

A Call for .Com-petition: Reining in Verisign's Monopoly Over the Internet's Most Popular Top-Level Domain

Since the United States government opted in the early 1990s to privatize management of internet domains, a company called Verisign¹ has grown into one of the most profitable companies in the world. Verisign is the government-designated monopoly entitled to manage top-level domains (“TLDs”) across the internet, and it has turbocharged its profitability through an automatically renewing agreement that has, over the course of two decades, increased the price for registering or renewing a .com domain name by 70%, while the true costs of maintaining the .com TLD have likely fallen.

As a result, domain name registrants are paying more and more every year, while Verisign's shareholders reap extraordinary, unjustified profits for what is a de facto public utility service. Today, the wholesale price of annually renewing a TLD through Verisign is \$9.59 and Verisign has announced plans to hike that price to \$10.26 in September 2024. Our analysis suggests that this new price represents an estimated \$6.73 in profit per domain name, a nearly 66% profit margin that enriches Verisign's shareholders at the expense of over 159 million .com registrants.²

These trends worsened following a 2018 amendment to the Cooperative Agreement (“the 2018 Amendment”) between the National Telecommunications and Information Administration (“NTIA”) and Verisign, which abdicated much of the government's oversight of Verisign. In particular, the 2018 Amendment (1) eliminated the NTIA's contractual right to initiate a competitive bidding process for the management of .com TLD registries, (2) granted Verisign authority to increase prices by up to 7% per year without preapproval or any cost justification, and (3) restricted NTIA's preapproval authority over separate agreements governing price, vertical integration, and other key terms.

The 2018 Amendment is a disaster for responsible government oversight of Verisign's government-designated monopoly, with ripple effects across the entire internet. Since the

¹ The company originally used a capital “S” in the middle of its name, as reflected in its legal name of VeriSign, Inc., but it now refers to itself as “Verisign” (lowercase “s”) in colloquial communications. See, e.g., *Legal Notices and Terms of Use*, VERISIGN, https://www.verisign.com/en_US/legal-notices/index.xhtml. Accordingly, this brief uses “Verisign” except when quoting older sources that use “VeriSign.”

² See Earnings Presentation for Q1 2024 Verisign Earnings Conference Call, <https://investor.verisign.com/static-files/d5b9f337-b9c0-4b59-a7fe-c44b9579893b>.

2018 Amendment, the wholesale price to register or renew a domain name has increased by over 30% without meaningful justification. Across 159 million .com registrants, that price increase represents an additional \$383 million annual windfall for Verisign's shareholders, with no direct method for NTIA to restrain future price hikes if the Trump-era terms are rolled over.

President Biden's 2021 Executive Order on Promoting Competition in the American Economy directed agencies (including the Department of Commerce) to develop individual strategies to promote competition in the sectors of the economy they oversee because a "fair, open, and competitive marketplace" is an essential "cornerstone of the American economy."³ The order also affirms that agencies must adhere to statutory mandates to promote fair competition. The statute that created the NTIA expressly states that NTIA's mandate includes facilitating "the full development of competition."⁴ Moreover, as detailed below, competition mandates were also embedded in the privatization policies and contractual arrangements that gave Verisign control of the .com TLD in the first place. NTIA has had three years since the issuance of President Biden's Executive Order to reexamine whether the Cooperative Agreement with Verisign complies with these mandates.

If NTIA lets the current terms roll over, it is reasonable to predict that by the end of the next term of the Cooperative Agreement in 2030, the price to register or renew a domain will be \$13.45, an over 71% increase over the pre-2018 price, and over 30% more than the September 2024 price, regardless of whether that price is justified by any costs. Moreover, 7% annual price hikes are more than double the current rate of inflation, \$13.45 is more than triple a fair market price for registration and renewal of domain names, based on an analysis of Verisign's earnings statements.

The NTIA is not entirely without options. These brief underscores the urgency of NTIA taking action now to stop the upcoming renewal of the Cooperative Agreement. The NTIA's deadline to provide that notice to Verisign is August 2, 2024.⁵

The question before the NTIA is clear: Should Verisign continue reaping large monopoly rents through its control of the most popular top-level domain on the internet, forcing businesses to pay an ever-increasing private tax that robs consumers to pay shareholders, including Verisign's largest shareholder, Warren Buffet?⁶ Or should the NTIA use its remaining authority to rein in Verisign's monopoly abuse?

The moment marks a new inflection point for the Biden administration's fair competition agenda, one affecting hundreds of millions of Americans, small businesses, and end-users

³ The White House, Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

⁴ 47 U.S.C. § 901(c)(3).

⁵ 120 days prior to automatic renewal of the existing Cooperative Agreement. See Amendment 35, *infra* note 54, at Section 6(a).

⁶ Also known as "[America's folksiest predator](#)."

of the internet. Ending the Cooperative Agreement between NTIA and Verisign would trigger renegotiation of the private .com Registry Agreement between Verisign and the Internet Corporation for Assigned Numbers and Names (“ICANN”), a nonprofit entity that ostensibly protects the public interest but counts Verisign as its largest financial backer. The Cooperative Agreement has ultimately harmed consumers, weakened public oversight, and provided cover for an exclusionary agreement between ICANN and Verisign that is ripe for both public and private antitrust scrutiny.

The renewal of the Cooperative Agreement only makes sense if the NTIA is able to restore the pre-2018 Cooperative Agreement. And one meaningful source of leverage for the NTIA to negotiate a reversion to pre-2018 conditions — including the restoration of a marginal price cap that reflects a fair market value — is its authority to trigger nonrenewal of the existing Cooperative Agreement. Our analysis suggests that price caps that allow Verisign to recoup a modest 10% margin would result in prices that are less than half of what Verisign currently charges, while fully compensating Verisign for any legitimate expenses associated with maintaining not only the .com TLD but also other databases and servers relating to internet infrastructure.

This brief details NTIA’s options for ending its relationship with Verisign, opening up management of the .com TLD for competitive bidding, and restoring fair price caps. It also addresses misconceptions about Verisign’s price justifications, which may have held back past administrations from solving, rather than perpetuating, this problem. Finally, looking beyond the NTIA, the brief presents a legal roadmap explaining how the Antitrust Division of the Department of Justice (or a class of web domain owners) could challenge Verisign and ICANN’s collusive anti-competitive grip on the .com wholesale market.

I. Overview of today’s .com market

A. Verisign runs a database tracking who owns which .com domain name

Today, anyone with a website that ends in .com — the most common top-level domain (“TLD”)⁷ on the internet, especially for businesses — pays what is essentially a private tax to the company with monopoly control over that TLD: Verisign. Nearly 160 million websites use the .com TLD.⁸ And the service has low turnover rates: Nearly three-quarters of .com website owners renew.⁹

So what does Verisign do? According to CEO Jim Bidzos, Verisign “enables the world to

⁷ The term “top-level domain” is the broadest domain name market, referring to any ending after the “.” in a domain name, such as .uk, .biz, or .net. The term “generic top-level domain” (or “gTLD”) refers to a narrower market, only for domains that can be used anywhere (e.g., .biz), excluding geographic or country-specific (e.g., .uk) domains.

<https://www.webnic.cc/domain-names/difference-between-gtlds-and-cctlds-and-how-to-choose-the-right-one-or-both/>

⁸ Verisign, Quarterly and Full Year 2023 Earnings Conference Call, p. 6 (Feb. 8, 2024), <https://investor.verisign.com/static-files/b0f00083-c90b-4ce5-b39f-a4fb10d3a0f2>.

⁹ VeriSign, Inc., Annual Report 22 (Form 10-K), p. 24 (Dec. 31, 2023), <https://investor.verisign.com/static-files/90ea25bb-9510-44aa-bdb6-2b75698df322>, (“Verisign 10-K”).

connect online with reliability and confidence, anytime, anywhere.”¹⁰ Although Verisign does maintain some infrastructural aspects of the internet (such as root servers), with respect to .com and other TLDs, it is simply a registry.

What is a registry? Essentially, it is a “database of the ownership records for domains registered under specified top-level domains.”¹¹ Registrars such as GoDaddy and Namecheap, by contrast, sell domain names — such as <https://www.pets.com> — on a retail basis. The registry “sets up domain name extensions, defines the rules for registration, and then works with registrars to sell domain names to the public.”¹²

In other words, Verisign’s .com registry service, although critical to management of the internet, is not technologically sophisticated. There are other companies that already manage dozens of other TLDs that could bid to take over Verisign’s role.¹³ Not renewing NTIA’s contract with Verisign would open up the market, encouraging new investments in competitors and enticing new entrants into the space.

B. Verisign has a monopoly over the .com market

With respect to the .com TLD market, Verisign is a government-designated monopoly: It controls 100% of the wholesale market for .com registrations. But even with respect to the broader TLD market, Verisign has significant market power, as .com remains the single most popular TLD, constituting nearly half of all web domains.¹⁴ The .com domain was among the first domains on the internet¹⁵ and is the most memorable for and trusted by users. Survey data shows that people assume that URLs end in .com — so they are more likely to dismiss or simply forget businesses that use other domains.¹⁶ Many smartphones even place a default “.com” button on digital keyboards.¹⁷ While there may be a long tail of other TLDs on the market, .com remains the single best option for businesses.

¹⁰ Verisign, “What Does Verisign Do?,” https://www.verisign.com/en_US/company-information/index.xhtml.

¹¹ Priya, *What is a Domain Registrar? Explained for Beginners*, THEMEISLE (Oct. 7, 2023), <https://themeisle.com/blog/what-is-a-domain-registrar/>.

¹² *Id.*

¹³ Examples might include Identity Digital, or XYZ LLC. See, e.g. <https://www.identity.digital/registry>; <https://www.prnewswire.com/news-releases/xyz-registry-expands-leadership-footprint-with-ceo-domain-acquisition-301952553.html>. Identity Digital acquired Afiliis’s registry line of business in 2020. <https://icannwiki.org/Donuts>

¹⁴ *Most Popular Top-Level Domains Worldwide as of December 2023*, STATISTA, <https://www.statista.com/statistics/265677/number-of-internet-top-level-domains-worldwide/> (last visited July 10, 2024). Verisign is also a registry for other TLDs, including .net, .name, .cc, and .edu. Verisign as a Domain Registry, VERISIGN, https://www.verisign.com/en_US/domain-names/domain-registry/index.xhtml (last visited July 10, 2024).

¹⁵ Leah Nylen, *Why your website is about to get more expensive*, POLITICO (Apr. 9, 2022), <https://www.politico.com/news/2022/04/09/website-domain-more-expensive-00023524>.

¹⁶ Kyle Byers, *Domain Extensions: .com vs .org, .net, .io & 4 other TLDs (Study)*, GROWTH BADGER (Jan. 30, 2022), <https://growthbadger.com/top-level-domains/>.

¹⁷ Syed Aquib Ur Rahman, *Com vs. Net - How Are These Popular Domain Name Extensions Different?*, SHIKSHA ONLINE (Dec. 21, 2023), <https://www.shiksha.com/online-courses/articles/com-vs-net/>.

C. Verisign's price dictates most of what consumers pay – nearly double the fair market value

The price consumers pay is mostly determined by the wholesale price Verisign charges to registrars, plus whatever markups those registrars charge. Verisign currently charges registrars \$9.59 per year for .com registrations and will hike that to \$10.26 in September 2024.¹⁸

Benchmarking against a variety of market reference points – including Verisign's own publicly reported costs – a fair range for the true market value of .com wholesale registrations is likely less than half of the price Verisign currently charges. Notably, the below estimates still build in profit margins for Verisign – but they are reasonable, rather than extortionate, margins.

Fair Market Benchmarks

- 1) Other registries have managed TLDs for much less.
For example, in 2018, the experienced registry Neustar bid just 70 cents to run India's domain, .in.¹⁹ Adjusted for inflation, that would be approximately 87 cents today.
- 2) Verisign's profits far outstrip its reported expenses.
A reasonable approximation can be derived from Verisign's recent disclosures to its investors.²⁰ Verisign manages 159.6 million .com domains, which is 92% of the total number of TLDs that it manages.²¹ Verisign's investor guidance predicts a lower bound of \$1.045 billion in profit for 2024.²² That works out to \$6.05 in profit per .com TLD.²³ The current wholesale price is \$9.59 per .com domain name, which suggests the cost to Verisign of managing a .com domain is \$3.53. When that price increases to \$10.26 per domain, Verisign's profits increase to \$6.73 per domain, a staggering 65.6% profit margin. These costs are likely exaggerated, given that they reflect monopoly-driven executive compensation – including \$12 million per year to CEO D. James Bidzos.²⁴ Nonetheless, accepting Verisign's costs for the sake of argument, and further granting Verisign a generous profit margin of 10%, a fair wholesale price cap for a .com address would be \$3.89.
- 3) Finally, a private litigant asserted in 2009 that "potential competitors of VeriSign had stated publicly that, if awarded the .com contract, they could and would offer

¹⁸ Andrew Allemann, *Verisign Announces .Com Price Hike to \$10.26*, DOMAIN NAME WIRE (Feb. 8, 2024), <https://domainnamewire.com/2024/02/08/verisign-announces-com-price-hike-to-10-26/>.

¹⁹ Andrew Allemann, *How much would .Com domains cost if .com went out to bid?*, DOMAIN NAME WIRE (Sept. 11, 2018), <https://domainnamewire.com/2018/09/11/verisign-coperative-agreement/>. In 2020, Neustar sold its registry business to GoDaddy. Neustar, *Neustar Sells Its Registry Business To GoDaddy* (Apr. 6, 2020), <https://www.home.neustar/about-us/news-room/press-releases/2020/neustar-sells-its-registry-business-to-godaddy>.

²⁰ Verisign, *Quarterly and Full Year 2023 Earnings Conference Call*, p. 6 (Feb. 8, 2024), <https://investor.verisign.com/static-files/b0f00083-c90b-4ce5-b39f-a4fb10d3a0f2>.

²¹ *Id.* at 6.

²² *Id.* at 10. The margins would be even higher if the upper bound 2024 profit guidance of \$1.065 billion is used.

²³ Multiply \$1.045 billion by 92%, divided by 159.6 million TLDs.

²⁴ Salary.com, *D. James Bidzos, Executive Compensation*, <https://www1.salary.com/D-James-Bidzos-Salary-Bonus-Stock-Options-for-VERISIGN-INC.html>; Verisign 2024 Proxy Statement and 2023 Annual Report, pp. 28-30, <https://investor.verisign.com/static-files/fla590ec-b871-4452-9be6-46f15a61c094>.

registry services at or below \$3 per domain name.”²⁵ Adjusted for inflation, that would be \$4.37 today.

Accordingly, a fair market value for Verisign’s wholesale .com prices likely ranges from 87 cents to \$4.37. Based on the above estimated cost of \$3.53, Verisign’s current \$9.59 wholesale price represents a markup of 172%.

By contrast, unlike Verisign’s prices, registrars’ markups are held in check by competition.²⁶ Although GoDaddy has a nearly 23% share of the .com retail market, the remaining 77% of the market is diversified among dozens of registries, none of which have a market share over 5%.²⁷ GoDaddy currently charges \$22 for a three-year contract.²⁸ The next most popular registrar, Namecheap, charges \$10.28 per year.²⁹ That is a 7% markup over Verisign’s current price.

In other words, Verisign’s wholesale markup is nearly 25 times more than a representative retail markup. Because the retail market is more competitive, once fair wholesale prices are introduced, most of the savings will likely be passed on to end consumers.

Consumers, including millions of small businesses, are currently slated to pay an ever-increasing private tax for what is essentially a utility service – keeping track of a list of domain name owners on a database – because of an unusual set of contractual arrangements and understandings between Verisign, the federal government, and an internet governance nonprofit organization that is nominally independent but actually depends upon Verisign for most of its revenue.

II. The History of the “Incestuous Legal Triangle” Behind .com Price Gouging

A. A history rooted in unrealized competition mandates

How did Verisign acquire its guaranteed stranglehold over .com?

The unusual public-private relationship behind Verisign’s monopoly can be traced back to the privatization of domain name management services and other internet functions in the 1990s.³⁰ In 1993, the National Science Foundation (“NSF”) entered into a Cooperative Agreement with Network Solutions, Inc. (“NSI”) to provide and coordinate registration of

²⁵ *Coalition for Icnan Transparency, Inc. v. Verisign, Inc.*, 611 F.3d 495, 503 (9th Cir. 2009).

²⁶ Domain Name Stat, .com, https://domainnamestat.com/statistics/tld/com-TLD_ID-220.

²⁷ *Id.*

²⁸ Monique Danao, *How Much Does a Domain Name Cost in 2024?*, FORBES (May 7, 2024), <https://www.forbes.com/advisor/business/software/how-much-domain-name-cost/>.

²⁹ *Id.*

³⁰ See, e.g., Michael Roberts, *The Villain in the ICANN-VeriSign Struggle is the U.S. Government*, CIRCLEID (Feb. 20, 2006), https://circleid.com/posts/the_villain_in_the_icann_verisign_struggle; Cooperative Agreement No. NCR-9218742 between National Science Foundation and Network Solutions, Incorporated, Article 1 (Jan. 1, 1993), https://freespeech.com/wp-content/uploads/2020/05/NCR-9218742_Cooperative_Agreement.pdf [“Original Cooperative Agreement”].

“directory and database services” across the internet.³¹ The original 1993 agreement between NSF and NSI was structured as a typical cooperative agreement between a federal agency and a private party,³² with substantial NSF staff involvement in “support planning, oversight, monitoring, and evaluation,” and funding structured at cost plus a fixed fee for NSI.³³

In 1998, NSF stepped aside because the Clinton administration wanted to privatize the internet.³⁴ NTIA took over and in 1999 brokered a deal wherein NSI would be allowed to maintain its monopoly over domain name wholesaling at a guaranteed, fixed price in return for abiding by policies adopted by the newly formed ICANN, a nonprofit organization with a complex governance structure.³⁵ The original Memorandum of Understanding between the Department of Commerce and ICANN stated that the principles governing privatization included “competition” and that “ICANN has declared its commitment to these principles in its Bylaws.”³⁶ Moreover, ICANN committed to help develop a “plan for introduction of competition in domain name registration services.”³⁷

Verisign became involved when it acquired NSI in 2000,³⁸ and thus inherited NSI’s Cooperative Agreement with NTIA.³⁹ In parallel, Verisign entered into an agreement with ICANN to operate the registry for the .com TLDs. The 2001 .com Registry Agreement

³¹ Original Cooperative Agreement, *supra* note 26, at 2.

³² <https://www.grants.gov/learn-grants/grant-policies/federal-grant-and-cooperative-agreement-act-1977>; <https://www.osp.pitt.edu/news/what-cooperative-agreement-and-how-it-different-grant>

³³ Original Cooperative Agreement at Articles 6(B)(1), 8(A).

³⁴ U.S. National Science Foundation, A Brief History of NSF and the Internet (Aug. 13, 2003), https://www.nsf.gov/news/news_summ.jsp?cntn_id=103050.

³⁵ U.S. Department of Commerce, Domain Name Agreements between the U.S. Department of Commerce, Network Solutions, Inc., and the Internet Corporation for Assigned Names and Numbers (ICANN) (Sept. 28, 1999), https://www.ntia.gov/files/ntia/publications/doc_nsi_icann_19990928.pdf; For more information on ICANN’s structure, see ICANN, About Us, <https://atlarge.icann.org/about/how-is-icann-organized>. ICANN has been criticized because the “domain name industry, nominally regulated by ICANN, also provides its funding,” see Emily Taylor, *The internet is run by an unaccountable private company. This is a problem*, THE GUARDIAN (Sept. 21, 2015), <https://www.theguardian.com/technology/2015/sep/21/icann-internet-us-government>.

³⁶ U.S. Department of Commerce, Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (1998), <https://www.ntia.gov/other-publication/memorandum-understanding-between-us-department-commerce-and-internet-corporation>; see also *id.* at Section II.A (purpose includes “development of robust competition”); *id.* at Section II.C (“This Agreement promotes the management of the DNS in a manner that will permit market mechanisms to support competition and consumer choice in the technical management of the DNS. This competition will lower costs, promote innovation, and enhance user choice and satisfaction.”).

³⁷ *Id.* at Section V.C.3. Subsequent amendments and other documents relating to the past contractual relationship between NTIA and ICANN are available at <https://www.ntia.gov/page/docicann-agreements>. This relationship became controversial. In 2021, one commentator argued that “ICANN is arbitrarily and capriciously violating agreements with the U.S. government” while taking contradictory positions in antitrust litigation, and NTIA was making matters worse by “improperly waiving specific performance of ICANN’s contractual obligations.” Greg Thomas, *The Insult and Injury of the U.S. Government’s Failure to Enforce ICANN’s Contractual Obligation*, CIRCLEID (Apr. 13, 2021), <https://circleid.com/posts/20210413-insult-and-injury-of-us-governments-failure-to-enforce-icann>. NTIA and ICANN were bound directly by contract until 2016, when the NTIA transitioned certain functions to ICANN as part of the long privatization process. See NTIA, *IANA Functions and Related Root Zone Management Transition Questions and Answers* (2015), https://www.ntia.doc.gov/files/ntia/publications/qa_-_iana-for_web_eop.pdf.

³⁸ VeriSign buys domain firm, CNN MONEY (Mar. 7, 2000), <https://money.cnn.com/2000/03/07/deals/verisign/>.

³⁹ U.S. Department of Commerce, Special Award Conditions NCR-92-18742 Amendment Number 24 (2016), <https://www.ntia.gov/files/ntia/publications/amend24.pdf>.

imposed a price cap of \$6 per year.⁴⁰

B. Past NTIA officials paid lip service to competition mandates while implicitly serving as an antitrust shield

Despite the initial policy goals and contractual constraints, within a few years, the situation turned into what one industry observer called an “incestuous legal triangle” between NTIA, Verisign, and ICANN.⁴¹ After Verisign sued ICANN in 2004 – essentially because Verisign was upset that ICANN stopped Verisign from showing unwanted ads to users who mistyped domain names⁴² – Verisign allegedly used predatory tactics to improperly pressure ICANN into executing an amended .com Registry Agreement with anti-competitive terms.⁴³ The March 2006 .com Registry Agreement introduced automatic renewal terms (eliminating competitive bidding) and removed price caps, instead allowing a succession of price hikes of up to 7%. Verisign “took advantage of that and raised the fee to \$7.85, a penny short of what had been permitted.”⁴⁴

Following several congressional hearings, the George W. Bush administration’s NTIA approved the March 2006 .com Registry Agreement in November 2006, framing it as “part of a settlement of ongoing litigation.”⁴⁵ In tandem, the NTIA executed another amendment to the Cooperative Agreement with Verisign. This did not roll back the price hikes but added a significant condition: Verisign could not renew its .com Registry Agreement with ICANN again without the prior written approval of NTIA, which would be based on “public interest factors,” including “reasonable prices, terms and conditions.”⁴⁶ The scope of NTIA’s review expressly included “all terms in the Registry Agreement” except for a few very specific terms (e.g., expansion of the definition of Registry Services) in the renewal provision.⁴⁷

However, this did not allay growing concerns about the anti-competitive nature of this arrangement. In 2008, the DOJ urged NTIA to require that ICANN “give greater consideration to consumer interests before ... renewing registry agreements” because

⁴⁰ Verisign and ICANN .com Registry Agreement (16 April 2001), Appendix G, <https://www.icann.org/en/registry-agreements/com/revise-verisign-com-registry-agreement-appendix-g-16-4-2001-en> (Section 1).

⁴¹ Michael Roberts, *The Villain in the ICANN-VeriSign Struggle is the U.S. Government*, CIRCLEID (Feb. 20, 2006), https://circleid.com/posts/the_villain_in_the_icann_verisign_struggle.

⁴² Their disputes began when Verisign launched a “service” in 2003 that redirected mistyped domain names to a page filled with sponsored links. See Fred Locklear, *Who “owns” unregistered domain name space?*, ARS TECHNICA (Sept. 15, 2003), <https://arstechnica.com/uncategorized/2003/09/2824-2/>. After ICANN suspended this “service,” Verisign sued ICANN for antitrust violations in 2004. See Declan McCullagh, *VeriSign sues ICANN to restore Site Finder*, CNET (Feb. 27, 2004), <https://www.cnet.com/tech/tech-industry/verisign-sues-icann-to-restore-site-finder/>.

⁴³ See Fourth Amended Complaint for Violation of the Antitrust Laws and Declaratory and Injunctive Relief, Case No. 05-4826 (RMW) PVT, D.I. 299 (N.D. Cal. Feb. 22, 2011), <https://storage.courtlistener.com/recap/gov.uscourts.cand.173949/gov.uscourts.cand.173949.299.0.pdf> (see, e.g., paragraphs 181, 204-214 and 233).

⁴⁴ <https://phys.org/news/2012-11-verisign-renewal-hike-prices.html>

⁴⁵ U.S. Department of Commerce, Fact Sheet: Department of Commerce Approval of the .com Registry Agreement (2006), https://www.ntia.gov/files/ntia/publications/icanncom_fact_113006.pdf.

⁴⁶ U.S. Department of Commerce, Amendment to Financial Assistance Award NCR-92-18742 Amendment Number 30 (2006), https://www.ntia.gov/files/ntia/publications/amend30_11292006.pdf, (Section 2.A(ii)).

⁴⁷ *Id.*

“Verisign possesses significant market power as the operator of the .com registry.”⁴⁸ This does not appear to have led ICANN to change its renewal practices.

When the .com Registry Agreement came up for renewal in 2012, the Obama administration’s NTIA froze the hiked \$7.85 price as a new price cap.⁴⁹ Verisign could only charge more with the NTIA’s prior written approval that a price increase would serve the public interest.⁵⁰

These renewed restrictions did not survive the next renewal. In 2018, the Trump administration’s NTIA (reportedly acting on DOJ advice) loosened price restrictions and made other changes that reduced NTIA’s oversight.⁵¹ In 2020, ICANN and Verisign implemented these changes in their own agreement, including allowing Verisign to hike prices based on a multiprong formula “in each Pricing Year of the final four Pricing Years of every six year period,” with up to a 7% increase in those years.⁵² ICANN and Verisign have agreed that whenever NTIA and Verisign amend the Cooperative Agreement, ICANN and Verisign will negotiate in good faith to ensure those changes are reflected in the .com Registry Agreement.⁵³

Although NTIA removed price caps, the 2018 amendment also stated that it is “not intended to confer federal antitrust immunity on Verisign.”⁵⁴ Moreover, ICANN has competition mandates that have been hardwired into its bylaws since its first agreement with the Department of Commerce.⁵⁵ Today, ICANN’s bylaws still proclaim that “promoting

⁴⁸ U.S. Department of Commerce, Correspondence between NTIA and DOJ (2008),

<https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>.

⁴⁹ Anick Jesdanun, *VeriSign wins .com renewal, but can't hike prices (Update)*, PHYS.ORG (Nov. 30, 2012),

<https://phys.org/news/2012-11-verisign-renewal-hike-prices.html>.

⁵⁰ Cooperative Agreement, Amendment 32, https://www.ntia.gov/files/ntia/publications/amendment_32_11292012.pdf (Section 2).

⁵¹ U.S. Department of Commerce, Amendment to Financial Assistance Award Amendment 35 (2018),

https://www.ntia.gov/sites/default/files/publications/amendment_35_0.pdf, (Sections 2, 3 and 5(d)); see also Expert Report by the Honorable John Kneuer, ICANN Independent Review Process (May 29, 2020),

<https://www.icann.org/en/system/files/files/irp-afilias-expert-report-kneuer-01jun20-en.pdf> (“Expert Report”);

Leah Nysten, *Why your website is about to get more expensive*, POLITICO (Apr. 9, 2022),

<https://www.politico.com/news/2022/04/09/website-domain-more-expensive-00023524>.

⁵² ICANN, Third Amendment to the .com Registry Agreement (Dec. 1, 2012), <https://itp.cdn.icann.org/en/files/registry-agreements/com/com-amend-3-pdf-27mar20-en.pdf>, (Amendment 3, Section 17).

⁵³ ICANN and Verisign Announce Proposed Amendment to .COM Registry Agreement, ICANN (Jan. 3, 2020),

<https://www.icann.org/en/announcements/details/icann-and-verisign-announce-proposed-amendment-to-com-registry-agreement-3-1-2020-en>.

⁵⁴ U.S. Department of Commerce, Amendment to Financial Assistance Award Amendment 35 (2018),

https://www.ntia.gov/sites/default/files/publications/amendment_35_0.pdf (Section 7 (“Amendment 35”)); see also U.S. Department of Commerce, Amendment to Financial Assistance Award Amendment 32 (2012),

https://www.ntia.gov/files/ntia/publications/amendment_32_11292012.pdf, (Section 5); Cooperative Agreement, Amendment 24, <https://www.ntia.gov/files/ntia/publications/amend24.pdf> (Section 25).

⁵⁵ U.S. Department of Commerce, Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (1998), <https://www.ntia.gov/other-publication/memorandum-understanding-between-us-department-commerce-and-internet-corporation>; see also *id.* at Section II.A (purpose includes “development of robust competition”); *id.* at Section II.C (“This Agreement promotes the management of the DNS in a manner that will permit market mechanisms to support competition and consumer choice in the technical management of the DNS. This competition will lower costs, promote innovation, and enhance user choice and satisfaction.”).

competition” is among its “core values.”⁵⁶

Yet ICANN has repeatedly argued, both to its stakeholders and the Department of Justice, that it has **no** obligation to promote competition.⁵⁷ In 2020, Verisign even paid a former Department of Commerce official to submit an expert declaration in an international dispute resolution proceeding to support ICANN’s argument that it has no “authority or responsibility to act as a regulator in matters of competition, including over Verisign.”⁵⁸

Although formally this state of affairs likely does not prevent an antitrust lawsuit, in practice the NTIA created an appearance of endorsing the current contractual terms, which may have dissuaded potential litigants.

C. Contractual conditions for ending or changing the status quo

Although ICANN ostensibly sets the policies that Verisign is obligated to comply with, Verisign is also, reportedly, “ICANN’s biggest funding source.”⁵⁹ Under the .com Registry Agreement, Verisign pays ICANN several types of fees, which are tied to the number of domain name registrations, extensions, or fee-paying registrars (retail domain name sellers).⁶⁰ In 2021, the parties also entered into a “binding letter of intent” in which Verisign agreed to pay ICANN an additional \$20 million spread out over a five-year period to support certain ICANN activities to “preserve and enhance the security, stability and resiliency of the DNS.”⁶¹ ICANN thus has a conflict of interest and cannot be counted on to rein Verisign in voluntarily.

The Trump administration’s NTIA (reportedly with support from the Department of Justice) made contractual changes that narrowed NTIA’s options for exerting oversight into Verisign’s relationship with ICANN.⁶² Under previous amendments, NTIA approval was

⁵⁶ *Bylaws for Internet Corporation for Assigned Names and Numbers*, ICANN (Nov. 17, 2023), <https://www.icann.org/resources/pages/governance/bylaws-en/#article2>, (ICANN “Core Values” include “Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market” and “Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process”); *see also Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, ICANN (Aug. 9, 2016), <https://www.icann.org/resources/pages/governance/articles-en> (“open and transparent processes that enable competition and open entry in Internet-related markets”).

⁵⁷ ICANN Decision Paper for Amendment 3 to .COM Registry Agreement, and Binding Letter of Intent between ICANN and Verisign (2020), <https://itp.cdn.icann.org/en/files/registry-agreements/com/com-decision-document-27mar20-en.pdf>; Correspondence between NTIA and DOJ (2008), <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>.

⁵⁸ Expert Report *supra* note 51 at paragraph 2; *see also id.* at paragraph 4(g).

⁵⁹ Kevin Murphy, ICANN slashes staff and domain prices could rise, DOMAIN INCITE (May 30, 2024), <https://domainincite.com/29928-breaking-icann-slashes-staff-and-domain-prices-could-rise>.

⁶⁰ .com Registry Agreement, ICANN (Dec. 1, 2012), <https://www.icann.org/en/registry-agreements/com/com-registry-agreement-1-12-2012-en>, (RA Section 7.2); *id.* at (RA [Amend 3](#), Section 16).

⁶¹ Letter of Intent from ICANN and Verisign, ICANN and VERISIGN <https://itp.cdn.icann.org/en/files/registry-agreements/com/com-loi-27mar20-en.pdf>, (Section 2). The contemplated activities “include, without limitation, active measures to promote and/or facilitate DNSSEC deployment, Security Threat mitigation, name collision mitigation, root server system governance and research into the operation of the DNS.” *Id.*

⁶² The American Economic Liberties Project has separately written to the Department of Justice urging withdrawal of the erroneous guidance letter. *See* Letter from American Economic Liberties Project, Demand Progress Education Fund, and

required before Verisign could enter into or revise the .com Registry Agreement.⁶³ Now, NTIA approval is only required for a subset of terms: “pricing; vertical integration; renewal or termination; functional and performance specifications; and the Whois Service.”⁶⁴ Thus, NTIA may lack approval authority over other terms, such as .com Registry Agreement Section 7.3(b) (“No Tying”). Moreover, only Verisign can make proposals to change the subset of terms over which NTIA has approval.⁶⁵ And the “Department’s pending approval for any change to the .com Registry Agreement under Section 4 of this Amendment 35 shall not prevent Verisign and ICANN from entering into an amendment to the .com Registry Agreement, for its renewal, extension, continuation or substitution, without such change.”⁶⁶ Further, Amendment 35 specifies that “neither party may amend the Cooperative Agreement without ... mutual written agreement.”⁶⁷

III. Verisign’s Justifications for Price-Gouging Do Not Compute

A. Verisign spends most of its monopoly rents on stock buybacks, not infrastructure or research and development

Verisign’s revenues far exceed anything necessary to maintain or improve its services. Indeed, Verisign spends most of its monopoly revenues in ways that do not improve infrastructure or service.⁶⁸ At the current price of \$9.59, the approximately 159.6 million websites that use the .com TLD⁶⁹ will pay Verisign annual revenue amounting to \$1.53 billion for 2024, even before accounting for the extra margin that will be added by the September 2024 price hike.⁷⁰ A small fraction of this windfall would cover Verisign’s actual costs. With a gross profit margin of nearly 90% and an operating margin of nearly 70%,⁷¹ Verisign routinely spends billions on stock buybacks,⁷² but only 6% of revenue (\$91 million) on research and development.⁷³ Stock buybacks – a form of market manipulation that was outlawed until the Reagan era⁷⁴ – overwhelmingly benefit Verisign’s largest shareholder, a

Revolving Door Project to the Department of Justice (June 26, 2024), <http://www.economicliberties.us/wp-content/uploads/2024/06/AELP-Verisign-Letter-to-DOJ-Final-062624.pdf>.

⁶³ See, e.g., U.S. Department of Commerce, Amendment to Financial Assistance Award NCR-92-18742 Amendment Number 30 (2006), https://www.ntia.gov/files/ntia/publications/amend30_11292006.pdf (Section 2).

⁶⁴ Amendment 35, *supra* note 54 (preamble; see also Section 4).

⁶⁵ *Id.* at Section 4(d).

⁶⁶ *Id.* at Sections 4(c) and (d).

⁶⁷ *Id.* at Section 6(a).

⁶⁸ Letter from American Economic Liberties Project, Demand Progress Education Fund, and Revolving Door Project to the Department of Justice (June 26, 2024), <http://www.economicliberties.us/wp-content/uploads/2024/06/AELP-Verisign-Letter-to-DOJ-Final-062624.pdf>; see also Letter from Internet Commerce Association to DOJ Re: Verisign .COM Pricing Competition Concerns (Aug. 31, 2021), <https://subscriber.politicopro.com/f/?id=00000180-0057-dbc2-a7c6-697731f40002> (additional metrics).

⁶⁹ Verisign, Quarterly and Full Year 2023 Earnings Conference Call 6 (Feb. 8, 2024), <https://investor.verisign.com/static-files/b0f00083-c90b-4ce5-b39f-a4fb10d3a0f2>.

⁷⁰ Andrew Allemann, Verisign Announces .Com Price Hike to \$10.26, DOMAIN NAME WIRE (Feb. 8, 2024), <https://domainnamewire.com/2024/02/08/verisign-announces-com-price-hike-to-10-26/>.

⁷¹ GURUFOCUS, VeriSign Inc., <https://www.gurufocus.com/stock/VRSN/summary?search=VRSN> (last visited June 21, 2024).

⁷² VeriSign, Inc., Annual Report 22 (Form 10-K) (Dec. 31, 2023), <https://investor.verisign.com/sec-filings/sec-filing/10-k/0001014473-24-000006>.

⁷³ *Id.* at 25.

⁷⁴ Arne Alsin, *The Ugly Truth Behind Stock Buybacks*, FORBES (Dec. 15, 2020), <https://www.forbes.com/sites/aalsin/2017/02/28/shareholders-should-be-required-to-vote-on-stock-buybacks/>.

hedge fund owned by one of the wealthiest men in the country: Warren Buffet.⁷⁵ Verisign's reported costs also incorporate executive compensation⁷⁶ that is higher than it would otherwise be if Verisign were not a monopoly.

B. Verisign also manages two servers and another general internet database, but those services do not justify exorbitant .com prices either

Verisign has also long provided services relating to “root servers.” When a user types in a website address (e.g., <https://www.pets.com>), the user's browser queries the root server to look up the right TLD (.com), and then the browser will contact that TLD server to reach the correct internet protocol (IP) address.

In 2016, NTIA transitioned oversight of root servers to ICANN.⁷⁷ Since then, under the Root Zone Maintainer Service Agreement between ICANN and Verisign, ICANN has paid Verisign \$25,000 per month (\$300,000 per year) to perform technical services during an eight-year term that expires in October 2024.⁷⁸ These services revolve around Verisign's management of the “root zone file,” a database comprising all TLDs.⁷⁹ That is what helps root servers direct queries to TLD name servers.⁸⁰ Verisign also operates two of the world's 13 root servers itself (ICANN and 10 other entities — a mix of private entities, universities, and federal agencies — manage the rest).⁸¹

Even observers who support Verisign's management of the .com TLD have argued that there is no inherent technological or policy-based reason the root zone maintainer services should be linked to .com registry services.⁸²

Nonetheless, Verisign could argue that its exorbitant prices for running the .com database are necessary to cross-subsidize the root zone file database.

Verisign's lower bound of revenue guidance for 2024 is \$1.56 billion. Assuming 92% of that comes from .com domains, then Verisign will earn \$1.43 billion from .com domains in 2024.

⁷⁵ Ramish Cheema, *Warren Buffet's Portfolio: 15 Longest Held Stocks*, YAHOO (Apr. 9, 2024), <https://finance.yahoo.com/news/warren-buffett-portfolio-15-longest-151441672.html?guccounter=1>.

⁷⁶ Salary.com, D. James Bidzos, *Executive Compensation*, <https://www1.salary.com/D-James-Bidzos-Salary-Bonus-Stock-Options-for-VERISIGN-INC.html>; Verisign 2024 Proxy Statement and 2023 Annual Report, pp. 28-30, <https://investor.verisign.com/static-files/fla590ec-b871-4452-9be6-46f15a61c094>.

⁷⁷ ICANN, *Root Zone Maintainer Agreement* (28 Sept. 2016), <https://www.icann.org/en/stewardship-implementation/root-zone-maintainer-agreement-rzma>.

⁷⁸ *Id.* (Root Zone Maintainer Services Agreement, Schedule 3).

⁷⁹ Esteban Borges, *DNS Root Servers Explained: Concept and Location*, RECORDED FUTURE (Mar. 29, 2024), <https://www.recordedfuture.com/threat-intelligence-101/cyber-threat-landscape/dns-root-servers>; see also Verisign 10-k, supra note 9 at 7.

⁸⁰ Esteban Borges, *DNS Root Servers Explained: Concept and Location*, RECORDED FUTURE (Mar. 29, 2024), <https://www.recordedfuture.com/threat-intelligence-101/cyber-threat-landscape/dns-root-servers>; see also Verisign 10-k, supra note 9 at 7.

⁸¹ IANA, *Root Servers*, <https://www.iana.org/domains/root/servers>.

⁸² Milton Mueller, “Inextricably intertwined”: the ICANN-Verisign Root Zone Management Agreement, *Internet Governance Project* (July 1, 2016), <https://www.internetgovernance.org/2016/07/01/inextricably-intertwined-the-icann-verisign-root-zone-management-agreement/>.

Applying the same ratio of 33% of revenue for costs and expenses to the total \$1.56 billion in revenue yields \$514.8 million. Even if *all* of Verisign’s costs and expenses were attributed to .com revenues, Verisign would still come out ahead by \$915.2 million. That profit, divided by 159.6 million .com domains, works out to \$5.73 in profit per .com web domain. Dividing the \$514.8 million in costs and expenses by the 159.6 million .com domain names works out to \$3.23 per .com domain name. Applying a generous 10% profit margin yields a fair market price of \$3.55 – well within the fair market range proposed above.

Of course, more precise measures could be developed through litigation discovery and expert reports, or through congressional subpoenas. The bottom line is that even if Verisign’s .com price were cross-subsidizing Verisign’s “root zone maintainer” role (and even if that were a desirable policy choice), that *still* would not justify the current price – much less the price hikes baked into Verisign’s perpetual contracts with NTIA and ICANN.

C. Verisign’s price is driving, not lagging, inflation

Verisign has argued that its price is reasonable because the “wholesale price of .com domain names has not kept up even with inflation.”⁸³ This argument is both misleading and wrong. First, it ignores that past prices were not fair market prices but instead have long reflected Verisign’s monopoly power. Second, the assertion that Verisign’s price has not kept up with inflation is based on cherry-picking reference dates. While Verisign’s arguments might carry some weight if measured from 1999, when internet technology was still relatively new, that is not the case with the latest round of price hikes. As late as September 2020, Verisign’s wholesale price was \$7.85 per domain.⁸⁴ Adjusted for inflation as measured by the consumer price index (CPI), that would be approximately \$9.47 today.⁸⁵ But the current wholesale price is \$9.59, and Verisign has announced that it will further hike that to \$10.26 in September 2024.⁸⁶ If the current pricing terms are renewed, Verisign will be entitled to additional future price hikes of 7% – more than twice the current CPI of 3.3%.⁸⁷

In other words, by any measure, rolling over the current terms would lock in increasingly inflationary rents.

⁸³ Nylan, *supra* note 15.

⁸⁴ ICANN and Verisign Announce Proposed Amendment to .COM Registry Agreement, VERISIGN (Jan. 3, 2020), <https://investor.verisign.com/news-releases/news-release-details/icann-and-verisign-announce-proposed-amendment-com-registry>.

⁸⁵ Using the U.S. Bureau of Statistics CPI calculator, available at: https://www.bls.gov/data/inflation_calculator.htm.

⁸⁶ Andrew Allemann, Verisign Announces .Com Price Hike to \$10.26, DOMAIN NAME WIRE (Feb. 8, 2024), <https://domainnamewire.com/2024/02/08/verisign-announces-com-price-hike-to-10-26/>.

⁸⁷ U.S. Consumer Price Index (CPI) YoY, INVESTING.COM (JUNE 12, 2024), <https://www.investing.com/economic-calendar/cpi-733>.

IV. How NTIA Can Stop This Cycle of Exploitation

There are two paths NTIA can take to address Verisign's monopoly: either end its relationship with Verisign now or condition renewal on contractual revisions that reverse Amendment 35, enable competitive bidding, and impose evidence-based price caps.

A. NTIA should end its relationship with Verisign

The best outcome would be to introduce periodic competitive bidding for a simple clerical service that millions of people have little choice but to use to ensure the credibility and memorability of their businesses online. Not renewing the contract is one way NTIA⁸⁸ can open up Verisign and ICANN's arrangement to scrutiny and public pressure.

The current term of the Cooperative Agreement between NTIA and Verisign runs through November 30, 2024.⁸⁹ Under Amendment 35, the term "shall automatically renew for six-year terms, unless the Department provides Verisign with written notice of non-renewal within one hundred twenty days (120) prior to the end of the then current term."⁹⁰ One hundred twenty days prior to November 30 is August 2, 2024. "[U]pon expiration or termination of the Cooperative Agreement, neither party shall have any further obligation to the other and nothing shall prevent Verisign from operating the .com TLD pursuant to an agreement with ICANN or its successor."⁹¹

The term of the .com Registry Agreement, as amended, nominally "expire[s]" on November 30, 2024 (the same day the Cooperative Agreement expires)⁹² – however, there is an automatic renewal provision.⁹³ Unlike the Cooperative Agreement, the .com Registry Agreement does not include any mechanism for providing a notice of nonrenewal. But if NTIA does not renew the Cooperative Agreement, ICANN and Verisign have agreed that they will revise the .com Registry Agreement "as may be necessary for consistency with changes to, or the termination or expiration of, the Cooperative Agreement."⁹⁴

Ending NTIA's relationship with Verisign would trigger renegotiation of the .com Registry Agreement with Verisign, which would have to take into account heightened antitrust scrutiny because Verisign and ICANN would no longer be able to invoke implicit government support or responsibility as a litigation shield.

⁸⁸ Or more precisely, the Office of International Affairs of NTIA.

⁸⁹ See Amendment 35, *supra* note 50, at Section 6(a).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*; see also First Amendment to .com Registry Agreement, <https://itp.cdn.icann.org/en/files/registry-agreements/com/com-amend-1-pdf-20oct16-en.pdf> (Section 1) ("First Amendment").

⁹³ .com Registry Agreement, ICANN (Dec. 1, 2012), <https://www.icann.org/en/registry-agreements/com/com-registry-agreement-1-12-2012-en> (Article VI, Section 4.2).

⁹⁴ First Amendment, *supra* note 92 at Section 2.

B. Alternatively, NTIA should exercise real oversight by amending the Cooperative Agreement to reintroduce competition and price caps

1. Undo Amendment 35 and reintroduce competitive bidding provisions

Before the notice of nonrenewal deadline, NTIA should make Verisign agree to undo the Trump administration's changes to the Cooperative Agreement that purport to hamstring NTIA. NTIA should ensure that it has a right to initiate competitive bidding – not just if Verisign breaches some minimal technical requirements but any time the contract comes up for renewal.

NTIA should anticipate that both Verisign and ICANN may raise various objections to competitive bidding. For example, ICANN previously defended its refusal to put the .net TLD out for bid by protesting that if it put all TLDs out to bid, that would be chaotic and would provide no incentive for registry operators to invest in long-term stability and growth.⁹⁵

This argument is meritless, for several reasons. First, a principled distinction could be drawn between TLDs that carry significant market power, such as .com, and the long tail of other TLDs where different market considerations might apply. Putting .com out to bid does not mean that all other TLDs need to be put out to bid at the same time. Second, contract terms that provide several years of monopoly power – even the six-year terms of the current contract – would provide incentives for long term stability and growth. Verisign's massive stock buybacks, which dwarf investments in stability and growth, confirm that no-bid contracts are overkill in this market and ultimately harm internet users more than helping them.

2. Restore fair, evidence-based price caps

Another important goal is restoring price caps, so that consumers are no longer subject to price gouging. NTIA could use its renewal leverage to assert meaningful oversight of a monopolist providing a utility service. Utility regulators typically impose robust price constraints, and NTIA used to do so as well.

Unlike the Obama administration's NTIA, this NTIA should not merely freeze an exorbitant price but reduce it based on actual evidence of Verisign's costs and a reasonable profit margin. As discussed in our analysis above, a fair price cap would be in the range of 87 cents to \$4.37 per domain – in other words, well under half of Verisign's September 2024 price of \$10.26, a price Verisign will continue to hike at more than twice the current rate of inflation if current terms are rolled over. The range proposed in this brief would still enable

⁹⁵ Andrew Allemann, *ICANN says putting TLDs out to bid is against internet users interest*, DOMAIN NAME WIRE (Aug. 16, 2023), <https://domainnamewire.com/2023/08/16/icann-says-putting-tlds-out-to-bid-is-against-internet-users/>.

Verisign to turn a reliable profit, without squeezing registrars (retail sellers such as Namecheap) or gouging consumers.

Alternatively, instead of a dollar value price cap, NTIA could allow Verisign to charge an amount based on its demonstrated costs plus a margin capped at 10%, to be adjusted for inflation on an annual basis.

NTIA should be aware that Verisign is incentivized to delay the negotiation process and to delay providing information until after August 2. If Verisign delays, NTIA's better option is to send a notice of nonrenewal rather than risk being cornered into bad terms yet again.

V. Piercing the Counterfeit Antitrust Shield: Possible Legal Options for the Justice Department — and Class Action Plaintiffs⁹⁶

The Justice Department — and class action attorneys representing registries or .com website owners — has several viable options for challenging the monopolistic arrangement between Verisign and ICANN. And they likely do not need to wait for NTIA to make up its mind before taking action. Whatever norms or apprehensions about potential affirmative defenses might have fended off justice in the past, our analysis (based on a review of publicly available facts) indicates that these companies now appear to have a weaker defense against antitrust lawsuits than they did when the NTIA and ICANN were subject to a Memorandum of Understanding that heightened the NTIA's supervision of domain name registration.⁹⁷

Moreover, there is an existing roadmap from a prior case against Verisign that could be dusted off and updated. The “Coalition for ICANN Transparency” (“CFIT”), a nonprofit organization whose members include website owners, sued Verisign for various antitrust violations over a decade ago. The Ninth Circuit reversed a dismissal order, finding that CFIT's complaint contained sufficient allegations that Verisign's contracts and conduct relating to the .com TLD violated both Section 1 and Section 2 of the Sherman Act for the case to move forward. *Coalition for Icann Transparency, Inc. v. Verisign, Inc.*, 611 F.3d 495,

⁹⁶ This brief is provided “as is” for informational purposes only and does not provide legal advice about any particular legal situation, or any financial or tax advice. It also does not create a lawyer-client relationship.

⁹⁷ ICANN previously had a Memorandum of Understanding with NTIA that addressed management of TLDs. See U.S. Department of Commerce, Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (1998), <https://www.ntia.gov/other-publication/memorandum-understanding-between-us-department-commerce-and-internet-corporation>. In 2009, NTIA and ICANN entered into an “Affirmation of Commitments” that among other things set forth principles for ICANN's management of TLDs. See “Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assignment of Names and Numbers,” <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>. In 2016, NTIA privatized certain infrastructure functions and handed them off to ICANN, ending another major contract with ICANN. See ICANN, Stewardship of IANA Functions Transitions to Global Internet Community as Contract with U.S. Government Ends (Oct. 1, 2016), <https://www.icann.org/en/announcements/details/stewardship-of-iana-functions-transitions-to-global-internet-community-as-contract-with-us-government-ends-1-10-2016-en>. ICANN appears to no longer have a direct relationship with NTIA relevant to TLDs.

502 (9th Cir. 2009) (“Verisign”).⁹⁸ Despite this favorable ruling, the case never reached a merits ruling on those claims, apparently because CFIT could not demonstrate standing.⁹⁹ But the complaint and the Ninth Circuit’s ruling remain useful resources for future litigants.

A. Potential Section 1 Claims: Price Hikes and No-Bid Renewals Restrain Trade

Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.” 15 U.S.C. § 1.¹⁰⁰ Establishing a Section 1 claim requires showing: “(1) the existence of a conspiracy, (2) intention on the part of the co-conspirators to restrain trade, and (3) actual injury to competition.” *Verisign*, 611 F.3d at 502 (citations omitted).

“[V]ertical price restraints are to be judged by the rule of reason.” *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007). Under the rule of reason, courts must distinguish between restraints that harm consumers and pro-competitive terms that “are in the consumer’s best interest.” *Id.* “Harm to consumers in the form of higher prices resulting from competitive restraints has long been held to constitute an actual injury to competition.” *Verisign*, 611 F.3d at 504.

a. The pricing terms of the .com Registry Agreement restrain trade

The 2001 .com Registry Agreement “imposed on Verisign a price cap of \$6 per year.” *Verisign*, 611 F.3d at 500.¹⁰¹ The 2006 .com Registry Agreement removed that cap and replaced it with a series of large price hikes. *Id.* CFIT alleged that “ICANN was economically motivated to conspire with VeriSign because VeriSign agreed to share its monopoly profits with ICANN and to cease its predatory behavior, which had put ICANN in financial jeopardy.” *Verisign*, 611 F.3d at 503.

The Ninth Circuit held that CFIT’s allegations that Verisign intended to restrain trade by conspiring with ICANN, and that the resulting restraint would harm competition and ultimately customers (“in the form of higher prices for registration of domain names, and potentially lower-quality services”), were sufficient to state a claim under Section 1. *Id.* at 503.

The current .com Registry Agreement is vulnerable to a similar Section 1 claim. As detailed above, the .com Registry Agreement likewise replaced a flat price cap with a series of large

⁹⁸ *Coal. For ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 503 (9th Cir. 2010) (Plaintiff CFIT’s Fourth Amended Complaint is of particular value and is accessible online:

<https://storage.courtlistener.com/recap/gov.uscourts.cand.173949/gov.uscourts.cand.173949.299.0.pdf>.

⁹⁹ *Coalition for Icann Transparency Inc. v. Verisign, Inc.*, 771 F. Supp. 2d 1195 (N.D. Cal. 2011).

¹⁰⁰ The Sherman Act applies to nonprofit entities where the challenged activities are commercial in nature. See *National Collegiate Athletic Ass’n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 101 n.22 (1984) (“There is no doubt that the sweeping language of § 1 applies to nonprofit entities”).

¹⁰¹ *Verisign and ICANN .com Registry Agreement* (Apr. 16, 2001), Appendix G, <https://www.icann.org/en/registry-agreements/com/revise-verisign-com-registry-agreement-appendix-g-16-4-2001-en> (Section 1).

price hikes. While the 2018 Amendment to the Cooperative Agreement authorizes Verisign to enter into pricing terms with ICANN for “up to” 7% price hikes, ICANN and Verisign could have agreed to a lesser maximum – such as 3% price hikes or a fixed year-over-year price – in the .com Registry Agreement if ICANN took its own pro-competition bylaws seriously. Demand for renewal of .com TLDs is likely highly inelastic, meaning customers will not alter their behavior in response to price fluctuations as they would for things like newspapers. Customers face switching costs related to making technical changes and revising their marketing and advertisements to reflect a new TLD (such as .in). Thus, increased prices will not threaten overall revenue through decreased demand, and ICANN has no real incentive to stop Verisign from charging supra-competitive prices.

As noted above, the actual fair market price for .com is likely in the range of 87 cents to \$4.37. Registrars and ultimately end consumers are harmed by paying at least double, if not more than triple, that high-end boundary. It may be difficult for Verisign and ICANN to show pro-competitive justifications that could offset such harms, especially given how much Verisign’s stock buybacks outstrip any “investment” in the stability of the internet.

b. The no-bid, auto-renewal terms of the .com Registry Agreement restrain trade

Although the Sherman Act “does not require competitive bidding,” *National Soc. of Professional Engineers v. U.S.*, 435 U.S. 679, 694 (1978) (“*Engineers*”), “concerted action between co-conspirators to eliminate competitive bidding for a contract is an actionable harm to competition.” *Verisign*, 611 F.3d at 502 (citation omitted). CFIT’s claim that the autorenewal provision violated Section 1 also survived the dismissal motion on appeal.

The Ninth Circuit found, taking CFIT’s factual pleadings as true, that Verisign’s initial 2001 .com Registry Agreement with ICANN “contained a renewal provision that allowed ICANN to place the contract up for competitive bidding upon its expiration.” *Verisign*, 611 F.3d at 500.¹⁰² Removing previous competitive bidding terms and adopting automatic renewals could qualify as an actionable harm to competition.

Verisign and ICANN might claim that foregoing competitive bids encourages long-term investment in growth, infrastructure, and improvements to promote the stability of the internet. A plaintiff may rebut that assertion by demonstrating that the effects of foreclosing potential rivals outweigh any benefits, and by pointing to evidence that Verisign’s pricing power has increased stock buybacks at the expense of additional investment in service quality. In any event, the Supreme Court has found that “the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.” *Engineers*, 435 U.S. at 695-6 (“The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain –

¹⁰² The language of Section 25 of the 2001 .com agreement appears to be more nuanced but does provide for competitive bidding in several circumstances, including a price trigger in addition to technical triggers. See *.com Registry Agreement*, ICANN (May 25, 2001), <https://www.icann.org/en/registry-agreements/com/com-registry-agreement-25-5-2001-en>.

quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”)

In addition, if other registries, along with Verisign, have influenced ICANN to adopt certain identical terms for all registry agreements – such as automatic renewal – it is possible that the conduct might constitute a “hub-and-spoke” conspiracy. *See, e.g., Toys “R” Us, Inc. v. Federal Trade Commission*, 221 F.3d 928 (7th Cir. 1999) (finding restraint of trade where a toy retailer negotiated a series of agreements with manufacturers with the same terms, and manufacturers agreed only on condition that their competitors would do the same); *United States v. Apple, Inc.*, 791 F.3d 290, 316-320 (2d Cir. 2015) (Apple’s identical agency agreements with five e-book publishers qualified as a hub-and-spoke conspiracy because all parties communicated with each other about terms and status throughout negotiations). This claim would require further discovery to develop, but it is notable that the renewal provision requires that the terms of any renewed .com Registry Agreement (other than terms for “the price of Registry Services” and certain technical standards) be consistent with the terms in the ICANN’s Registry Agreements with the five largest top-level domain (TLD) registrars.¹⁰³

B. Potential Section 2 Claims: Verisign’s Alleged Predatory Practices Maintain or Attempt to Maintain Monopoly Power

Section 2 of the Sherman Act encompasses both maintenance of monopoly and attempted monopolization. A maintenance of monopoly claim has two elements: (1) “the possession of monopoly power in the relevant market,” and (2) “the acquisition or perpetuation of this power by illegitimate ‘predatory’ practices.” *Verisign*, 611 F.3d at 506 (citations omitted).

Direct evidence of monopoly power may include historical data showing that the defendant was able to profitably raise prices for non-cost reasons without any new suppliers entering the market, or in the face of new suppliers. *See Mylan Pharm. Inc., v. Warner Chilcott Pub. Ltd.*, 838 F.3d 421, 434 (3d Cir. 2016). Attempted monopolization has three elements: “(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.” *Id.* (citations omitted). Improper coercion of a standards-setting body may constitute impermissible predatory conduct for such a claim. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495-97 (1988) (finding antitrust violations where a manufacturer undertook predatory actions to coerce a building code body to publish standards barring the use of a rival’s product).

There is likely a strong argument that Verisign has market power with respect to the .com market, based on the facts noted above and in our June 26, 2024, letter to the Department of Justice.¹⁰⁴

¹⁰³ *Id.*; *see also* notice and cure provisions in Section 6.1.

¹⁰⁴ Letter from American Economic Liberties Project, Demand Progress Education Fund, and Revolving Door Project to the Department of Justice (June 26, 2024), <http://www.economicliberties.us/wp-content/uploads/2024/06/AELP-Verisign-Letter-to-DOJ-Final-062624.pdf>; *see also* Letter from Internet Commerce Association to DOJ Re: Verisign .COM Pricing

In the *Verisign* case, CFIT alleged that Verisign improperly coerced ICANN to “perpetuate” Verisign’s exclusive control over .com by awarding the 2006 .com Registry Agreement “without any competitive bidding” and by agreeing to terms that favored Verisign. *Verisign*, 611 F.3d at 506. Verisign allegedly “paid lobbyists to support its position, ‘stacked’ ICANN’s public meetings with VeriSign supporters, hired purportedly independent organizations and individuals to advocate VeriSign’s position, paid bloggers to attack ICANN’s reputation, planted news stories critical of ICANN in mainstream media, threatened ICANN with litigation, arbitration, and government investigation, and indeed eventually brought suit against ICANN in federal and state court.” *Verisign*, 611 F.3d at 505. Based on these allegations, CFIT’s claim that Verisign monopolized and attempted to monopolize the .com market was also revived by the Ninth Circuit. *Id.*

Discovery would be required to ascertain the nature and extent of Verisign’s more recent activities to cause ICANN to renew the .com Registry Agreement. Nonetheless, this past conduct suggests that there could be a viable Section 2 claim against Verisign.

C. A Counterfeit Antitrust Shield Does Not a “State Action Defense” Make

Verisign and ICANN could argue that they are exempt from antitrust liability under the “state action doctrine.” Antitrust laws do not apply to the government or its instrumentalities. See *Parker v. Brown*, 317 U.S. 341, 351 (1943). Private actors can benefit from this shield only if (1) they act pursuant to a “clearly articulated and affirmatively expressed” state policy, and (2) their conduct is “actively supervised” by the state itself. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1981) (finding that a wine dealers’ association was not immune from antitrust laws, even though it was acting according to clear state policy, because the state did not actively supervise the association). The purpose of the active supervision inquiry “is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention.” *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 634-35 (1992).

The statutory authority undergirding the federal government’s entry into agreements with Verisign (and its predecessor) is the Federal Grant and Cooperative Agreement Act, which at all relevant times has included a competition mandate.¹⁰⁵ This did not change when NTIA became involved. Indeed, under the National Telecommunications and Information Administration Organization Act, NTIA’s mandate includes “advanc[ing] the following

Competition Concerns (Aug. 31, 2021), <https://subscriber.politicopro.com/f/?id=00000180-0057-dbc2-a7c6-697731f40002> (additional statistics).

¹⁰⁵ Original Cooperative Agreement, *supra* note 26, at 2; 41 U.S.C. § 501 (1978), <https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg3.pdf>; Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. § 501 (1978) (express purposes include “maximiz[ing] competition in the award of contracts and encourag[ing] competition”), <https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg3.pdf>. The language remains similar today. See 31 U.S.C. § 6301(3) (“promote increased discipline in selecting and using procurement contracts, grant agreements, and cooperative agreements, maximize competition in making procurement contracts, and encourage competition in making grants and cooperative agreements”), <https://www.law.cornell.edu/uscode/text/31/6301>.

policies: [f]acilitating and contributing to the full development of competition, efficiency, and the free flow of commerce in domestic and international telecommunications markets.”¹⁰⁶

The Clinton administration’s 1998 policy statement on privatization of the internet,¹⁰⁷ which led to ICANN’s role in domain name management, likewise does not articulate a policy favoring the kind of restraints ICANN and Verisign impose on competition. To the contrary, the statement expressly rejected requests for “full antitrust immunity or indemnification for the new corporation” and instead stated that “antitrust law will provide accountability to and protection for the international Internet community.”¹⁰⁸ This statement also expressed expectations that the Cooperative Agreement would wind down soon, and as part of the process, the government expected Verisign’s predecessor (NSI) to “take specific actions, including commitments as to pricing and equal access, designed to permit the development of competition in domain name registration and to approximate what would be expected in the presence of marketplace competition.” Although we have not undertaken a full review of every past contract and amendment between ICANN and NTIA, it does not appear that these contain any “clear articulation” favoring restraints on competition.

In any event, it appears that NTIA no longer has a direct contract with ICANN relating to TLD management generally.¹⁰⁹ Thus, ICANN will have more difficulty arguing that it is acting under any clear state policy or is being actively supervised by the state. The Cooperative Agreement between NTIA and Verisign likely would not rescue any potential state actor defense for either ICANN or Verisign, especially given that recent amendments expressly state that they are not intended to confer antitrust immunity.¹¹⁰ Moreover, Amendment 35 states that “upon expiration or termination of the Cooperative Agreement, neither party shall have any further obligation to the other and nothing shall prevent Verisign from operating the .com TLD pursuant to an agreement with ICANN or its successor.”¹¹¹

Additionally, Verisign could again argue — as it did in the *Verisign* case — that its activities are protected under the *Noerr-Pennington* doctrine, which grants immunity to private parties petitioning the government to take anti-competitive actions, whether through direct petitioning or indirect publicity campaigns. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961) (*Noerr*) (“[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,” the petitioners are immune from antitrust liability). As noted above, however, the Supreme

¹⁰⁶ 47 U.S.C. § 901(c)(3).

¹⁰⁷ Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998), <https://www.govinfo.gov/content/pkg/FR-1998-06-10/pdf/98-15392.pdf>.

¹⁰⁸ *Id.* at 31,747.

¹⁰⁹ See *supra* note 97.

¹¹⁰ See Amendment 35, *supra* note 54 at Section 7; see also Amendment 32, *supra* note 54 at Section 5; Amendment 24, *supra* note 54 at Section 25; U.S. Department of Commerce, Amendment to Financial Assistance Award, Amendment 34 (Oct. 19, 2016), https://www.ntia.gov/files/ntia/publications/amendment_34.pdf, (Section 1).

¹¹¹ See Amendment 35, *supra* note 54 at Section 6(a).

Court has held that this does not shield attempts to influence the standard-setting process of a private association. *Allied Tube Conduit*, 486 U.S. at 511 (“What petitioner may not do (without exposing itself to possible antitrust liability for direct injuries) is bias the process by, as in this case, stacking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition.”). And the Ninth Circuit rejected this defense in the *Verisign* case, finding that although the doctrine shields litigation itself (such as Verisign’s separate lawsuit against ICANN), it does not apply to “predatory and harassing activities” outside of litigation. *Verisign*, 611 F.3d at 506. Thus, this quasi-governmental shield also appears to be weak.

A full analysis of all potential defenses is beyond the scope of this brief. For example, plaintiffs may have to develop arguments based on the continuing violation doctrine to rebut statute of limitations defenses. But to the extent that ICANN and Verisign have attempted to fend off litigation by pointing to federal government agencies as an excuse, those arguments are likely unavailing. While ICANN may not be a “competition regulator,” that does not give it license to collude with Verisign to restrain trade. Both ICANN and Verisign are each ultimately responsible for their own compliance with the antitrust laws.

VI. Conclusion

It is time to rein in Verisign’s monopoly over the .com TLD. NTIA must act quickly to spur competition and cap prices. Doing so will create a fairer marketplace and ultimately save consumers and businesses hundreds of millions of dollars per year. If it does not, Verisign’s collusive relationship with ICANN and monopolistic practices are ripe for antitrust action.