

# Gender Diversity in Experts: A Reply to and Extension of Rafkin and Kuykendall

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As an economist trained in data-driven industrial organization and econometrics, I was happy to read Brian Rafkin's and Blair Kuykendall's recent article, *Antitrust Cancel Culture: Do Economic Experts Really Cancel Each Other Out in Merger Litigation?*<sup>1</sup> Data is the collection of many individual anecdotes that allow patterns, inferences, and conclusions to be drawn out into the light. Like the sunshine, data sheds light where previously there was darkness. By analyzing data, Rafkin and Kuykendall conclude that, more often than not, economics and economic expert testimony matters when a proposed horizontal merger in the U.S. is challenged by the government and ends up being litigated in federal court.

While not the focus of Rafkin and Kuykendall's analysis, the authors' list of 18 challenged horizontal mergers that were litigated in U.S. federal court over the past 15 years serves another data-driven purpose. Data show how infrequently a woman is the testifying economic expert in U.S. horizontal merger challenges. Augmenting Rafkin and Kuykendall's table with the gender of the economic experts shows how rare it is to find a woman as the testifying economic expert in this type of high-stakes merger litigation.<sup>2</sup> Across 23 challenged horizontal mergers—the 18 provided by Rafkin and Kuykendall plus an additional five hospital mergers not included in the authors' analysis—only one, less than 5 percent, had a woman economic expert testifying on behalf of the government. The data is somewhat better on the side of the merging parties: Five out of the 23 challenged horizontal mergers, nearly 22 percent, had a woman economic expert testifying on behalf of the merging parties.<sup>3</sup> I expect these counts would be similarly small or smaller if parsed along other dimensions of diversity.<sup>4</sup>

<sup>1</sup> Brian Rafkin & Blair Kuykendall, *Antitrust Cancel Culture: Do Economic Experts Really Cancel Each Other Out in Merger Litigation?*, ANTITRUST, Spring 2021, at 55.

<sup>2</sup> The data are available from the author on request.

<sup>3</sup> Since the mid-2000s, women have represented just under 35% of economics Ph.D students and 30% of economics assistant professors. See Shelly Lundberg & Jenna Stearns, *Women in Economics: Stalled Progress*, J. ECON. PERSP., Winter 2019, at 3.

<sup>4</sup> During the 2018–2019 academic year, of the 464 Ph.D economics degrees awarded to U.S. citizens and permanent residents, only 40 were awarded to students identifying as African-American, Black, Hispanic, and/or Latino. See Am. Econ. Ass'n, *Report of the Committee on the Status of Minority Groups in the Economics Profession* (Dec. 2020), <https://www.aeaweb.org/content/file?id=13728>.

Case	Date Decided	Judge	Gender	Government's Economic Expert(s)	Parties' Economic Expert(s)
FTC v. Thomas Jefferson University	12/8/2020	Gerald J. Pappert	Male	Male	Male
FTC v. Peabody Energy	9/29/2020	Sarah E. Pitlyk	Female	Male	Female, Male
United States v. Sabre	4/7/2020	Leonard P. Stark	Male	Male	Male
New York v. Deutsche Telekom	2/10/2020	Victor Marrero	Male	Female, Male	Male
FTC v. RAG-Stiftung	1/24/2020	Timothy J. Kelly	Male	Male	Male
FTC v. Wilh. Wilhelmsen Holding	10/1/2018	Tanya S. Chutkan	Female	Male	Male
FTC v. Tronox	9/12/2018	Trevor N. McFadden	Male	Male	Male
FTC v. Sanford Health / Mid Dakota Clinic	12/14/2017	Alice R. Senechal	Female	Male	Male
United States v. Energy Solutions	7/13/2017	Sue Lewis Robinson	Female	Male	Male
FTC v. Advocate Health / NorthShore	3/22/2017	Jorge L. Alonso	Male	Male	Male
United States v. Anthem	2/8/2017	Amy Berman Jackson	Female	Male	Female
United States v. Aetna	1/23/2017	John D. Bates	Male	Male	Male
FTC v. Staples	5/10/2016	Emmet G. Sullivan	Male	Male	Male
FTC v. Pinnacle Health / Penn State Hershey	5/9/2016	John E. Jones III	Male	Male	Male
FTC v. Steris	9/24/2015	Dan Aaron Polster	Male	Male	Female
FTC v. Sysco	6/23/2015	Amit P. Mehta	Male	Male	Male
United States v. Bazaarvoice	1/8/2014	William H. Orrick	Male	Male	Male
FTC v. OSF / Rockford	4/5/2012	Frederick J. Kapala	Male	Male	Female
United States v. H&R Block	11/10/2011	Beryl A. Howell	Female	Male	Female
FTC v. Lab. Corp. of America	2/22/2011	Andrew J. Guilford	Male	Male	Male
FTC v. CCC Holdings	3/18/2009	Rosemary M. Collyer	Female	Male	Male
FTC v. Whole Foods Market	8/16/2007	Paul L. Friedman	Male	Male	Male
FTC v. Foster (Western Refining)	5/29/2007	James Browning	Male	Male	Male

Of course, there are many holes one could try to poke in this. Maybe women economists are slated to be the testifying economic expert in challenged horizontal mergers that the parties' abandon before litigation in federal court commences. Or maybe women economists are testifying as the economic expert in vertical merger trials in federal court (though I know of only two such acquisitions<sup>5</sup>). Or maybe women are testifying as the economic expert in challenged horizontal mergers that go through the Federal Trade Commission's Part 3 administrative litigation channel or arbitration with the Department of Justice Antitrust Division rather than through federal court. Or maybe the past is not reflective of the future, with the composition of challenged horizontal mergers that have not yet been decided in federal court looking very different than those already decided (though I know of only one challenged horizontal merger pending a decision for which the U.S. government's testifying economic expert is a woman<sup>6</sup>). More data—and along with it more sunshine—would be able to say whether any of these are real holes to poke or not.

<sup>5</sup> These two vertical merger challenges are *United States v. AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018), and *California v. Valero Energy Corp.*, No. C 17-03786 WHA (N.D. Cal. 2017).

<sup>6</sup> *FTC v. Hackensack Meridian Health Inc.*, 2:20-cv-18140 (D.N.J. 2020).

When the financial stakes are high, to gain insights, data on challenged horizontal mergers in federal court often are augmented with data on the composition of the judiciary.<sup>7</sup> The stakes are similarly high for advancing the diversity of voices within the economic and legal professions in high-stakes litigation. While the relatively small number of observations—23—may make it difficult to draw definitive conclusions, the patterns in the results are instructive and suggest scope for improvement. As with many aspects of business, if you do not measure it, then you cannot take action to improve it.<sup>8</sup> Measuring diversity with data means we learn where we are and where there is room to improve. ●

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<sup>7</sup> See, e.g., Lex Machina, which uses data analytics to predict the behavior of courts, judges, lawyers, and parties (<https://lexmachina.com/>). While correlation does not necessarily imply causality, and being appreciative of the small sample size in this set of 23 horizontal merger challenges, the government won 100% of the time when the judge was a woman. On the other hand, the parties to the proposed horizontal merger won just over 50% of the time when the judge was a man. A more diverse set of voices may bring a more diverse set of outcomes. For an alternative view on predicting judicial outcomes, see Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241 (2019).

<sup>8</sup> The origin of the saying—if you cannot measure it, you cannot improve it—is attributed to Peter Drucker.