YU9X-8FM9 (listing single-family homes as their own rental category versus apartments).

177 *See, e.g.*, *id.*

searches.[178] Institutional investors also appear to recognize this, as these firms target their purchases to specific neighborhoods. In Atlanta, investors disproportionately "buy in places with entry-level homes and in communities of color."[179] Researchers Taylor Shelton and Eric Seymour have found that while some firms clearly target communities of color, what they are actually doing is specializing: "Essentially, these companies have learned to target different kinds of neighborhoods with different demographic characteristics in order to avoid competing with one another, which in turns allows each company to maximize their market power and their profits."[180]

Additionally, the fact that Americans are becoming less and less mobile over time indicates narrow geographic markets. According to a recent U.S. Census and Harvard University study, "[n]early six in 10 young adults live within 10 miles of where they grew up, and eight in 10 live within 100 miles."[181] These facts signal that American migration is at near-historic lows.[182] In fact, the average American lives less than eighteen miles from their mother.[183] If Americans cannot move far for various reasons, such as needing to remain close to home to use intrafamily childcare to manage the rising costs of having a family, then setting the boundaries of the

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[178] *See, e.g.*, *Neighborhoods*, @PROPERTIES, https://perma.cc/QX3J-D7X6 (dividing the Chicago metro area into eight regions, including the Chicago South Side and the North Suburbs, each containing a multitude of neighborhoods, such as the Hyde Park, East Hyde Park, Kenwood, and Woodlawn neighborhoods within walking of the University of Chicago Law School).

[179] Eason & Perry, *supra* note 19.

[180] Taylor Shelton & Eric Seymour, *Corporate Landlords Redux*, MAPPING ATLANTA (Feb. 27, 2023) [hereinafter Shelton & Seymour, *Corporate Landlords*], https://perma.cc/2W3G-5ZEZ.

[181] *See* Nathaniel Hendren, Sonya R. Porter & Ben Sprung-Keyser, *New Data Tool and Research Show Where People Move as Young Adults*, U.S. CENSUS BUREAU (July 25, 2022), https://perma.cc/7PZP-V344; *see also*, D'Vera Cohn & Rich Morin, *Who Moves? Who Stays Put? Where's Home?*, PEW RSCH. CTR. (Dec. 29, 2008), https://perma.cc/3VD7-XVSN ("Among all respondents to the Pew Research Center survey, 57% say they have not lived in the U.S. outside their current state: 37% have never left their hometown and 20% have left their hometown (or native country) but not lived outside their current state.").

[182] *See* William H. Frey, *Americans' Local Migration Reached a Historic Low in 2022, but Long-Distance Moves Picked Up*, BROOKINGS INST. (Feb. 2, 2023), https://perma.cc/VJ7Z-52P5.

[183] *See* Quoctrung Bui & Claire Cain Miller, *The Typical American Lives Only 18 Miles from Mom*, N.Y. TIMES (Dec. 23, 2015), https://perma.cc/8D9M-54N9.

market at the metro or even city level may be too large. Geographic markets may be as small as specific neighborhoods.[184]

The facts additionally suggest that a HMT will find narrow geographic markets. Outside of the evidence of demand inelasticity demonstrated by dropping migration rates, many housing markets sustain vastly different rents for similar properties nearby. For example, according to RentCafe, the average single-family home in Cambridge, Massachusetts, can be rented for $3,614. In contrast, the average single-family home in Somerville, Massachusetts, a neighboring city, can be rented for $3,431.[185] This puts single-family rental prices over 5% more in Cambridge than in Somerville despite their similarity and proximity, indicating that a court may be sympathetic to dividing the market into these smaller areas.

2. No structural presumption (yet).

Even assuming a court would agree with these narrower market definitions, the facts on the ground do not lend themselves to a promising antitrust case under the structural presumption. Under the current merger doctrine, merging firms must constitute at least 30% of the relevant market in order to trigger the structural presumption.[186] Although the data indicates that institutional investors have been purchasing large numbers of single-family homes in specific neighborhoods, especially in recent years,[187] housing advocates have not demonstrated that these increased purchases have led to a market share of 30% by any investor.

To win under a structural presumption theory, plaintiffs will likely need to demonstrate that markets are very narrow through tools such as surveys and cross-price elasticities and conduct an economic analysis at this more granular level. The absence of such analyses suggests that the facts are not developed enough to

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184 *See, e.g.*, Kaysen & Koeze, *supra* note 14 (discussing the changing ownership structure of Bradfield Farms, a neighborhood on the outskirts of Charlotte, North Carolina, where large investors purchased half of the homes sold in 2021 and 2022).

185 *See Average Rent in Somerville MA*, RENTCAFE, https://www.rentcafe.com/average-rent-market-trends/us/ma/somerville/ (accessed Jan. 22, 2024).

186 *Phila. Nat'l Bank*, 374 U.S. at 364.

187 *See, e.g.*, Thomas Malone, *Single-Family Investor Activity Remained High in the Third Quarter*, CORELOGIC (Dec. 23, 2021), https://perma.cc/5RWR-BU2Z (documenting that institutional investors were responsible for 40% of metro Atlanta home purchases near the end of 2021); *see also* Taylor Shelton, *Atlanta's Corporate Landlords*, MAPPING ATLANTA (Jan. 17, 2023), https://perma.cc/CV3Z-RMZD; Kaysen & Koeze, *supra* note 14 (calculating that 33% of all homes were sold to institutional investors in a North Carolina neighborhood).

sustain the structural presumption. This is not to say it will never be possible. In fact, potential plaintiffs may seek to develop these facts to "skate to where the puck is going to be."

Recall that industry experts now estimate that institutional ownership of single-family homes will jump by a factor of eight to over 40% by 2030.[188] It is worth noting that investors may be strategic or sophisticated enough to halt their purchasing right before triggering the structural presumption. Recent economic research has found that private equity firms exploit mandatory disclosure thresholds by participating in undisclosed mergers at the local service industry level.[189] For example, these investors disproportionately target local firms in service industries like health services, auto services, and engineering services.[190]

The more significant problem for would-be plaintiffs comes from entry barriers. To sustain an antitrust case under the merger doctrines, a plaintiff must establish that there are entry barriers preventing competitive entrance. This is an indication of whether a corporation is extracting economic profits. If it is making outsized profits, other investors will move into the space, competing prices down until a competitive equilibrium is reached where profits equal zero.

To this end, a potential litigant's case would be hampered by a difficult-to-reconcile fact: in the areas where institutional entrance is the highest, there has been a contemporaneous increase in build-to-rent single-family homes. "American developers are building new single-family rentals (SFR) at an impressive pace. In 2022, an all-time high of 14,541 new homes were completed in one year."[191] Sun Belt cities led the way in new home construction, with Phoenix, Dallas, Houston, and Atlanta representing four of the top five metro areas building single-family rental homes.[192] In

188 *See Where Have All the Houses Gone? Private Equity, Single Family Rentals, and America's Neighborhoods: Virtual Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Servs.*, 117th Cong. 6 (2022) (statement of Jim Baker, Executive Director, Priv. Equity Stakeholder Project) ("Some have projected that the share of rental homes owned by large investors will hit several million homes, or 40 to 50 percent of market share, by 2030.").

189 *See generally* Barrios & Wollman, *supra* note 35.

190 *See id.* at 26–27.

191 Alexandra Both, *New Build-to-Rent Homes Hit Record With 3 Times as Many Houses Under Construction*, RENTCAFE (May 30, 2023), https://perma.cc/Y252-RVLZ.

192 *See id.*

this way, it appears the market (through new competition) is responding to the profitability of single-family rentals by producing more supply, mitigating anticompetitive concerns.

3. Analyzing unilateral and coordinated effects theories.

However, evidence of a Clayton Act violation can go beyond invoking the structural presumption within a market.[193] Scrutinizing the unilateral and coordinated effects theories also gives rise to the idea that these mergers have profound anticompetitive effects.

It is clear under the unilateral effects theory that institutional buy-up of single-family homes reduces head-to-head competition. In *United States v. Vail Resorts, Inc.*,[194] the District Court of Colorado looked at the diversion ratio between the merging firms.[195] In this analysis, the government documented how many of the customers who chose not to ski at one resort because of a price hike would move to another resort owned by the acquisition target company.[196] While this substitution, in theory, would motivate the owner of the first resort *not to increase prices*, if both resorts were owned by the same company, they no longer would have the incentive not to raise prices. Similarly, institutional purchases of single-family homes reduce competition by allowing these firms to recapture the tenants they lose by increasing rents, especially since Americans generally tend not to leave a narrow geographic area.

The coordinated effects theory also pushes against allowing institutional ownership of single-family homes. The coordinated effects framework looks at how the merging firms interact with their competitors more broadly. This framework often asks a more straightforward question: Does the merger make it easier for companies in the industry to tacitly collude?[197]

Here, the answer is clearly yes. The difference between tens or hundreds of thousands of landlords in a metro area before the

[193] *See, e.g.*, Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1387 (7th Cir. 1986) (identifying internal management structure and entry barriers due to state regulations as relevant evidence).

[194] No. 97-B-10 (D. Colo. July 25, 1997).

[195] Competitive Impact Statement at 12–14, United States v. Vail Resorts, Inc., No. 97-B-10 (D. Colo. Jan. 22, 1997).

[196] *Id.*

[197] *See, e.g.*, *Hosp. Corp. of Am.*, 807 F.2d at 1386.

Great Recession, and the dozens (or fewer) of institutional investors that moved in afterwards, decreases the transaction costs of coordinating price hikes, precisely what is feared in the discussion in *Hospital Corp. of America v. FTC*.[198] Returning to our Atlanta setting, the bunching dynamics detailed by Professors Taylor Shelton and Eric Seymour suggest facts that may make a court sympathetic to a coordinated effects legal theory because the institutions seem to explicitly avoid competing with one another by not infringing on each other's territory: "Essentially, these companies have learned to target different kinds of neighborhoods with different demographic characteristics in order to avoid competing with one another, which in turn[ ] allows each company to maximize their market power and their profits."[199]

Both a coordinated effects theory and a unilateral effects theory leverage the single-family home industry's unique market structures and demand elasticities. However, defenders of institutional entrance invoke economic phenomena to explain rising rents. In the next Part, this Comment details the alternative economic explanations to the housing puzzle and illustrates why these represent only partial explanations at best.

IV. Addressing Alternative Explanations of the Housing Puzzle

This Comment previously detailed the arguments for monopoly pricing in the housing market. From headline-stealing newspaper stories to peer-reviewed causal evidence, the rent-pricing trends in the single-family rental market have captured national attention. For example, bills attempting to reduce the incentives of institutional ownership have been introduced within the last few years in both the House and the Senate. In October 2022, Representatives Ro Khanna, Katie Porter, and Mark Takano introduced the Stop Wall Street Landlords Act of 2022,[200] which both denies institutional investors tax and other benefits (such as mortgage assistance) for owning more than four homes and imposes another tax on the sales of these excess homes.[201] Senator

[198] 807 F.2d 1381 (7th Cir. 1986); *id.* at 1387 ("The reduction in the number of competitors is significant in assessing the competitive vitality of the Chattanooga hospital market. The fewer competitors there are in a market, the easier it is for them to coordinate their pricing without committing detectable violations.").

[199] Shelton & Seymour, *Corporate Landlords*, *supra* note 180.

[200] H.R. 9246, 117th Cong. (2022).

[201] *Id.* §§ 2–3.

Jeff Merkley of Oregon proposed a similar bill in the Senate.[202] While neither bill made it to the floor, they show a growing appetite for legislation to combat this monumental shift in single-family home ownership from individuals to institutions.

It is perhaps troubling that U.S. antitrust doctrine provides no remedy in a situation that has garnered such broad criticism. The displeasure with institutional ownership has generated outsized reactions across industries—from academia, to the media, and even to politics. Why does the doctrine allow for these dynamics that so many people find concerning? This Part proceeds by addressing these questions in two steps: Part IV.A details the economic explanations that militate against a theory of monopoly pricing by institutional investors. The reason for antitrust inaction is partially explained by the fact that monopoly pricing is not the only possible explanation for rising prices. Thus, stepping back to understand and analyze these alternative economic explanations is crucial to scrutinizing the housing puzzle. Part IV.B responds to these theories by explaining how the unique market structure of housing distorts traditional economic analysis and demands a more nuanced approach. Finally, Part IV.C concludes by taking the lessons that the housing puzzle offers and proposing a policy solution. Specifically, the housing puzzle suggests that antitrust doctrine should go beyond merely looking at levels of and changes in market share and additionally incorporate one other important factor: changes in orders of magnitude. At the very least, policymakers should further scrutinize the housing puzzle as they decide how antitrust doctrine should evolve.

A. Traditional Economic Theory Pushes Against a Monopoly Power Explanation for Rising Rents

One explanation for antitrust law's failure to mitigate the problem is that in such a complicated market, other economic forces may be at play. Consider again the research of Professors Gurun, Wu, Xiao, and Xiao. Although they causally showed that the increase in ownership concentration leads to higher rents, they were unable to disentangle the exact mechanism. Specifically, although the authors could rule out selection into neighborhoods by specific firms, their research additionally shows that increases in competition coincided with increases in neighborhood

[202] End Hedge Fund Control of American Homes Act, S. 5151, 117th Cong. (2022).

safety.[203] One could theorize that consumers observe the increase in safety and, because they value their well-being, are willing to pay more for the properties than they were before.

A traditional economics analysis suggests that prices can increase when (1) demand increases outpace that of supply or (2) supply shrinks faster than demand. The explanations are relatively intuitive. Prices increase when demand increases more than supply because consumers are willing to pay more for the same good. However, producers cannot merely sell more of the good to satiate demand because the goods are costly to produce. As a result, prices must increase to bring the market back to equilibrium, where producers can sell as much as consumers can buy. Similarly, prices increase when supply shrinks faster than demand because when producers face higher costs under competitive markets, they can no longer make a product selling the good at the previous price. As a result, prices must increase to bring the market back into equilibrium until fewer consumers are willing to buy the goods.

Disentangling the causes of rent increases in the single-family home market is especially difficult because the market exists at the confluence of several economic dynamics. Demand for single-family rentals is increasing,[204] housing prices continue to rise, and the market has seen an increase in concentration over the past decade.[205] For example, the cost of owning a single-family home appears to be increasing more than the costs of owning other types of housing units: "Nationally, the average annual maintenance cost of single-family homes during the first quarter of 2023 was $6,409, up about 9 percent year over year. Townhouse costs rose about 4 percent and condo costs rose less than 2 percent."[206] Ultimately, more research is needed to ascertain which phenomena are responsible for what portion of the rental increases.

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[203] *See* Gurun et al., *supra* note 13, at 96.

[204] *See, e.g.*, Nicole Bachaud, *A Blend of Stability and Gradual Changes in the U.S. Rental Market (November 2023 Rental Market Report)*, ZILLOW (Dec. 7, 2023), https://perma.cc/24S4-V6ZK; *Zillow's 2024 Housing Market Predictions*, ZILLOW (Nov. 30, 2023), https://perma.cc/94TV-HDUC.

[205] *See supra* Part I.C.

[206] Kolomatsky, *supra* note 78.

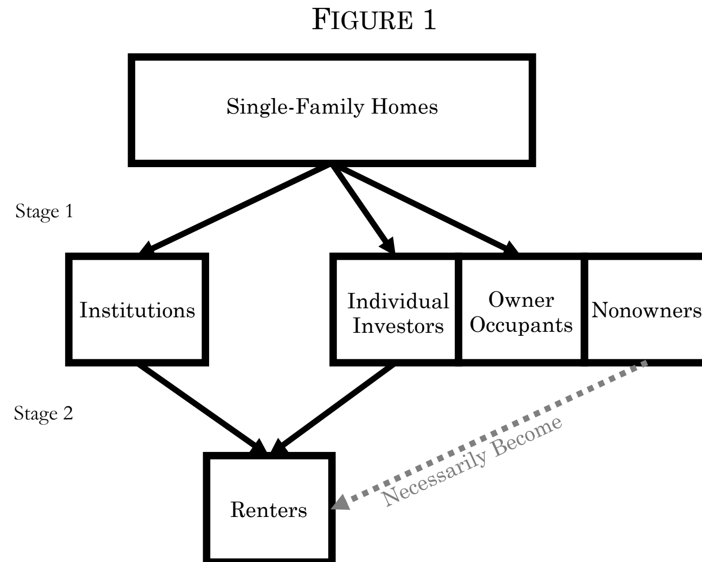
B. The Unique Market Structure Distorts Traditional Economic Theory

However, there are reasons to be skeptical that the answers lie exclusively in changes in demand and supply. Specifically, the unique market structure of single-family homes allows institutions to manipulate supply and demand in the rental market through their purchasing behavior. This suggests two complications to the traditional economic theory. First, market actors may be able to exercise market power at lower market shares than antitrust doctrine traditionally recognizes. Second, where institutions can control demand for one product by limiting access to another, traditional stories of supply and demand oversimplify the market dynamics.

While housing costs for *individuals* have increased dramatically, institutional investors can insulate themselves from these rising costs by hiring home maintenance workers and bringing them within the firm. Similar to how one could conceptualize purchasing a single-family home by an institutional investor as a horizontal merger, one could conceptualize hiring previously independent contract workers, such as plumbers and electricians, as a vertical merger. In fact, by bringing these contract workers into the firm, institutions theoretically reduce the supply, increasing home maintenance costs for those outside the firm.

Additionally, consider Figure 1 detailing the market structure of the single-family housing market:

FIGURE 1



The single-family housing market differs from typical markets because institutions interact with consumers at two different stages. First, institutions compete with individuals in the home-buying market. Afterward, institutions turn around and immediately rent these homes to consumers in the second stage.

This multitiered interfacing between institutions and individuals stems from the inherent inelasticity of housing. After all, a person generally needs to consume *some* amount of housing. As a result, if they cannot own their own homes, they will either have to rent or move in with someone who does. By winning the buying competition in the first stage, institutions necessarily force the losers to the second stage. Yet at both stages, institutions wield some amount of market power. As a result, an institution in the first stage has some degree of market-making power in the second stage. Thus, institutions arguably exert control over the demand for single-family homes. This is unique to the housing market not only because housing is a necessity, but also because consumers are highly immobile and thus geographically inelastic.

The problem becomes even more acute over time. Consider again the example of Bradfield Farms, where investors purchased over 50% of the properties listed for sale in 2021 and 2022.[207] As institutions continue to hold onto these single-family homes while purchasing half of the available stock, the portion of homes owned by and thus sold by individuals will decrease. This will cause the demand for single-family rentals to increase due to the diminished single-family housing for sale.

Structurally, institutional entrance inserts a middleman between the individual home buyer and the home seller. This poses an economic risk because it allows monopoly power to distort the market more than once by allowing institutional investors to flex their pricing power both at the home-purchasing stage and the home-renting stage. But courts scrutinize vertical mergers far less than horizontal mergers in recognition of this two-staged monopolistic pricing dynamic. Courts and economists often advocate for vertical mergers between two firms with market power on two separate verticals because they result in the elimination of double marginalization (EDM):[208]

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[207] Kaysen & Koeze, *supra* note 14.

[208] *See* United States v. AT&T Inc., 310 F. Supp. 3d 161, 197 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

> [D]ouble marginalization refers to the situation in which two different firms in the same industry, but at different levels in the supply chain, each apply their own markups (reflecting their own margins) in pricing their products. Those "stacked" margins are both incorporated into the final price that consumers have to pay for the end product. By vertically integrating two such firms into one, the merged company is able to "shrink that total margin so there's one instead of two," leading to lower prices for consumers. EDM is, therefore, procompetitive.[209]

A vertical merger therefore benefits consumers by eliminating the two-staged monopolistic pricing dynamic. Once the two firms become one, the incentives of the combined firm reduce the output and distort prices.

While institutional entrance can be conceptualized as a "re-institution of double-marginalization," this cascading effect distorts traditional economic theory. By entering the market as powerful nonowner occupiers, these institutions can wield monopolistic power at the home buying-stage and at the home-renting stage. Now homeowners get less than they should for selling their homes, reducing supply by reducing the incentive to sell or build homes. This supply distortion would cause rents to rise in the home-rental market. Additionally, fewer individuals can own their own homes at all due to missing out when institutions outbid them their homes. This itself causes another distortion which increases the demand for single-family rental because those who miss out on homebuying must find somewhere to live.

Thus, while defenders of institutional investors rightly identify other market forces that may cause skyrocketing rents, these supply- and demand-side stories are likely incomplete. The distinct characteristics of the housing market and the essential need for individuals to have housing indicate that the economic intricacies involved are much more complex than what a basic price theory model might imply.

C. How the Housing Puzzle Speaks to Modern Antitrust Debates

The distinct characteristics of the housing market raise doubts that the traditional economic theory of supply and demand

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[209] *Id.* (citations omitted).

tells the entire story. Part of the reason that antitrust doctrine struggles to act within the single-family rental housing market is because the market structure obfuscates institutional monopoly power. Although shares rarely rise even above 10% in any one metropolitan market, institutions can extract rents by simultaneously entering different verticals. Similarly, the actions of an institution on one vertical (e.g., the home-buying market) inevitably impact individuals on another (e.g., the home-renting market). The interaction between different verticals makes analyzing the economic impact on consumers more difficult to measure because it becomes a multidimensional shift in supply and demand. This economic evaluation is often denoted the "consumer welfare standard."[210] Such problems have caused critics of the consumer welfare standard to advocate for a movement away from indicators such as market share and more towards other types of industry dominance.[211]

In the discussion surrounding the 2023 Merger Guidelines, proponents and critics debated whether the guidelines focused too much on concentration measures. Economists such as Carl Shapiro accused the then-Draft Guidelines of "abandon[ing] the protection of customers from harm due to enhanced market power"[212] by focusing more on measures such as the HHI than on prices or consumer welfare.[213] These economists critique what they see as the agencies' signaled decision to "*not* evaluate such acquisitions based on their effects on customers. [Instead, they choose to focus on] 'preserv[ing] the possibility of eventual deconcentration.'"[214] In response to these criticisms, defenders of then-Draft Guidelines argued that focusing on concentration is a "return to the law" imposed by the Clayton Act,[215] which "implicitly

210 *See* Leah Samuel & Fiona Scott Morton, *What Economists Mean When They Say "Consumer Welfare Standard"*, PROMARKET (Feb. 16, 2022), https://perma.cc/7WEQ-JSRJ (summarizing the standard).

211 *See generally, e.g.*, Lina M. Kahn, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) (identifying predatory pricing and integration across business lines as risk indicators).

212 Carl Shapiro, *Why Dropping Market Power from the Merger Guidelines Matters*, PROMARKET (Aug. 7, 2023), https://perma.cc/7WEQ-JSRJ.

213 *See, e.g.*, Carl Shapiro, *How Would These Draft Guidelines Work in Practice?*, PROMARKET (Sept. 1, 2023), [hereinafter Shapiro, *How Would These Draft Guidelines Work?*] https://perma.cc/Q4EW-B9SU; Dennis Carlton, *Have the Draft Guidelines Demoted Economics?*, PROMARKET (Aug. 4, 2023), https://perma.cc/K8KR-B8SS.

214 Shapiro, *How Would These Draft Guidelines Work?*, *supra* note 213 (quoting U.S DEP'T OF JUST. & FED. TRADE COMM'N, DRAFT MERGER GUIDELINES 18 (2023)).

215 Eric Posner, *The Revised Merger Guidelines Will Restore Principle of Competition to Merger Review*, PROMARKET (July 19, 2023), https://perma.cc/3DBR-8GTB.

count[s] harm to consumers and other counterparties (like workers) as the major harms that justify enforcement."[216] These defenders argue that focusing too much on economic efficiency measures and consumer harm "can interfere with enforcement even when enforcement is designed to advance it."[217]

Perhaps the housing puzzle ultimately suggests the need to balance consumer welfare and concentration measures because it represents a clear example of monopolistic power in environments of lower market shares. While the concentration remains below the *Philadelphia National Bank* standard of 30%, the market's HHI has changed by *orders of magnitude* from an HHI near 0 to around 100. Calculating an exact number is difficult, because different sources use different definitions of homes and use different geographic boundaries.[218] However, according to Professors Taylor Shelton and Eric Seymour's recent study, three firms own 11% of the roughly 170,000 single-family rental homes in the Atlanta metro area.[219] Calculating a partial HHI from these firms alone yields a number just over 43.[220] Strikingly, this analysis does not contain holdings from ten of the eleven companies analyzed in other media reports.[221] A back-of-the-envelope calculation combining these two sources strongly suggests the HHI hovers around 100.[222] Even without this speculation, limiting the market

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216 Eric Posner, *The Role of Consumer Welfare in Merger Enforcement*, PROMARKET (Sept. 7, 2023), https://perma.cc/J8LH-9M7N.

217 *Id.*

218 *Compare* Eason & Perry, *supra* note 19, *with* Taylor Shelton & Eric Seymour, *Horizontal Holdings: Untangling the Networks of Corporate Landlords*, ANNALS AM. ASS'N GEOGRAPHERS, Jan. 19, 2024, at 1, 2–3 [hereinafter, Shelton & Seymour, *Horizontal Holdings*].

219 *See* Katherine Duplessis, *Researchers Find Three Companies Own More than 19,000 Rental Houses in Metro Atlanta*, GA. STATE UNIV. NEWS (Feb. 26, 2024), https://perma.cc/TXD5-73S5; Shelton & Seymour, *Horizontal Holdings*, *supra* note 218, at 8. The total number of single-family rental homes in the Atlanta metro area is approximately 172,000 ($19{,}000 / .11 \approx 172{,}000$).

220 "Three corporate landlords control nearly 11 percent of the single-family homes available for rent in metro Atlanta's core counties, according to a new analysis led by Taylor Shelton, a geographer at Georgia State University." Duplessis, *supra* note 219. Of these, Invitation Homes owns 7,861, Pretium Partners owns 7,171, and Amherst Holdings owns 4,061. Shelton & Seymour, *Horizontal Holdings*, *supra* note 218, at 8 tbl.1. A back of the envelope calculation of just these three firms yields a partial HHI of $(100 * 7{,}861 / 172{,}000)^2 + (100 * 7{,}171 / 172{,}000)^2 + (100 * 4{,}061 / 172{,}000)^2 = 43.84$.

221 *See* Eason & Perry, *supra* note 19.

222 Normalizing the housing data from Eason and Perry's report in the Atlanta Journal-Constitution (AJC) using Shelton and Seymour's study (S&S) yields an HHI of 86.5. The number is derived via the following calculation: (1) normalize a company's AJC housing stock number using the ratio of the homes associated with Invitation Homes in the S&S report divided by the homes associated with Invitation Homes in the AJC report;

to merely these three companies, the HHI has still jumped at least one order of magnitude, from near 0 to over 40. Perhaps concentration measures reveal monopolistic power and consumer harm, but our notions of concentration must go beyond levels and change to incorporate orders of magnitude. This suggests that market shares do incorporate structural market information, so long as we are flexible in our approach.

CONCLUSION

Although some evidence suggests that institutional entrance into the single-family rental market has caused prices to increase, as the facts stand right now, it is unlikely these firms' actions have opened themselves up to antitrust litigation. Between confounding economic phenomena; inadequate, below-threshold market shares; and demonstrably surmountable barriers to entry, a would-be plaintiff trying to establish antitrust harm is unlikely to convince a court under current doctrine.

However, the recent budding literature on the economics of single-family rentals suggests that market power at least plays a role in skyrocketing rents. Motivated by these findings, this Comment has mapped a path forward for an individual hoping to bring an antitrust claim against these institutions.

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(2) once the unit number has been normalized (i.e., converting it from AJC's base units to S&S base units), divide that unit number by the total housing stock in S&S (leaving us with a S&S market share number); (3) using the S&S market share number, calculate an HHI by multiplying by 100 and squaring the now-percentage figure; (4) finally, add the individual HHI numbers together. This yields an HHI of 86.5:

$$86.5 = \Sigma\ (100 * (\text{AJC number} / \text{S\&S Total Market}) * (\text{S\&S Invitation Homes Number} / \text{AJC Invitation Homes Number}))^2 =$$

$$(100 * (11{,}141 / 172{,}000) * (7{,}861 / 11{,}141))^2 +$$
$$(100 * (10{,}607 / 172{,}000) * (7{,}861 / 11{,}141))^2 +$$
$$(100 * (5{,}743 / 172{,}000) * (7{,}861 / 11{,}141))^2 +$$
$$(100 * (5{,}201 / 172{,}000) * (7{,}861 / 11{,}141))^2 +$$
$$(100 * (5{,}153 / 172{,}000) * (7{,}861 / 11{,}141))^2 +$$
$$(100 * (4{,}975 / 172{,}000) * (7{,}861 / 11{,}141))^2 +$$
$$(100 * (4{,}337 / 172{,}000) * (7{,}861 / 11{,}141))^2 +$$
$$(100 * (2{,}477 / 172{,}000) * (7{,}861 / 11{,}141))^2 +$$
$$(100 * (1{,}492 / 172{,}000) * (7{,}861 / 11{,}141))^2 +$$
$$(100 * (1{,}130 / 172{,}000) * (7{,}861 / 11{,}141))^2 +$$
$$(100 * (1{,}098 / 172{,}000) * (7{,}861 / 11{,}141))^2 +$$
$$(100 * 7{,}171 / 172{,}000)^2 + (100 * 4{,}061 / 172{,}000)^2.$$

Note that the last two numbers come from the AJC reporting and therefore do not need to be normalized. Also note that this number, if correct, would represent a lower bound, as there are additional individuals and companies that have not been included.

Antitrust litigation represents only one avenue to alleviate the perceived harms of institutional investment. If legislators are genuinely as outraged as they claim,[223] then policy-based solutions may represent a better vehicle to solve the problem. For example, they could pass a bill finding antitrust harms occurring at lower market share levels or ban institutional ownership altogether.

Outsourcing a solution to the housing puzzle to other fora does not entirely solve the problem. While policy solutions can ultimately provide relief tomorrow, they do not provide relief for yesterday's injuries. The failure of current antitrust doctrine to act highlights the need for doctrinal evolution. This Comment illustrates how current conceptions of market share fail to appreciate the complex strategies institutions take to enter these multi-tiered markets. Ultimately, the housing puzzle can instruct future development in antitrust. Specifically, policymakers and legal advocates can scrutinize what exactly makes commentators across industries so uncomfortable with the current reality of the single-family housing market to shore up weaknesses currently plaguing the doctrine.

[223] *See supra* notes 32, 94.