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THE NEED FOR A PANDEMIC MERGER MORATORIUM

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EXECUTIVE SUMMARY

During a pandemic, any greater consolidation of corporations is a risk to health, jobs, and small businesses. Instead of charging forward with more mergers during the coronavirus-created economic crisis, we should impose a moratorium until the Federal Trade Commission can determine that small businesses, workers, and consumers are no longer under the financial stress wrought by the pandemic. A pandemic merger moratorium, such as the Pandemic Anti-Monopoly Act introduced by Senator Elizabeth Warren and Representative Alexandria Ocasio Cortez, would:

- Protect small and medium-sized businesses from pandemic profiteering;
- Protect jobs and workers; and
- Protect our healthcare system.

Recent polling by Data for Progress shows wide, bipartisan support for a pandemic merger ban for big companies:

- 57% of likely voters support this ban. Only 19% of likely voters oppose it, while 24% were not sure.
- Democrats support a ban 4:1, Republicans support it 2:1, and Independents support it 4:1.
- The polling also showed that a majority of Americans support (with a third strongly supporting) breaking up big telecommunications and cable companies.
- A majority of both parties support breaking up big agriculture and big tech because they have too much power, with slightly more Republicans in favor of breaking up big tech.

INTRODUCTION

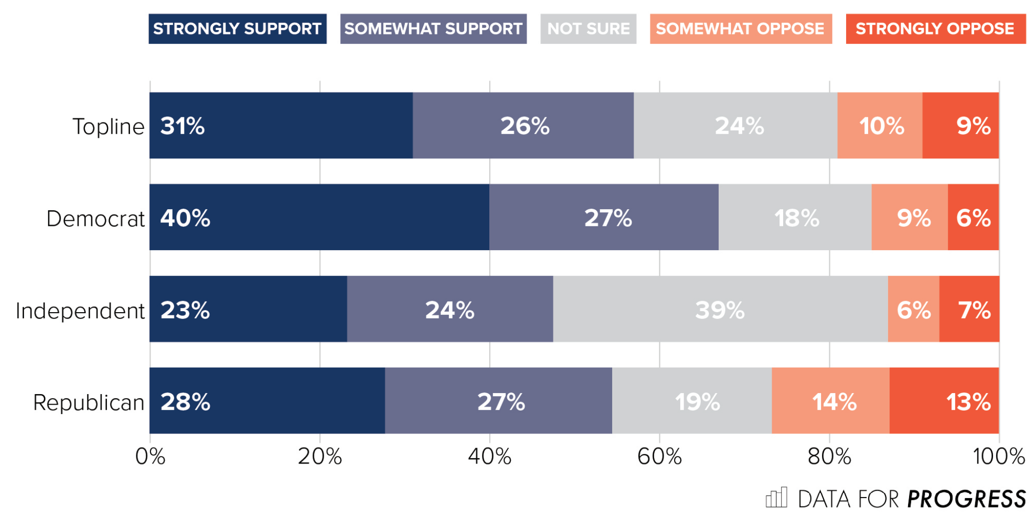
The medical and economic hardships produced by the coronavirus pandemic can be directly traced to extreme consolidation and monopolization. We have allowed a handful of big corporations and Wall Street financiers to consolidate power in fragile, single-point-of-failure companies. The early ventilator crisis and the repeated shortages of medical equipment are a direct result of consolidation in the medical supplies sector. Hospital bed shortages are a direct result of what is often called the "bed shed" of the last 20 years, when hospital mergers left communities with the bare minimum number of beds required on good days, and little room for catastrophe. The chaos in the food sector is a direct result of vertical and horizontal mergers that have created a fragile supply chain, easily disrupted.

During a pandemic, greater consolidation by big firms is a public health risk, a risk to workers, and a major risk to already struggling small and medium-sized businesses that we value. The fragility and weakness of the country combined with unprecedented access to capital by private equity and big business produce an unfair and dangerous situation. The pandemic could become an engine of mass consolidation of power and profiteering, destroying long term job stability and weakening our medical systems.

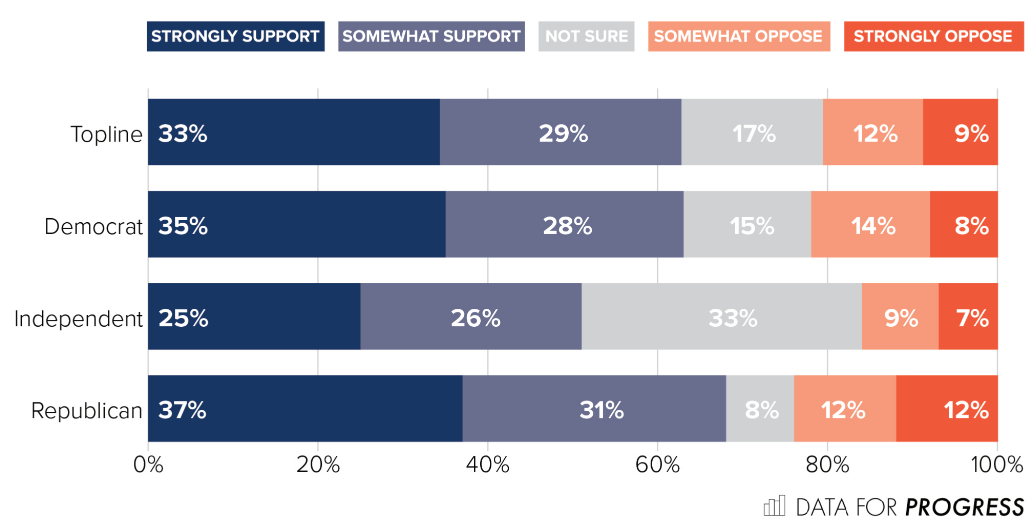
A merger moratorium, such as the Pandemic Anti-Monopoly Act introduced by Senator Elizabeth Warren and Representative Alexandria Ocasio Cortez, would prevent millions of layoffs, protect worker safety, protect our small and medium-sized businesses, protect our innovation systems, and protect our supply chains from further weakening. Recent polling by Data for Progress shows wide, bipartisan support for a pandemic merger ban for big companies:

- 57% of likely voters support this ban. Only 19% of likely voters oppose the ban, while 24% were not sure.
- Democrats support a ban 4:1, Republicans support it 2:1, Independents support it 4:1.
- The polling also showed that a majority of Americans support (with a third strongly supporting) breaking up big telecommunications and cable companies.
- A majority of both parties support breaking up big agriculture and big tech because they have too much power, with slightly more Republicans in favor of breaking up big tech.

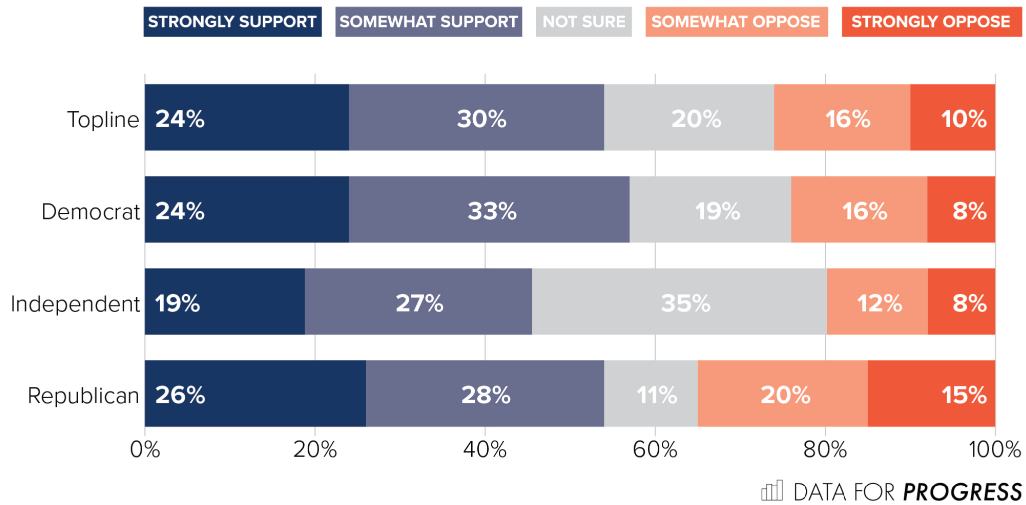
Do you support or oppose legislation to pause mergers and acquisitions from companies and hedge funds worth more than $100 million?



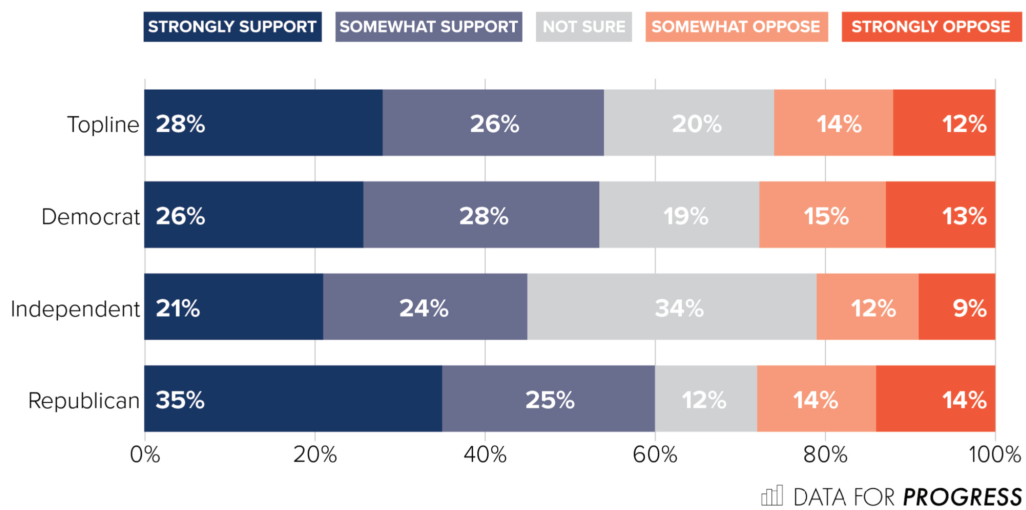
Would you support or oppose breaking up big telecommunications and cable companies, so that they stop abusing customers and workers?



Would you support or oppose breaking up big agriculture companies like Bayer/ Monsanto and Tysons, so that they don't control all aspects of food production?



Would you support or oppose breaking up big tech companies, like Facebook and Instagram, to stop them from having too much power?



Ultimately, a merger moratorium would serve as a life raft for struggling companies, giving them the opportunity to retain their employees with accessible, affordable loans, keep workers on their same employer-provided health insurance plans, and prevent any further unnecessary concentration among viable employers that would limit unemployed workers' options going forward.

HOW IT WOULD WORK

Currently, mergers need to be reviewed and approved by the Federal Trade Commission before they can go through. Under current policy, the FTC will approve most mergers so long as they will not harm consumer welfare.

The Pandemic Anti-Monopoly Act would impose a moratorium on "risky" mergers until the FTC can determine that small businesses, workers, and consumers are no longer under the financial stress wrought by the pandemic. This would apply to any mergers between companies with over $100m in revenue or financial institutions with more than $100m in market capitalization; private equity companies, hedge funds, or companies majority-owned by a private equity company or hedge fund; companies with an exclusive patent that impacts the crisis; and transactions that must otherwise be reported to the FTC under existing law.[1] (For example, neither Amazon nor a private equity firm like Blackstone would be allowed to buy Lark, a digital healthcare company that sells AI coaching and telemonitoring.) This proposal would also pause all waiting periods and deadlines that are typically imposed on antitrust agencies in their review processes, as well as give the FTC a directive to propose rules that establish a legal presumption against any mergers and acquisitions that would pose a risk to the government's ability to adequately respond to a national crisis.

The moratorium can be understood as a modification to the CARES Act, which created a highly unregulated lending window. It was intended to help struggling businesses, but without a moratorium, it can be used to finance acquisitions and generally gobble up good "deals" created by this disaster.

A MERGER MORATORIUM WOULD PROTECT SMALL BUSINESSES FROM PANDEMIC PROFITEERING

One of the biggest risks in any financial disaster is that unscrupulous vultures will use a stricken economy to buy up distressed assets at a bargain. This happened after the 2008 financial crisis, when bailout legislation released billions in emergency funds to big banks, intended primarily to allow those banks and financial institutions to extend loans to consumers to provide relief. With few requirements or conditions on the funding extended to the banks, several banks used this capital to finance acquisitions of struggling banks and financial institutions, leading to consolidation in banking and the collapse and dissolution of several other financial institutions.

The $500 billion available in the Exchange Stabilization Fund managed by Treasury Secretary Steven Mnuchin lacks controls and conditions on its disbursal and usage, even allowing for financial assistance to be granted without any disclosure requirements. There is no mechanism in the law as currently enacted preventing corporations that wish to use these funds to finance a wide range of corporate transactions, provided they are willing to pay the loans back to the government. For the vast majority of loan recipients, there is no

1. A Clayton Act amendment (Hart-Scott-Rodino Antitrust Improvements Act of 1976) states that the factors that go into determining necessity of pre-merger reporting to the FTC are: 1) nature of the commerce, 2) the size of the parties involved, and 3) the size of the transaction—the amount of assets or securities involved. In 2019, the size of the transaction threshold became $90 million.

requirement that they keep their current workers on payroll. Without a merger moratorium, we should expect that the government will be funding vulture acquisitions and rapid consolidation.

The size limit in the ban will permit struggling independent businesses to combine when they feel that is their best option. It will protect viable but fragile medium-sized and smaller businesses from overwhelming pressure to sell out to private equity firms and massive corporations. The ban creates incentives for those with access to capital to make investment and loans to temporarily struggling businesses.

A MERGER MORATORIUM WILL PROTECT JOBS AND WORKERS

Recent research shows that consolidation has taken about $14,000 a year from American workers and transferred that to investors. That's a big deal when you consider that personal median income is around $30,000 a year. Dominant companies take the money they once spent on wages and use it on stock buy-backs, to give investors more money. This, in turn, has been a major driver of inequality and the small savings of most American workers, which has made surviving the pandemic difficult for most people.

Preventing Employer Abuse of Power

Since the beginning of the COVID-19 pandemic, more than 21 million people have become unemployed. At the outset of the crisis, the need for immediate cash on hand for struggling families was so acute that for the first time in recent memory, the government was forced to disburse checks to nearly the entire adult population in order to cover basic needs like rent, car payments, groceries, and other necessary expenses.

As millions lost their jobs, and companies began to fold overnight, the job market constricted further as surviving corporations froze hiring, laid off millions more, and rescinded offers to incoming workers. Taken together with some of higher profile mergers and attendant layoffs, we are now entering a situation where millions are looking for a job, but fewer and fewer companies are in a position to hire.

Companies that are in a position to hire during the pandemic have substantially more leverage over those seeking employment, and the freedom to limit the salaries and benefits that they need to offer in order to find a suitable candidate. In addition, those lucky enough to retain their jobs in the face of layoffs are acutely aware that their positions are not guaranteed, and that there is a glut of qualified candidates willing to replace them. This trend greatly restricts workers' ability to organize and collectively bargain for better treatment.

Moreover, anticompetitive arrangements like non-compete clauses in employment contracts have limited worker mobility for anywhere between 36 and 60 million workers, making incumbent employees more reliant on their employers. These trends, along with a job market that has grown increasingly tolerant of contract employment without benefits, such as rideshare drivers, app-based food delivery services, and door-to-door delivery services for groceries and consumer goods, allow dominant employers to race to the bottom when it comes to providing for their employees, while they generate record profits.

Mergers contribute to layoffs due to reorganization and redundancy, which place an enormous strain on the job market in the context of the pandemic.

- The T-Mobile-Sprint merger earlier this year may ultimately lead to the loss of more than 24,000 jobs on its own.
- Cengage and McGraw-Hill, in anticipation of a merger, laid off hundreds of employees each.
- ViacomCBS has laid off more than 450 employees since their merger, explicitly acknowledging that these losses are permanent, and not tied to the shock from the pandemic.
- Prior to the pandemic, South Carolina's largest hospital system, Prisma Health, was formed in a merger between Palmetto Health and Greenville Health System, serving 1.2 million patients a year, and generating $3.9 billion in annual revenue. Since the merger, more than 327 have been laid off, medical and administrative roles included.

Mergers also contribute to workers losing their health insurance. Roughly half of the population was getting their health insurance through their employer. Allowing this pattern to continue unabated in the midst of a pandemic makes families and communities more vulnerable, and strains the financial capacity of our profit-centric healthcare system.

A MERGER MORATORIUM WILL PROTECT HEALTHCARE

In medical devices and supplies, the effects of market concentration have been ruinous. Particularly among medical device manufacturers and medical suppliers, unchecked market concentration has had tangible, negative effects on American health security, and now, in the face of the pandemic, a catastrophic effect on the global economy.

- Newport Medical Instruments won a contract with HHS in 2008 to develop and manufacture $3,000 ventilators, specifically to stockpile them in the event of a viral respiratory pandemic. They were purchased by a competitor, and then another competitor subsequently, as part of an effort by those competitors to stifle competition in the ventilator market. To date, Phillips, who currently holds a new contract with the government to meet this need, has been incapable of delivering.
- The White House's management of Project Airbridge, in which a number of medical supplies distributors were granted temporary antitrust immunity to deliver PPE, may have laid the groundwork for further anti-competitive activity and future mergers in this space that would shut out smaller competitors and further weaken supply chains. This "state-sanctioned cartel" could be a preview for a post-pandemic medical supply distribution market.

Merger activity in hospital systems, and the consequent obsession with profit over access to care, has hindered the country's capacity to properly respond to systemic shocks such as COVID-19. Consolidation of hospital systems without concern for the consequences of that consolidation have constrained the numbers of available hospital beds, as well as forced an allocation of resources that is more responsive to market dynamics than public health needs. Helped along by more than 800 acquisitions in the last 20 years, hospitals today have been incapable of providing an adequate number of beds, a shortage that is felt especially acutely in rural ICUs.

In seeking greater profits, a smaller number of emergency healthcare providers hospitals are actively contributing to the scarcity of quality medical services. Misplaced concerns that a bed provided is a bed filled, hospitals, and the financiers that facilitate the creation of these ever-growing portfolios of hospital groups, have pivoted, providing outpatient services at the expense of inpatient care.

For further consolidation to be allowed in this market in particular, proposed mergers should have to withstand enhanced levels of scrutiny from the FTC that properly incorporate the public health implications of any such transaction into that evaluation. Profits alone, and particularly where those profits are not shared widely, can no longer be the sole justification for market concentration that has contributed to some of the worst loss of life the country has ever seen.

CONCLUSION

Our society has a major monopoly problem. Two corporations control office supplies. Four corporations control wireless. Five corporations control food. Two corporations dominate retail. Five corporations control defense contracting. Four corporations control home internet, and in many parts of the country, people have no say at all about which provider they use. One corporation dominates books. Five oil corporations control contracts at 50,000 gas stations. The entire pharmaceutical business model is a monopoly. Three corporations dominate the market for voting machines. A decade after they helped trigger the Great Recession, too-big-to-fail banks are bigger and more concentrated than ever. Google, Facebook, Amazon, and Apple collectively control our communications infrastructure and online shopping.

Additional corporate consolidation during a pandemic threatens health care, jobs, worker protections, and small and medium-sized small businesses. The country's economic weakness and fragility, combined with big business and private equity's access to capital, creates an unstable environment that could easily worsen the economic and medical hardship. As the pandemic progresses, greater consolidation will destroy long term job stability and weaken our healthcare systems. A merger moratorium is essential to protect jobs, workers, small and medium-sized businesses, and our innovation and supply systems.

METHODOLOGY

From 7/17/2020 to 7/17/2020 Data for Progress conducted a survey of 1,225 likely voters nationally using web panel respondents. The sample was weighted to be representative of likely voters by age, gender, education, race, and voting history. The survey was conducted in English. The margin of error is +/- 2.8 percent.

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