SECOND SUPPLEMENT TO MEMORANDUM 2024-13

Antitrust Law: Status Update (Panelists and Public Comment)

This supplement presents information about individuals representing the four organizations serving on a panel to respond to the expert reports presented at the Commission's May 2, 2024, meeting.[1] It also includes additional public comments that the staff has received relative to the Antitrust Study.

The biographical information on the panelists and public comments are attached as Exhibits to this supplement.

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PANELISTS

At the May meeting, following presentation of the expert working group reports, four organizations will participate in a panel to present responses to the exert reports.

California Alliance for a Fair Economy: Professor Marshall Steinbaum, Assistant Professor of Economics, University of Utah and Sheheryar Kaoosji, Executive Director, Warehouse Workers Resource Center.

United Food and Commercial Workers Western States Council: Michael Strumwasser and Kathy Finn.

California Chamber of Commerce: Eric Enson.

Netchoice: Professor Tom Campbell. (Professor Campbell notes that the views

[1] Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise. The Commission welcomes written comments at any time during its study process.

Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

[2] The dates reflect either the date of the comment letter or the date the staff received the comment.

expressed are his own).

PUBLIC COMMENTS

The staff has received a number of public comments relating to the Antitrust Study. This memorandum provides brief biographical information about the commentors. The comments are attached as Exhibits to this memorandum.

If the staff receives additional public comment, that comment will be provided in another supplemental memorandum.

California Alliance for A Fair Economy

This comment was submitted by a broad coalition of stakeholders[3] and is responsive to the Expert Report on Single Firm Conduct. As noted above, representatives of the alliance are presenting as panelists.

California Chamber of Commerce

This comment was submitted by Eric Enson, counsel to the California Chamber of Commerce and is responsive to the Expert Report on Single Firm Conduct. As noted above, Mr. Enson is presenting as a panelist on behalf of the chamber.

Jordan Cunningham

This comment was submitted by former Assembly Member Jordan Cunningham. He was a coauthor of Assembly Concurrent Resolution 95 (2022), which authorized the Commission to conduct the Antitrust Study. His comments are responsive to the Expert Report on Single Firm Conduct.

Professor Tom Campbell Supplement to Previous Comments

Professor Tom Campbell has previously submitted two comment letters (dated February 15, 2024, and March 13, 2024) that were provided in the First Supplement to Memorandum 2024-13. The attached comment supplements the previously submitted comments.

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[3] The signatories to this comment letter are: American Economic Liberties Project (AELP), California Nurses Association, Democracy Policy Network (DPN), Economic Security California (ESCA), Ending Poverty in California (EPIC), Farm Action (FA), Institute for Local Self-Reliance (ILSR), Rise Economy, Small Business Majority, TechEquity Action, United Food and Commercial Workers International Union (UFCW) Western States Council, and Warehouse Workers Resource Center (WWRC).

Professor John Scott

Professor John T. Scott[4] submitted comments on February 14, 2024. Professor Scott states:

> I am a Professor of Economics, Emeritus, at Dartmouth College. I write today concerning the Law Revision Commission's Study B-750 regarding antitrust, and particularly about the harms that an "abuse of dominance" law would inflict on small California businesses.
>
> My expertise is the economics of technological change. I recently published a comprehensive analysis of how "abuse of dominance" laws would impact large digital platforms such as Google, Facebook, and Amazon, and how such impacts would have severe consequences for small businesses that partner with large digital platforms to operate, find customers, sell products and services, and grow.

Professor Scott submitted two documents entitled "Estimates of Potential Harm to U.S. Small and Medium-Sized Businesses from Proposed Abuse-of-Dominance Antitrust Legislation Aimed at Large Digital Platforms" and "California 'Abuse of Dominance' Legislation Would Crush CA-based Small and Medium-Sized Businesses." He states that the views in this submission are his own and he received modest compensation the Data Catalyst Institute[5] (DCI), where these papers are published.

Respectfully submitted,

Sharon Reilly
Executive Director

[4] Professor Scott's biographical information can be found on the Dartmouth College website at https://economics.dartmouth.edu/people/john-troy-scott.

[5] According to its website, "[t]he Data Catalyst Institute (DCI) analyses complex battles at the intersection of innovation, business, the law, and public opinion by synthesizing insights from original research and our unique community of academics, analysts, and practitioners."

Biographies of Panelists

Marshall Steinbaum

Marshall Steinbaum is an Assistant Professor of Economics at the University of Utah and a Senior Fellow in Higher Education Finance at Jain Family Institute. He studies market power in labor markets and its policy implications, including for antitrust and competition policy. He is an empirical labor economist by training, and his research investigates the existence and implications of employer power in labor markets, with applications to antitrust, higher education, and student debt. In addition to his academic research, he has written for a number of popular outlets relating to his expertise in inequality, antitrust, labor markets, the history of economic ideas and intellectual history more generally, student debt and higher education policy, as well as book reviews related to those subjects. His work has appeared in the Journal of Economic Literature, Industrial and Labor Relations Review, University of Chicago Law Review, and Law and Contemporary Problems. He is also an editor of After Piketty: the Agenda for Economics and Inequality, which was published in 2017. He earned a PhD in Economics from the University of Chicago in 2014.

Sheheryar Kaoosji

Sheheryar Kaoosji, Executive Director of Warehouse Workers Resource Center (WWRC) has spent 20 years developing research, policy and campaign strategies to support deep and sustained organizing among the most marginalized and critical communities in California, including families facing displacement in San Francisco, farm workers in the state's agricultural valleys, misclassified truck drivers at the Port of Los Angeles and, for the past 10 years, workers and communities affected by the massive warehousing and logistics sector of Inland Southern California. He was behind the WWRC's innovative campaign model to organize workers in the supply chains of the largest companies in the world, and the WWRC's broader communities to demand a sustainable and just goods movement sector in Southern California.

Michael Strumwasser

Michael Strumwasser handles large-scale judicial and administrative litigation in government law, economic regulation, education law, civil rights, public finance, and environmental law. He is a nationally recognized authority on administrative law and insurance- and utility regulation and is co-author of the Rutter Guide, *California*

Administrative Law (with Michael Asimow, Herbert Bolz, and Laurine Tuleja). Mr. Strumwasser represents and advises public officials and agencies, and also represents consumer, environmental, and labor organizations challenging governmental actions. He has successfully represented consumers and regulators in state and federal courts and agencies and before Congress and the California Legislature, including over 50 cases resulting in published appellate decisions. He was lead counsel for the California Insurance Commissioner, developing regulations to implement Proposition 103 and successfully defending the program against numerous industry challenges, and has prosecuted unfair insurance practices on behalf of the California Department of Insurance.

Mr. Strumwasser co-founded Strumwasser & Woocher after seventeen years with the California Department of Justice, the last eight years as Special Assistant Attorney General, where he handled some of the state's most important antitrust, consumer-protection, and environmental cases, including California's challenges to major supermarket and oil-company mergers, defended consumer interests in utility-rate litigation, and represented the Governor of California in Nuclear Regulatory Commission health-and-safety reviews. He has written and lectured widely on administrative law and economic regulation. He holds A.B., M.S., and J.D. degrees from UCLA.

Kathy Finn

As the first woman elected as president of UFCW Local 770, Kathy Finn brings decades of experience, grit, and dedication to fighting for the rights of working people. A lawyer by trade, Kathy started working with UFCW in 1990. For 20 years as Director of Collective Bargaining, Kathy sat at the bargaining table during contract negotiations to ensure our members get the benefits workers deserve. As Secretary-Treasurer for 5 years, Kathy worked side by side with now retired President John Grant to strengthen our union and make it more democratic. Kathy was elected by Local 770 membership as President of UFCW 770 in 2024, and has already set out to achieve her goal of building more member power within our union. With a passion for protecting the health and pension benefits of our members, she currently serves as a trustee on the Southern California UFCW Health & Welfare Fund and the Pension Fund. Kathy is also a board member of the Los Angeles Alliance for a New Economy (LAANE).

Eric Enson

Eric Enson is a partner in Crowell & Moring's Antitrust and Competition Law Group. Consistently recognized by *Chambers*, *Best Lawyers in America*, and *The Legal 500* as a leading competition lawyer, clients turn to Eric for his extensive antitrust litigation and

counseling experience. Eric represents clients in all manner of antitrust claims, such as complex international cartel investigations and antitrust class actions, including major jury trials. Eric's experience extends to matters involving claims of monopolization and other types of unilateral conduct.

Professor Tom Campbell

Biographical information of Professor Campbell is set forth in the First Supplement to Memorandum 2024-13.

April 24th, 2024

California Law Review Commission (CLRC)
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

Re: RESPONSE TO CLRC WORKING GROUP REPORT ON SINGLE-FIRM CONDUCT

We represent a diverse group of organizations including legal experts, policy advocates, community based organizations and union representatives from a broad spectrum of California industries which have been working collaboratively to provide information, resources and recommendations to both respond to reports developed by the CLRC and to effectively support updating California's Cartwright Act. This letter provides collective feedback and recommendations to strengthen the CLRC's Single-Firm Conduct report.

As set forth below, we advocate that the Commission recommend a single-firm conduct standard that incorporates a broader range of potential harms than set forth in the Working Group Report. We also recommend that the Commission articulate an alternative to the "rule of reason" framework that limits the ability of harms to be off-set by vague and unrelated potential benefits. Finally, we recommend that the Commission account for potential vagueness in the law by providing an expert administrative agency with rulemaking authority.

We look forward to and thank the Commission for its thoughtful consideration.

Sincerely,

- American Economic Liberties Project (AELP)
- California Nurses Association
- Democracy Policy Network (DPN)
- Economic Security California (ESCA)
- Ending Poverty in California (EPIC)
- Farm Action (FA)
- Institute for Local Self-Reliance (ILSR)
- Rise Economy
- Small Business Majority
- TechEquity Action
- United Food and Commercial Workers International Union (UFCW) Western States Council
- Warehouse Workers Resource Center (WWRC)

I. INTRODUCTION

Federal antitrust law prohibits the creation or maintenance of a monopoly by any means other than competition on the merits.[1] Unlike California's Cartwright Act, which generally prohibits agreements between two or more parties in restraint of trade,[2] federal antitrust law also prohibits certain types of conduct that firms engage in unilaterally, or "single-firm conduct." The absence of a prohibition on monopolizing conduct is a blindspot in California's antitrust law, one which the Working Group Report on Single-Firm Conduct (the "Report") appropriately identifies as the Cartwright Act's "most glaring deficiency."[3]

The above and undersigned authors of this response agree with the Working Group Report that the inclusion of a single-firm conduct standard in the Cartwright Act would be a great improvement to California's antitrust law. We further agree with the Report's authors that merely parroting the language of Section 2 of the Sherman Act would create a "severe disadvantage" if California courts were led to believe that 130 years of federal jurisprudence - which has detrimentally narrowed the scope and enforceability of antitrust law - were imported into California law.

Aside from those broad areas of agreement, we nevertheless identify areas where the Report's recommendations should be improved. For example, the Report identifies the Rule of Reason as a source of confusion for courts ("there is no easy way for the courts to weigh the anticompetitive harms against the procompetitive benefits") but nevertheless risks codifying that very standard into California antitrust law. Meanwhile, the Report dismisses efforts in other jurisdictions - including New York's 21st Century Antitrust Act - that offer substantive alternatives.[4]

While the Report seeks to advance an alternative standard for one type of single-firm conduct - namely, prohibiting single-firm conduct that excludes competitors ("exclusionary conduct") - it does so to the neglect of other harmful modes of single-firm conduct. We recommend that the Commission address single-firm conduct more holistically to address harmful conduct rooted in an "abuse of dominance" or "unfairness" standard akin to Section 5 of the Federal Trade Commission Act. Focusing solely on exclusionary conduct may immunize some modes of conduct that harm workers, consumers, and businesses without necessarily excluding competitors. A broader standard might include conduct like price discrimination, price gouging, worker misclassification, resale price maintenance and other vertical restraints.

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[1] Section 2 of the Sherman Act, 15 U.S.C.A. § 2; see also *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966) ("The offense of monopoly under s 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.")

[2] Cal. Bus. & Prof. Code Sec. 16700 *et seq*.

[3] Single-Firm Conduct Working Group, California Law Revision Commission Study of Antitrust Law, January 2024. Accessible online: http://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp1.pdf

[4] Since the adoption of CA Assembly Concurrent Resolution 95 (Cunningham; Wicks) in 2022, which initiated the California Law Revision Commission's Study B-750, numerous jurisdictions are pursuing variations on an "abuse of dominance" standard, including: Pennsylvania H.B. 2012 ("Open Markets Act") (2023-2024); Minnesota H.F. 1563 (2023-2024); Maine No. 1815 (2023); New York S6748 ("Twenty-First Century Antitrust Act") (2023-2024 ;pending re-introduction); New Jersey S3778 (2023-2024).

We acknowledge that the Report's list of harmful single-firm conduct is "illustrative, not exhaustive." Our recommendations are similarly not exhaustive. We also recommend that the Office of the Attorney General be granted rulemaking authority to enumerate unlawful conduct that would fall under a broader standard of "abuse of dominance" or "unfairness." That rulemaking authority should also be extended to California's Unfair Competition Law and Unfair Practices Act.

We present these recommendations in further detail below, and thank the California Law Revision Commission for its thoughtful consideration.

RECOMMENDATION #1: Adopt a Single-Firm Conduct standard that prohibits harm to trading partners even if that conduct may not exclude rivals.

The Working Group Report on Single-Firm Conduct makes several observations about how the antitrust laws address single-firm conduct, and in doing so provides a useful foundation for further discussion. The Sherman Act condemns the *act* of monopolization, but not the mere *possession* of a monopoly. Monopolies nevertheless can cause a variety of harms, including but not limited to high prices, restricted choice, and "dulled incentives to innovate."

The Working Group Report also recognizes that the antitrust laws were motivated by a broader understanding that concentrated economic power leads to concentrated political power. Increased competition can "generate many useful byproducts," "including a more equal distribution of income and wealth and expanded opportunities for small businesses and entrepreneurs." We agree.

In other ways, however, the Working Group Report adopts a more limited scope of potentially harmful single-firm conduct. For instance, the Report focuses on "single-firm anticompetitive conduct that is exclusionary," or conduct that weakens actual or potential competitors. While identifying "anticompetitive exclusionary conduct" is "far from straightforward" (a complexity we address below), it also ignores other modes of single-firm conduct that cause harm to trading partners without necessarily weakening actual or potential competitors.

For example, worker misclassification (the act of depriving workers of various legal benefits by treating them as independent contractors instead of employees) is a form of single-firm conduct that creates clear harms for workers, but may not have the ancillary effect of weakening or excluding competitors. That is particularly true when misclassification by one firm has the knock-on effect of causing competitors to engage in misclassification, even if there is no explicit agreement between the firms to do so. FTC Commissioner Bedoya recently called misclassification "a pervasive and national scandal," depriving working people of "billions" every year.[5]

To provide another example, price discrimination (the roughly contemporaneous sale of the same good or service at prices which vary by more than the marginal cost of supplying those units) is a form of

[5] Remarks of Commissioner Alvaro Bedoya, "Overawed': Worker Misclassification as a Potential Unfair Method of Competition," February 2, 2024 https://www.ftc.gov/system/files/ftc_gov/pdf/Overawed-Speech-02-02-2024.pdf

single-firm conduct more closely associated with an "exploitative abuse" theory of harm.[6] Exploitative abuse involves a firm with market power "exploiting" that market power, and is arguably not addressed as an antitrust offense, either at the state or federal level. California law does not explicitly prohibit price or access discrimination. While the state's Unfair Practices Act prohibits locality price discrimination (as noted in the Working Group Report), it does not directly ban price or access discrimination between different buyers of the same product or service.

In recent years, we've seen emerging bipartisan consensus aimed at expanding the scope of conduct prohibited by federal antitrust laws, including the consideration of federal legislation prohibiting self-preferencing,[7] price gouging,[8] and the deployment of anti-competitive pricing algorithms.[9] In November 2022, the Federal Trade Commission issued a revised Policy Statement regarding the scope of Section 5 of the FTC Act, which broadly prohibits "unfair methods of competition in or affecting commerce."[10] These documents are helpful touchstones for considering a broader range of "anticompetitive," "unfair," or "abuse of dominance" conduct than the exclusionary conduct set forth in the Working Group Report.

We also put forth the following modes of single-firm conduct that may cause harm to trading partners (namely consumers, workers, or independent businesses) without necessarily having an "exclusionary" effect on existing or potential competitors:

Firms acquiring or maintaining monopsony power by engaging in conduct that suppresses wages:

- ❖ **Exploitative Contract Terms**, like forced arbitration or training repayment clauses that increase market power by reducing workers' capacity to bargain or seek legal redress. These clauses may not be able to be shown to harm rivals, but they can still increase a firm's market power.[11]

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[6] Price discrimination often occurs in buyer, rather than seller, markets, and buyer power can manifest at lower market shares than in seller markets. A company that buys 20 or 30 percent of the goods available in a certain industry has significant power to extract lower prices or other concessions from its suppliers, lest it take its business elsewhere. Indeed, the U.S. Seventh Circuit Court of Appeals found that a retailer with just a 20 percent share of the market had enough power to demand lower prices and other concessions from its suppliers. The thresholds included in New York's 21st Century Antitrust Act get closer to this reality; under that legislation, a seller with a 40 percent share of a given market, or a buyer with a 30 percent share, would be presumed to be dominant, a designation that would then allow prosecutors and judges to investigate whether that firm's actions are abusive.
[7] S.2992 - American Innovation and Choice Online Act, 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/senate-bill/2992/text
[8] S.4214 - Price Gouging Prevention Act, 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/senate-bill/4214/all-info
[9] S.3686 - Preventing Algorithmic Collusion Act, 118th Congress (2023-2024) https://www.congress.gov/bill/118th-congress/senate-bill/3686/text
[10] Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Federal Trade Commission, File No. P221202, November 10, 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf
[11] J. J. Prescott et al., *First Evidence on the Use of Training Repayment Agreements in the US Labor Force*, ProMarket (Mar. 27, 2024), http://www.promarket.org/2024/03/27/first-evidence-on-the-use-of-training-repayment-agreements-in-the-us-labor-force/.

- ❖ **Misclassification**, wherein firms gain market power by improperly classifying workers as contractors to increase their control over worker's wages and conditions of employment.[12]

- ❖ **Supply Chain Wage Suppression**, in which firms use their dominant position in a buyer market to push down wages in an adjacent market.[13] This may not have a demonstrable effect on the dominant firm's rivals, but it will structurally lower wages in an upstream market and transfer that surplus to the dominant firm.

- ❖ **Union Busting**, maintaining dominance over labor markets by suppressing workers ability to collectively bargain.[14]

Firms acquiring or maintaining market power by exploiting consumers:

- ❖ **Price Gouging,** where dominant firms use their market power to raise prices in excess of costs to exacerbate inflation or other economic disruptions. When firms in concentrated markets are allowed to price gouge, it provides rivals an opportunity to tacitly collude and raise their prices along with the dominant firm. This increase in control over prices by the dominant firm can benefit rivals while exploiting consumers. We continue to see repeated instances of this behavior, creating and exacerbating inflation.[15]

- ❖ **Deploying exploitative pricing algorithms**, like Amazon's Project Nessie which "induced other online stores to raise their prices and allowed Amazon to extract additional profits from shoppers," per the FTC's recent complaint.[16] Deploying algorithms like this may not impair rivals, but it does grant the firm greater market power.

- ❖ **Preventing data portability or monopolizing data**, like Apple has been accused of by the Justice Department. So long as firm's choose not to "provide access or interconnection to any third-party,"

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[12] Alvaro Bedoya, *"Overawed," Worker Misclassification as a Potential Unfair Method of Competition*, https://www.ftc.gov/system/files/ftc_gov/pdf/Overawed-Speech-02-02-2024.pdf.
[13] Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages*, 1978 to 2014, 83 AM. SOC. REV. 213, 216 (2018) ("dependence on large buyers decreases suppliers' wages and accounts for 10% of the decline in wage growth in nonfinancial firms since the 1970s"); Eamon Coburn, *Supply Chain Wage Theft as Unfair Method of Competition*, YALE LAW JOURNAL (FORTHCOMING) (2024), https://papers.ssrn.com/abstract=4716531 (last visited Apr 16, 2024).
[14] See Antitrust Complaint Against UPMC, Strategic Organizing Center, 43, http://thesoc.org/what-we-do/upmc-action/ ("UPMC's conduct not only violates federal labor law, but also may help maintain and extend UPMC's possible monopsony power"). Ioana Marinescu & Eric Posner, *A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony*, 14, Roosevelt Institute,
https://rooseveltinstitute.org/publications/a-proposal-to-enhance-antitrust-protection-against-labor-market-monopsony/.
[15] Josh Bivens, *Corporate Profits Have Contributed Disproportionately to Inflation. How Should Policymakers Respond?*, Economic Policy Institute,
https://www.epi.org/blog/corporate-profits-have-contributed-disproportionately-to-inflation-how-should-policymakers-respond/
; Isabella Weber & Evan Wasner, *Sellers' Inflation, Profits and Conflict: Why Can Large Firms Hike Prices in an Emergency?*, Economics Department Working Paper Series
(2023), https://scholarworks.umass.edu/econ_workingpaper/343.
[16] Dana Mattioli, *Amazon Used Secret 'Project Nessie' Algorithm to Raise Prices*, WSJ,
https://www.wsj.com/business/retail/amazon-used-secret-project-nessie-algorithm-to-raise-prices-6c593706 (last visited Apr 14, 2024).

the Working Group proposal leaves firms free to monopolize and monetize consumer data as they see fit, denying consumers the ability to port their data to competing services.[17]

Firms acquiring or maintaining market power by exploiting non-rival businesses:

- ❖ **Imposing Vertical Restraints**, like anti-steering provisions that reduce trading partner's ability to recommend customers use cheaper or higher quality services.
- ❖ **Engaging in Price Discrimination**, wherein firms use their buyer power to force suppliers to sell to them on more beneficial terms than their rivals.
- ❖ **Imposing Extractive Fees**, like when a platform charges an independent business an excessive fee for access. Today, certain platforms can take as much as half of the value of transactions, or levy fees that are over a hundred times the cost of providing their services.

RECOMMENDATION #2: Harmful single-firm conduct should not be off-set by out-of-market "pro-competitive" benefits.

Antitrust laws have been interpreted over time to distinguish between conduct that is illegal *per se*, and conduct that may warrant consideration of benefits to competition. Whereas weighing harms and benefits can create uncertainty in the law, *per se* illegality provides clarity and sureness in the law. Even so, courts have increasingly drifted away from the *per se* standard, and conduct that was once thought to be without competitive benefits - like non-price vertical restraints[18] and resale price maintenance[19] - has become prone to the whims of judicial discretion.

In general, we support a strengthening of *per se* standards of illegality where there is negligible evidence of offsetting justifications or benefits.[20] For all other types of conduct - and for the reasons described in the Working Group Report and here - consideration of pro-competitive justifications should be constrained to avoid uncertainty in the law itself and unpredictable outcomes in its enforcement.

The process of determining antitrust liability by weighing the harmful (or "anti-competitive") and beneficial (or "pro-competitive") effects of conduct is often referred to as the Rule of Reason. It has come to dominate modern antitrust law, but what counts as "harmful" or "beneficial," and how courts weigh those effects against each other, has led to confusion in the courts and inconsistent outcomes. Providing a consistent methodology for weighing "anti-competitive" and "pro-competitive" effects is critical to restoring the rule of law.[21] At a fundamental level, the law should be sufficiently specific and its enforcement predictable and fair. Current Rule of Reason analysis falls short of that basic principle.

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[17] Michael Liedke et al, *Justice Department Sues Apple, Alleging It Illegally Monopolized the Smartphone Market*, AP NEWS (2024),
https://apnews.com/article/apple-antitrust-monopoly-app-store-justice-department-822d7e8f5cf53a2636795fcc33ee1fc3.
[18] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)
[19] *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)
[20] In its recommendation prohibiting "loyalty rebates," the Working Group Report distinguishes "volume discounts" as "generally procompetitive." We disagree with this characterization. Volume discounts have a tendency to favor larger firms with greater purchase power and may result in secondary-line price discrimination against smaller purchasers.
[21] Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 22 Loy. Consumer L. Rev. 15 (2009). Available at: http://lawecommons.luc.edu/lclr/vol22/iss1/5

The Working Group Report appropriately recognizes that "there is no easy way for the courts to weigh the anticompetitive harms against the procompetitive benefits," but does not provide any recommendation for resolving this critical deficiency in the law. Rather, the Working Group Report imports that same confusion into its recommendations.[22]

Although the Cartwright Act does not currently address anticompetitive single firm conduct, the Rule of Reason applies to single firm conduct under federal law. The Rule of Reason has also been imported to claims alleging illegal restraints of trade under the Cartwright Act ("the analysis under the Cartwright Act mirrors the analysis under the Sherman Act."[23]) The Rule of Reason does not apply in cases of *per se* illegality, a standard of review for anti-competitive conduct that courts have deemed irrebuttable by any pro-competitive business justification. But California courts have recognized a recent trend toward applying the Rule of Reason even in those more extreme cases.[24]

Without clarity on what constitutes a "procompetitive effect," Rule of Reason analysis can serve as an escape hatch for firms engaging in anticompetitive conduct. In recent years, antitrust defendants have sought to avoid liability for otherwise anticompetitive conduct by arguing that restraints of trade allow them to "compete more effectively" in the market for motion-picture awards by restricting access to professional associations,[25] increase drug innovation by restricting entry of generic alternatives,[26] "increase utilization" of certain health plans by denying wrapping services to others,[27] and enhance consumer convenience and overall security by blocking rival smartphone app distributors.[28] In each instance, the respective courts found that the federal Rule of Reason applies equally to California's Cartwright Act before engaging in an imprecise balancing of anticompetitive and procompetitive effects.

The New York 21st Century Antitrust Act, as originally introduced in 2021 and again in subsequent sessions, sought to resolve this confusion by barring evidence of pro-competitive effects from being introduced as a defense to cure competitive harm.[29] Although the New York Twenty-First Century Antitrust Act was among the direct catalysts for the California Law Revision Commission's current study of antitrust,[30] the Working Group dismisses it out of hand, suggesting that "the bill might thus be

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[22] The Working Group Report recommends a prohibition on "anticompetitive exclusionary conduct" only to the extent that it "does not provide sufficient benefits to prevent the defendant's trading partners from being harmed by that increased market power." See Proposed Section 16720.1(b) at p. 16 of the Working Group Report.
[23] *Flaa v. Hollywood Foreign Press Ass'n*, 55 F.4th 680, 688 (9th Cir. 2022)
[24] *Sidibe v. Sutter Health*, No. 12-CV-04854-LB, 2022 WL 767087, at *2 (N.D. Cal. Mar. 11, 2022); citing *In re Cipro Cases I & II*, 61 Cal. 4th 116, 147-148 (2015) (finding that tying arrangements, which force purchasers to buy a separate product in order to receive another desired product, are subject to the per se rule and irrebuttable by any pro-competitive justification)
[25] *Id.*, at 691.
[26] *In re Cipro Cases I & II*, 61 Cal. 4th 116, 155 (2015)
[27] *Ben-E-Lect v. Anthem Blue Cross Life & Health Ins. Co.*, 51 Cal. App. 5th 867, 877 (2020)
[28] *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1042 (N.D. Cal. 2021), aff'd in part, rev'd in part and remanded, 67 F.4th 946 (9th Cir. 2023)
[29] NY S933C (2021-2022) ("Twenty-First Century Anti-Trust Act"), at §340(2)(b)(iii) ("Evidence of pro-competitive effects shall not be a defense to abuse of dominance and shall not offset or cure competitive harm.")
[30] The first resolution of California ACR-95 (2021-2022), the authorizing resolution for the California Law Revision Commission's present study of antitrust, directs the Commission to study, "Whether the law should be revised to outlaw monopolies by single companies [] as proposed in New York State's 'Twenty-First Century Anti-Trust Act.'"

understood to prohibit desirable, procompetitive conduct."[31] We disagree with that criticism and the Working Group's characterization of the bill's opposition.

Where conduct is not subject to a *per se* standard of illegality, we recommend that consideration of "pro-competitive" effects be limited to the market in which the harm has occurred. Harm to competition in one market should not be offset by purported benefits in a separate market, and harm to a person or persons from the challenged conduct should not be offset by benefits to another person or persons.

RECOMMENDATION #3: Give California antitrust enforcers rulemaking authority.

Both the Working Group Report and this response set forth an "illustrative, not exhaustive" list of modes of single-firm conduct that would be addressed by a single-firm conduct standard.[32] Enumerating specific types of conduct in the law itself is beneficial to the extent it provides clear notice to market participants of the meaning of otherwise unclear terms in the statute. The more clarity can be provided in the statute itself, the lesser risk of leaving to courts broad discretion to interpret those terms in inconsistent ways.

Judges typically lack formal economics or antitrust training. Recent years have seen renewed efforts to encourage judicial appointments from a broader range of professional backgrounds, but even so, only a small number of nominees have labor or economic justice backgrounds.[33] Prior to her appointment to the Federal Trade Commission, Chair Lina Khan wrote, "antitrust adjudication has become highly reliant on technical evidence and complex economic analysis, but generalist judges often lack the expertise to independently assess the arguments before them. Courts have sought to compensate for this institutional deficiency by relying on amicus briefs and third-party experts for the economic reasoning justifying antitrust rules, partially mirroring how administrative agencies solicit and review comments on proposed rulemaking."[34]

Khan's critique is an old one. The Supreme Court adopted the "Rule of Reason" in 1911, the same standard the Working Group recommends codifying. Congress saw this as a power grab by generalist judges who granted themselves the authority to classify restraints of trade as "reasonable." By 1914, Congress passed the Clayton and FTC Acts in response – granting the FTC rulemaking authority and classifying certain conduct as per se unlawful.

California lawmakers should similarly authorize the Office of the Attorney General (or another expert administrative body) to study business conduct, determine its competitive effects, and promulgate rules that provide clarity where it is lacking, in service of increased compliance with State antitrust and

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[31] The Working Group Report notes that the New York 21st Century Antitrust Act garnered criticism from the New York City Bar Association and Antitrust Section of the American Bar Association, without mention of the broad organizational support for the bill from consumer, labor, and small business advocates.

[32] Working Group Report, at p. 15

[33] "Economic Justice, Judges, and the Law," Alliance for Justice, August 2022. Accessible online: https://afj.org/article/economic-justice-judges-and-the-law/

[34] This piece was written prior to Chair Khan's government service. See Lina M. Khan, *The End of Antitrust History Revisited*, 1679-1680, Harvard Law Review (2020), https://harvardlawreview.org/print/vol-133/the-end-of-antitrust-history-revisited/ (last visited Apr 14, 2024).

unfair competition laws. In doing so, the Attorney General should receive public comment, consider all harms and potential benefits of certain conduct addressed by the rulemaking, and clarify its enforcement priorities. Doing so will enhance compliance, deter non-compliance, and limit unpredictable and costly delegation of discretion to generalist judges.

Rulemaking can mitigate barriers to both public and private enforcement of California antitrust and unfair competition laws.[35] It can provide small businesses a pathway to address monopolizing or unfair conduct without them or their lawyers raising millions of dollars to engage in a protracted court battle; it can provide workers with a pathway to report conduct without taking a publicly oppositional stand against their employer; and it can allow consumers to redress harms that have a large collective impact but too small of an individual impact to rationally warrant legal action.

For these reasons, we encourage the Commission and California lawmakers to include rulemaking authority in any proposed revision to the California Cartwright Act, Unfair Competition Law, and Unfair Practices Act.

PROPOSED REVISIONS TO THE WORKING GROUP'S LEGISLATIVE PROPOSAL:

We are grateful to the Working Group for recommending that California law be updated to include an antitrust prohibition against single-firm conduct. We further recognize that California law is unique from other jurisdictions in that it already has laws prohibiting unfair competition and unfair practices exercised by single firms.

Using the Working Group's proposed legislation as a starting point, we encourage the Commission to adopt a broader prohibition on single-firm conduct than "anticompetitive exclusionary" conduct. For the reasons above, we also incorporate a modest limitation on the potential for anticompetitive or unfair conduct to be off-set by procompetitive benefits. Lastly, we encourage the authorization of competition rulemaking authority to increase the clarity and accessibility of the antitrust laws to all California workers, consumers, and businesses.

Finally, we discourage the Commission from viewing this proposal as the only option for addressing antitrust single-firm conduct. As numerous other jurisdictions continue to pursue various legislation to adopt an "abuse of dominance" standard,[36] We encourage the Commission to avoid the Working Group's repudiation of those ongoing, evolving efforts.

Proposed Legislative Alterations:[37]

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[35] We understand that a separate Working Group has issued a report on Enforcement and Exemptions, and we reserve further discussion of barriers to enforcement for the Commission's consideration of that report.

[36] *See, e.g.*, Pennsylvania H.B. 2012 ("Open Markets Act") (2023-2024); Minnesota H.F. 1563 (2023-2024); Maine No. 1815 (2023); New York S6748 ("Twenty-First Century Antitrust Act") (2023-2024 ;pending re-introduction); New Jersey S3778 (2023-2024)

[37] Section (c) is modeled after the *Grinnell Corp* standard that remains a leading articulation of illegal monopoly under Section 2 of the Sherman Act; Section (d) is modeled after the existing Federal Trade Commission's Section 5 policy statement; Section (f) is modeled after the existing Federal Trade Commission Act.

(a) It is unlawful for one or more persons to engage in anticompetitive exclusionary conduct, *unlawful monopolization or monopsonization, or unfair methods of competition* that affects any part of the trade or commerce within the State.

(b) Conduct, whether by one or multiple actors, is deemed to be anticompetitive exclusionary conduct, if the conduct tends to

> (1) diminish or create a meaningful risk of diminishing the competitive constraints imposed by the defendant's rivals and thereby increase or create a meaningful risk of increasing the defendant's market power, and
>
> (2) does not provide sufficient benefits *within the same market* to prevent the defendant's trading partners from being harmed by that increased market power.

(c) Conduct that monopolizes or monopsonizes or attempts to do so shall be unlawful regardless of its exclusionary effects on competitors.

(d) Conduct is deemed an unfair method of competition if the conduct is coercive, exploitative, collusive, abusive, deceptive, predatory, or involves the use of economic power of a similar nature. Unfair conduct must also tend to negatively affect competitive conditions.This may include, for example, conduct that tends to foreclose or impair the opportunities of trading partners or market participants, reduce competition between rivals, limit choice, or otherwise harm consumers or workers.

(e) Those harmed by monopolies or monopsonies may seek redress through private enforcement.

(f) The Office of the Attorney General ("Attorney General") shall also have authority to enforce this statute.

> *(1) The Attorney General shall promulgate rules to clarify what conduct shall be considered exclusionary, monopolizing, monopsonizing, or unfair commercial conduct. The Department shall consider the potential harms and benefits of the rules that it promulgates, but it need not prove that a rule's projected benefits exceed its projected harms or that relevant the conduct excludes competitors.*
>
> *(2) The Attorney General shall establish a process through which workers, consumers, and businesses can seek remedies for conduct that is exclusionary, monopolizing, monopsonizing, or unfair at no cost.*
>
> *(3) The Attorney General may require persons engaged in commerce within California to produce answers in writing to specific questions about a firm's structure and business practices without any law enforcement purpose. Such answers shall be complete and made under oath.*

Definitions:

(g) “Trading partners” are parties with which the defendant deals, either as a customer or as a supplier. In (b), a trading partner is deemed to be harmed or benefited even if that trading partner passes some or all of that harm or benefit on to other parties.

(h) The defendant’s conduct has “increased *or maintained* market power vis-à-vis a customer” if the defendant can profitably make a less attractive offer to that customer, such as by charging a higher price or providing a lower quality product, than the defendant could absent that conduct. *Price gouging during periods of inflation, pandemic, or emergency shall be considered as conduct that impermissibly increases market power. Firms accused of charging excessive prices may rebut claims with evidence that prices are justified by changes in cost or product quality.*

(i) The defendant’s conduct has “increased market power vis-à-vis a supplier or worker” if the defendant can profitably make a less attractive offer to that supplier or worker, such as by paying less to the supplier or the worker or by offering less attractive working conditions, than the defendant could absent that conduct.

(j) “Anticompetitive exclusionary conduct” includes conduct that has or had a material risk of harming trading partners due to increased market power, even if those harms have not yet arisen and may not materialize.

(k) Establishing that the defendant has “engaged in exclusionary, *monopolizing, monopsonizing, or unfair conduct”* does not require defining a “relevant market” in which that conduct takes place. *Still, “sufficient benefits” in (b)2 cannot occur outside of the market that harm in (b)1 has occurred.*

(l) This statute does not require the plaintiff to establish any threshold of market power, as the focus of concern is on increases in market power *or unfair methods of competition*.

For more information please contact Teri Olle, Economic Security
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April 25, 2024

The Honorable Ambassador David Huebner, Chairperson
and Honorable Commissioners
California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, California 95814

Re: Antitrust Law – Study B-750 – Comment On Behalf Of The California Chamber Of Commerce

Dear Chairperson Huebner and Commissioners:

We write as counsel for the California Chamber of Commerce ("CalChamber").[1] CalChamber is a non-profit business association with more than 14,000 members, both individual and corporate, representing twenty-five percent of the State's private-sector workforce and virtually every economic interest in California. While CalChamber represents several of the largest corporations in California, seventy percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the State's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues.

CalChamber thanks the California Law Revision Commission (the "CLRC") for the opportunity to comment on the important work the CLRC is undertaking with respect to California's antitrust laws, Study B-750. CalChamber looks forward to continuing to work with the CLRC on developing policies that ensure a strong and dynamic business environment that benefits all Californians. This comment is primarily focused on the January 25, 2024 report and legislative proposal (the "Legislative Proposal") of the Single-Firm Conduct Working Group (the "Working Group").

Executive Summary: The Legislative Proposal Is Not Based On Need Or Supported By Economic Analysis, And Its Imprecision Will Chill Competition In California To The Detriment Of Consumers And Workers In The State.

In a free market, competitors increase market share and undercut rivals by slashing prices to consumers and by improving their product offerings. In a free market, start-ups strive to gain a foothold and take market share from incumbents by introducing innovative products aimed at driving outdated and inefficient competitors into ruin. In a free market, manufacturers give discounts and other benefits to resellers seeking to invest in, and promote, that manufacturer's product to the exclusion of its competitors. In a free market, businesses give rebates to loyal customers choosing to forego purchases from competing businesses. In a free market, businesses that obtain market power based on better products or services, first-mover advantage, or an efficient allocation of resources are allowed to enjoy

[1] CalChamber is also being advised on this matter by Dr. Henry Kahwaty and Brad Noffsker, economists with the Berkeley Research Group.

the benefits of their success even when it causes the collapse of competitors. In an efficient free market, there are well-defined guardrails of what is legal competition and what may be anticompetitive, making it easier, less expensive, and less risky to do business. When all of these factors coalesce in a fair, free, and open competitive process, consumers, workers, families, businesses, and economies flourish. There are few better examples of this than the California economy, which has grown to the fifth-largest in the world under the existing California antitrust regime.

But these hallmarks of a free and efficient market and the economic strides made in California are imperiled by the Working Group's Legislative Proposal. The Legislative Proposal seeks to revise California antitrust law to address single-firm conduct and, specifically, ban "anticompetitive exclusionary conduct," which seems benign enough. In doing so, however, the Legislative Proposal rejects over a century of federal and state legal precedent designed to identify truly anticompetitive conduct and fails to distinguish between what is and what is not anticompetitive, thereby threatening the type of aggressive competition that the antitrust laws were designed to promote and that ultimately benefit consumers. Under the Legislative Proposal, price cutting, programs designed to gain loyal customer followings, innovation aimed at taking market share from less-efficient competitors and small and/or temporary gains in market power, regardless of the size of the business or others in the market, would be subject to government and private lawsuits in state and federal courts.

The Legislative Proposal is not narrowly tailored to rein in defined anticompetitive conduct among unlawful monopolies. It is, instead, so broad and far-reaching that it will chill and impinge legitimate competition at every level of the California economy.

Notably, the Report recognizes that "[t]he fundamental challenge is where and how to draw the line between conduct that is welcomed as a legitimate form of competition and conduct that is anticompetitive and significantly enhances market power."[2] The Report also talks about the difficulty in distinguishing between conduct that constitutes legitimate forms of competition and conduct that significantly enhances market power, stating:

> We know from more than a century of experience under the [federal] Sherman Act that courts find it very difficult to distinguish single-firm conduct that harms competition from single-firm conduct that constitutes legitimate competition on the merits … More clarity in the statute will likely result in more protection of competition and consumers. The Legislature may therefore want to include language to help the courts distinguish anticompetitive exclusionary conduct from procompetitive conduct. That language can benefit from economic learning and the development of Sherman Act case law.[3]

Given this, the Legislative Proposal could have used the decades of economic learning around the Sherman Act to craft legislative text that would guide courts as they attempt to distinguish between legitimate, pro-competitive conduct that benefits consumers and the overall California economy and conduct that is anticompetitive and significantly enhances market power to the detriment of consumers and economic performance. That is not what the Legislative Proposal does, however. Indeed, it provides no meaningful guidance on how to distinguish between beneficial and harmful single-firm conduct. This

[2] Report, p. 1.
[3] Report, p. 1.

failure will lead to the indiscriminate outlawing of conduct that may increase market power regardless of whether that increase flows from beneficial or harmful conduct.

An even more fundamental shortcoming of the Legislative Proposal is that it is not based on a demonstrated need, but rather is based on anecdotal and unsupported beliefs that competition in California could be more robust. Nor does the Legislative Proposal provide an economic analysis of the likely impact of these kinds of revisions to California law. Indeed, the Legislative Proposal ignores all its likely costs, which are not insignificant. Chilling pro-competitive single-firm conduct can harm consumers and the overall performance of the economy in the same manner as anticompetitive conduct, and there is no rational economic basis to ignore the detrimental effects of the Legislative Proposal. In addition to chilling competition, the Report's imprecision and lax standards will lead to increased litigation that will result in inconsistent rulings among courts together with rulings restricting pro-competitive conduct, making doing business in California more expensive, riskier, and less desirable, all of which is bad for California consumers and workers.

There is no doubt that punishing and deterring anticompetitive conduct, providing opportunities for small businesses, lessening income inequality, and creating a level playing field for all are important policy goals. They are not, however, all best addressed by the antitrust laws, and they certainly will not all be served by the Legislative Proposal. CalChamber and its coalition members urge the CLRC not to adopt the Legislative Proposal.

There Is No Demonstrated Need For The Legislative Proposal And It Is Not Supported By Economic Analysis.

As a general matter, statutory reforms are appropriate when there is a demonstrable need for reform. Similarly, antitrust policy is most likely to benefit competition and consumers when it is supported by sound economic analysis. The Working Group's January 25, 2024 report (the "Report"), however, fails to demonstrate a need for revising California's antitrust laws and the Report provides no economic analysis of the likely impact of the Legislative Proposal.

For instance, the Report states that "[t]he most glaring deficiency in the Cartwright Act is its failure to reach purely unilateral conduct."[4] Yet the Report does not explain how this "glaring deficiency" has negatively impacted Californians through higher prices, inferior products or services, less competition, or any other measure. In fact, government and private antitrust enforcers have successfully challenged unilateral conduct using Section 2 of the federal Sherman Act for decades. Likewise, the Report envisions a policy change in which "courts should bear in mind that the policy of California is that the risk of under-enforcement of the antitrust laws is greater than the risk of over-enforcement."[5] But the Report employs no economic, or other, analysis of the likely effects of such a policy change. This is even more problematic in that such a policy contradicts federal antitrust teachings that courts should not interpret the antitrust laws in a way that may chill competition.[6] Moreover, the

[4] Report, p. 13.

[5] Report, p. 15.

[6] When describing why courts should avoid legal rules that may chill competition, Hovenkamp writes, "In a competitive market an aspiring monopolist has a relatively small percentage of the market, and it shares the market with many other firms. As a result, even if it succeeds in driving one firm out of business, it will be unable to reap monopoly profits afterwards. An underdeterrent rule in a competitive market will seldom create a monopoly. On the other hand, an overdeterrent rule may force firms to avoid hard competition, even though the

Working Group does not undertake an economic analysis of how the Legislative Proposal would impact competition in California, California workers, the willingness of businesses to operate in California, or California's tax base. Indeed, the Report provides no economic analysis of adopting the Legislative Proposal, calling directly into question whether the Legislative Proposal is good public policy.

Perhaps to address these shortcomings, two months after the Working Group released its Report, another CLRC working group published a report on "Concentration in California" (the "Concentration Report"). Yet in addition to the fact that the Concentration Report was published ***after*** the Legislative Proposal, the Concentration Report does not provide justification for the Legislative Proposal, for several reasons.

First, the Concentration Report does not empirically study business concentration in California or opine that concentration will be lessened through the Legislative Proposal. Instead, the Concentration Report provides "case studies" in four, national sectors – labor, agriculture, healthcare and pharmaceuticals, and entertainment – of various competitive concerns that have arisen in these industries – in some cases unrelated to concentration – that have been addressed, or are being addressed, under current state and federal antitrust laws. For example, the Concentration Report describes the history of alleged "no-poach" agreements in various labor markets that have been challenged by government and private enforcers under the existing antitrust laws.[7] Likewise, the Concentration Report refers to alleged collusion and related criminal and civil litigation in the poultry and pharmaceutical industries that have been challenged and resolved according to existing federal and state antitrust laws. Similarly, the Concentration Report refers to mergers in the entertainment and grocery industries that are being challenged, were challenged, or could have been challenged under existing competition laws. These case studies do not justify revisions to California's antitrust law. They merely underscore the importance of ongoing and robust enforcement of existing antitrust laws.

Second, claims that some of these industries are in fact concentrated are hotly contested, a fact that the Concentration Report does not address. The Concentration Report suggests, for example, that the music publishing and movie production industries are highly concentrated.[8] Industry data suggest otherwise, however. For example, according to IBISWorld, the combined share of the four largest companies in music publishing and movie production were only 17.9% and 40.7%, respectively.[9]

Passing statutory revisions in a vacuum or based on anecdotal and unsupported beliefs that competition in California is not as robust as it could be is bad for California businesses and ultimately California consumers. The kind of expansive revisions found in the Legislative Proposal should only be considered when there is a demonstrated need for them and there is sound economic evidence suggesting that revisions to existing law are likely to benefit Californians. It is CalChamber's view that

market is conducive to competition." (Hovenkamp, Herbert, Economics and Federal Antitrust Law, West Publishing Co., 1985, p. 168.)

[7] Notably, the Concentration Report states that "[t]hese so-called 'no-poach' agreements are pervasive throughout the economy, and have appeared in many industries, including those based primarily in California and critical to its future," but there is no quantification of these alleged unlawful agreements or explanation of how they might be related to business concentration in California.

[8] Concentration Report, pp. 40, 42.

[9] Movie & Video Production in the US, IBISWorld, November 2023, 51211A; Music Publishing in the US, IBISWorld, February 2024, 51223.

the CLRC should not consider the Legislative Proposal unless and until this kind of work is completed, and it supports such drastic changes.

The Legislative Proposal Presents An Unworkable Legal Framework With No Meaningful Guidance for Courts, Will Chill Competition In California, And Will Lead to Increased Litigation With Inconsistent Results.

While the Working Group was right to reject the "abuse of dominance" standard proposed in New York as too ambiguous and likely to "prohibit desirable, procompetitive conduct,"[10] the Legislative Proposal's "anticompetitive exclusionary conduct" framework suffers from the same flaws. Indeed, the Legislative Proposal is arguably more imprecise and further reaching than New York's abuse of dominance proposal. This imprecision with chill competition in California and will lead to increased litigation that will result in inconsistent rulings among courts, making doing business in California more expensive, riskier, and less desirable, all of which will work to the detriment of California consumers and workers.

The Legislative Proposal Does Not Distinguish Between Pro-Competitive And Anti-Competitive Single-Firm Conduct.

Although punishing and deterring anticompetitive conduct is certainly sound antitrust policy, it can be difficult to distinguish between pro-competitive and anticompetitive single-firm conduct. This idea is repeatedly recognized in the Report:

> "In practice, identifying single-firm anticompetitive exclusionary conduct is far from straightforward."[11]
>
> "Note that the very definition of "anticompetitive conduct" involves a potentially difficult balancing of benefits and harms."[12]
>
> "When courts find conduct that both weakens the competitive discipline of rivals and is reasonably necessary to provide benefits to trading partners, they have difficulty evaluating it. These issues are inherently complex, in part because there are many forms of anticompetitive and procompetitive conduct and many distinct market settings in which they arise."[13]

The balancing of benefits and harms when evaluating single-firm conduct and the inherent complexity of the issues involved is why courts can have difficulty distinguishing between anticompetitive conduct and beneficial, vigorous competition on the merits. Accordingly, antitrust policy must balance the social and economic gains from beneficial enforcement actions with the social and economic harms from erroneous enforcement actions. Actions and policy that chill legitimate,

[10] Report, p. 14; *see also* Antitrust Section of the American Bar Association critique of New York's proposed "Twenty-First Century Anti-Trust Act."

[11] Report, p. 4.

[12] Report, p. 4.

[13] Report, p. 4.

competitive conduct are not innocuous, but rather can harm consumers through higher prices and/or reduced innovation while also harming the economy overall.

Antitrust reforms that promote improved enforcement decision-making – both in terms of determining the types of conduct to challenge under the antitrust laws and helping the courts to adjudicate these challenges – are beneficial. The Legislative Proposal, however, does the opposite. The Legislative Proposal's goal of preventing "anticompetitive exclusionary conduct" will make antitrust enforcement less precise and less targeted at harmful conduct, and is thereby likely both to ensnarl and chill legitimate, beneficial single-firm conduct. This is to be expected when careful cost-benefit analysis is foregone, and the costs of chilling legitimate conduct are minimized or ignored. The fact that courts have struggled with single-firm conduct cases indicates that these cases can be difficult to evaluate, but such difficulty does not mean that downsides from chilling pro-competitive conduct should be downplayed or ignored.

The central element of the Legislative Proposal is:

> Conduct, whether by one or multiple actors, is deemed to be anticompetitive exclusionary conduct, if the conduct tends to
>
> (1) diminish or create a meaningful risk of diminishing the competitive constraints imposed by the defendant's rivals and thereby increase or create a meaningful risk of increasing the defendant's market power, and
>
> (2) does not provide sufficient benefits to prevent the defendant's trading partners from being harmed by that increased market power.[14]

While this language is relatively simple, it involves the same analytical problems highlighted in the Report with existing Sherman Act law – the difficulty evaluating conduct that "both weakens the competitive discipline of rivals and is reasonably necessary to provide benefits to trading partners."

This difficulty could be lessened by providing guidance to the legislature and courts regarding how to evaluate this trade-off in specific instances. Yet the Legislative Proposal merely lists several types of conduct – not all of which has been treated by courts as single-firm conduct[15] – that "can be anticompetitive, depending on the circumstances," including the following:

- Loyalty rebates;
- Exclusive dealing provisions;
- Most-favored nation clauses;
- Discrimination against rivals;

[14] Report, p. 16.
[15] For instance, loyalty rebates, exclusive dealing arrangements, most-favored nation clauses, and agreements to limit competition can be, and have been, challenged under the existing Cartwright Act as conduct that unreasonably restrains trade.

- Agreements to limit competition; and
- Predatory pricing.[16]

The Legislative Proposal, however, provides no guidance to the courts on the circumstances that convert these types of conduct into "anticompetitive exclusionary conduct." In fact, instead of translating economic learning of specific circumstances into directions to the courts, the Legislative Proposal does precisely the opposite.

Consider the Report's example of predatory pricing. Economic analysis views predatory pricing as pricing below cost to drive rivals from the market, with the losses flowing from below-cost pricing being recouped later, after rivals are driven from the market. The economic learning, therefore, is that pricing below cost to drive out rivals is only rational (or unlawful) if the alleged predator can later recoup its losses through increased prices. These standards are, of course, intended to distinguish between harmful predatory pricing and beneficial, intensively-competitive price decreases that are good for consumers. Even so, the Legislative Proposal states that establishing liability does not require findings that pricing was below some measure of cost or that the defendant is likely to later recoup the losses from below-cost pricing.[17] This rejection of well-founded economic principles could make price cutting to compete with rivals just as unlawful in California as predatory pricing.

Consider also the Report's example of refusals to deal. The Legislative Proposal notes that the Sherman Act approach "may immunize much conduct that could be anticompetitive."[18] It is generally recognized that a firm's refusal to deal with a competitor is not always anticompetitive. This is why these kinds of claims are typically analyzed by asking whether there are legitimate economic reasons for the refusal to deal, apart from attempting to exclude rivals. Despite this entrenched economic approach, the Legislative Proposal removes economic analysis of justifications for refusals to deal by dictating that liability does not require a showing that the refusal "makes no economic sense apart from its tendency to harm competition."[19] This rejection of economic learning of refusals to deal robs courts of direction for distinguishing between anticompetitive conduct and beneficial, pro-competitive or competitively neutral refusals to deal.

Another problem is that, although the Legislative Proposal focuses on curbing increases in market power, it abandons the standard method for measuring increases in market power. In monopolization cases, courts have traditionally required the definition of a relevant antitrust market. A relevant antitrust market is where competition takes place, and it includes the product at issue and those that are good substitutes for that product. Together, these products constitute a collection over which the market power of a particular product or competitor can be measured. In essence, defining a relevant antitrust market ensures that competitive constraints on a firm's conduct are included in the analysis of whether there has been, or will be, a harmful increase in market power:

> In most antitrust cases that require proof of market power the court determines whether some "relevant market" exists in which the legally necessary market power requirement can be inferred. In order to do this, the court usually 1) determines a relevant product market, 2)

[16] Report, p. 15.
[17] Report, p. 17.
[18] Report, p. 7.
[19] Report, p. 17.

> determines a relevant geographic market, and 3) compute the defendant's percentage of the output in the relevant market thus defined.[20]

Nevertheless, the Legislative Proposal removes this discipline via the following language: "Establishing that the defendant has engaged in anticompetitive exclusionary conduct does not require defining a 'relevant market' in which that conduct takes place."[21] This means that evaluating whether an increase in a firm's market power represents "anticompetitive exclusionary conduct" will not require an economic analysis of the competing products, services, or rivals that chasten any increase in that firm's market power.[22]

Likewise, the Report's definition of "anticompetitive exclusionary conduct" does not rely on any measure of market share, which is traditionally part of the method for assessing market power. Federal monopolization claims usually require a firm to have a share of a well-defined relevant antitrust market in excess of at least 50%, with potentially a somewhat lower share for an attempted monopolization claim.[23] Firms with shares below these levels are generally not expected, as a matter of economics, to have the requisite market power to harm consumers or rivals through exclusionary conduct, and therefore market share criteria are a critical tool in guiding courts regarding how to evaluate single-firm conduct. Not only does the Legislative Proposal fail to sharpen or adjust market share thresholds based on recent economic learning, it does away with these standards altogether:

> A single firm may violate section (a) regardless of whether it has or may achieve a market share above a threshold recognized under Section 2 of the Sherman Act. Furthermore, this statute is [sic] does not require the plaintiff to establish any threshold of market power, as the focus of concern is on increases in market power.[24]

In addition to abandoning the key metric that can answer the question of whether market power is dangerous to consumers and rivals, the Legislative Proposal's myopic focus "on increases in market power" could make small and/or temporary increases in market power unlawful even when the result of legitimate competition. For example, it could be unlawful in California for an independent grocery store to increase market share by placing items on sale for a period of time or for a small start-up to increase market power by introducing a new service that consumers want and benefit from, even if those increases are small or transitory. Both of these types of single-firm conduct are generally beneficial to consumers, but may be unlawful under the Legislative Proposal.

[20] Hovenkamp, Herbert, Economics and Federal Antitrust Law, West Publishing Co., 1985, p. 59.
[21] Report, p. 18.
[22] The Concentration Report recommends reducing the need to prove market definition in a rule of reason case. (Concentration Report, p. 18.) This recommendation similarly undermines principles of analysis that have been developed over many years to guide and assist courts when they evaluate single-firm or other conduct alleged to harm competition.
[23] See, Monopolization and Dominance Handbook, American Bar Association, 2011, pp. 222-223.
[24] Report, p. 18.

The Limited Guidance Offered By The Legislative Proposal Is Uninformative.

The only guidance offered by the Legislative Proposal for evaluating "anticompetitive exclusionary conduct" is the following:

> The competitive constraints imposed by the defendant's rivals may, without limitation, be diminished if the conduct at issue tends to (i) increase barriers to entry or expansion by those rivals, (ii) cause rivals to lower their quality-adjusted output or raise their quality-adjusted price, or (iii) reduce rivals' incentives to compete against the defendant.[25]

This is not useful, however, because it is too broad to be meaningful. For instance, if a firm were to expand its output supplied to a given market, economists would expect one or more rivals in that market to reduce the amount of their supply. Even if total supply were to expand, which would be beneficial for both competition and customers, the reduction in supply by the firm's rivals may form the basis for a violation of item (ii), above. Similarly, a chain that opens a new store in an area makes it more difficult for other, similar stores to enter or expand in that same area, which could violate item (i), above, despite being good for consumers. Likewise, a firm can be very successful with a product upgrade – so successful indeed that one or more rivals decide that it is too difficult to compete – which could be a violation of item (iii), above. These are not hypothetical examples: firms expand the volume of their output supplied to specific markets all the time; grocery chains compete locally with other grocers and regularly add stores serving individual local geographies; and it is common for the success of a particular product to cause rivals to limit offering competing products. None of these efforts should be unlawful in the abstract, but they may very well be under the Legislative Proposal.

Outlawing conduct that is commonly viewed as pro-competitive, like that described above, is counter-productive. As noted in the Report, "[i]t would be antithetical to the goals of the antitrust laws to punish successful firms that competed on the merits merely because their success harmed their rivals."[26] Similarly, the Report notes that firms can be successful (and even gain a monopoly) by "offering their customers better value than do their rivals"[27] – that is, by competing – and that "[n]either Congress nor the California legislature has ever wanted to discourage such efforts."[28] Indeed, the Report even cites to the Supreme Court's *Alcoa* decision for the bedrock antitrust principle that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[29] Even so, the Legislative Proposal is so broad and all-encompassing that it would capture and may make illegal many types of pro-competitive conduct, including conduct that makes a firm more successful and that federal and state competition laws have traditionally embraced.

The Report's Recommendations and Proposed Paradigm Shift Are Bad for California.

The critical question of any statutory revision is whether it is good for the State. The Legislative Proposal is not. The Report suggests that the "California Legislature could instruct the courts to err on the side of enforcement when the effect of the conduct at issue on competition is uncertain."[30] The

[25] Report, p. 16.
[26] Report, p. 7.
[27] Report, p. 3.
[28] Report, p. 3.
[29] *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945).
[30] Report, p. 4.

Legislative Proposal, however, does not merely tilt the needle in favor of enforcement on cases that are "close calls." Rather, as discussed above, the Legislative Proposal moves to a new paradigm where the tools that have been developed over time to help distinguish among beneficial and detrimental single-firm conduct are set aside. The net result is that conduct that is competitively beneficial, neutral, or damaging could all be considered illegal. There is no reason to suspect that such a dramatic change will be beneficial to consumers, workers, individual markets, or the economy at large. Instead, there is a real possibility that the Legislative Proposal could significantly chill the very competition it is seeking to protect, which will harm all Californians.

Moreover, the Legislative Proposal's rejection of core antitrust standards used to interpret and evaluate the Cartwright and Sherman Acts will, of course, lead to increased litigation in both state and federal courts. Lowering the bar on stating an antitrust claim will only increase costly and protracted litigation. And because the Legislative Proposal provides virtually no guidance for courts to determine what is and what is not "anticompetitive exclusionary conduct,"[31] there will be scores of inconsistent rulings making it more difficult to do business, and increasing the costs of doing business, in California, which harms consumers and workers in the State. The Legislative Proposal fails to take this into account, and, on balance, will be bad for California.

Conclusion.

CalChamber has long supported robust antitrust enforcement and sound competition policy. Yet the Legislative Proposal is not targeted solely at eliminating "anticompetitive exclusionary conduct," but rather targets a range of conduct that is considered to be normal, competitive behavior. In addition, the Legislative Proposal rejects over a century of federal and state precedent designed to guide courts in identifying anticompetitive conduct and therefore fails to distinguish between what is and what is not anticompetitive, endangering the type of aggressive competition that the antitrust laws were designed to promote and that ultimately benefit consumers. Moreover, the Legislative Proposal is not based on a demonstrated need for reform, but rather is based on a subjective belief that competition in California could be more robust. Nor does the Legislative Proposal provide an economic analysis of the likely impact of the proposed revisions. The Legislative Proposal's imprecision and lax standards will lead to increased litigation that will result in inconsistent rulings among courts together with rulings restricting pro-competitive conduct, making doing business in California more expensive, riskier, and less desirable, all of which is bad for California consumers and workers. Accordingly, CalChamber and its coalition members urge the CLRC not to adopt the Legislative Proposal.

Sincerely,

Eric P. Enson

Eric P. Enson

[31] Indeed, if the Legislative Proposal is adopted, courts would have to interpret – for the first time – ambiguous phrases embedded in the statute, such as "tends to diminish or create," a "meaningful risk" of "diminishing the competitive constraints," "thereby increase or create a meaningful risk" of increasing the defendant's market power, and "does not provide sufficient benefits" to "prevent the defendant's trading partners" from being "harmed by that increased market power."

April 16, 2024

The Honorable Ambassador David Huebner, Chair,
Honorable Commissioners
California Law Revision Commission
Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, California 95814

Re: Antitrust Law, Study B-750, and Google's Threat To Interrupt News in California

Dear Chair Huebner and Honorable Commissioners:

My name is Jordan Cunningham and, as a former Republican Assemblymember, I co-authored with Democrat Assemblymember Buffy Wicks ACR-95, the resolution that is being implemented by Study B-750.

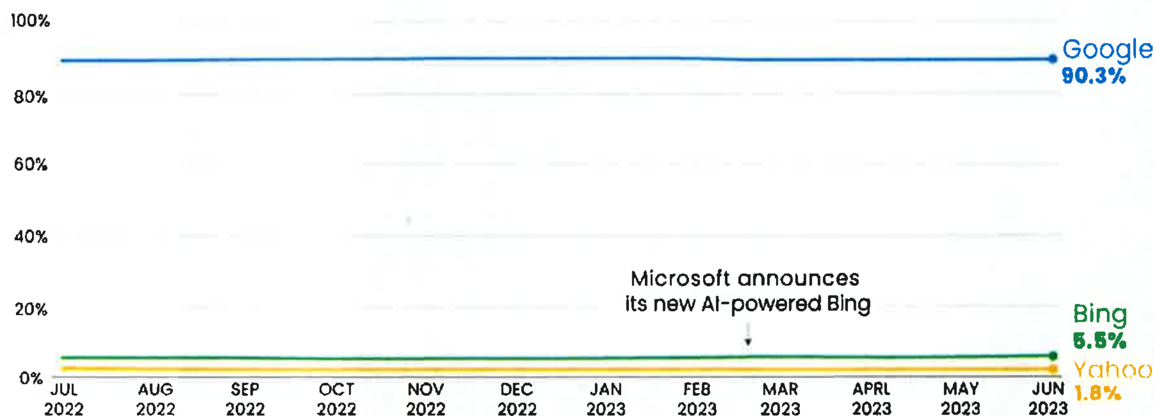
My understanding is that on May 2, as part of its study, the Commission has placed on its agenda whether legislative reforms are needed to address what the Commission is calling "single firm conduct;" that is, the Commission is considering whether California law is currently adequate to ensure that Californians are protected from the anti-competitive conduct of a giant company acting unilaterally.

I write respectfully to bring to your attention a story that underscores why Assemblymember Wicks and I authored the resolution, why my former legislative colleagues of all ideologies overwhelmingly endorsed it, why the resolution spotlights the curious absence of a Sherman Act Section 2 analog addressing such single firm conduct, endorsed it, and why the resolution calls out for your specific attention the technological dominance of large technology platforms.

As the attached *Politico* article reveals, one company – Google – has threatened to curtail the flow of news to Californians because it opposes a bill working its way through the Legislature. This bill is urgently trying to preserve rapidly collapsing local news, the foundation of our state and local self-governance. It is a breathtaking display of power by a single business over 39 million Californians. And it is a credible threat precisely because our current anti-trust laws simply have not worked to prevent one company from amassing so much practical power over our daily lives.

As of June 2023, an overwhelming 90.7% of all search queries conducted across all search engine providers are done through Google.[1] Newspapers, like everybody else, would be invisible if not searchable through Google. Because of their dominance over the digital ecosystem, every ***business dependent upon Internet searches has no alternative but to do business with Google.***

[1] Marcus Lu, *Visualizing Google's Search Engine Market Share*, VISUAL CAPITALIST (Sept. 12, 2023), https://www.visualcapitalist.com/visualizing-googles-search-engine-market-share/.



About 65% percent of users who get news from Google never leave Google's search landing page and click through to an actual website like a newspaper.[2] Instead, they read a snippet of news there on the search page. These are called "zero-click" searches.

What this means is that up to 65% of the time, when someone searches for news on Google, Google has an opportunity to get paid based on ads it places next to a news snippet but the newspaper that hires the reporters to gather the actual news doesn't. Google pays nothing to newspapers for the content it skims from them and profits from. Newspapers are powerless to hold them accountable for not doing so because there is nowhere else to go to be found online.

You and your colleagues are rightly acting deliberately and carefully in your work. It should not be rushed. The news industry, however, upon which our state and local democracies depend, cannot wait for broader anti-trust reforms to be enacted. These companies are collapsing now, before our eyes, and many will be gone unless my former colleagues act this year to prevent it. Happily, my former legislative colleague and resolution co-author is not waiting and is pushing the legislation over which Google is threatening to punish an entire state.

Please consider in your deliberations a single technology company's power to estrange us from the news. The very concept of reasoned governance depends upon access to credible information in the news. This is a perfect example of why there is a bi-partisan consensus that our anti-trust laws must be updated, and why this Commission's work is so important to our future.

Sincerely,

Jordan Cunningham, Assemblymember (Ret., 2016-2022)

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[2] Troy Masters, *The California Journalism Preservation Act is Our Best Bet to Protect Journalism*, SACRAMENTO BEE (June 29, 2023), https://www.sacbee.com/opinion/article275859591.html.

POLITICO

Google blocks some California news as fight over online journalism bill escalates

The search giant is reprising a tactic it has used to battle similar bills in other countries, requiring platforms to pay news publishers.

California's bill has attracted broader attention because the state is home to tech titans like Google and Meta. | Pier Marco Tacca/Getty Images

By **JEREMY B. WHITE**
04/12/2024 09:01 AM EDT

Californians may find their Google results bereft of local news links Friday morning as the search giant escalates its fight against a landmark state bill aimed at forcing tech giants to pay online publishers.

Google is temporarily blocking California-based news outlets' content for some state residents, reprising a political tactic the tech industry has repeatedly used to try to derail such bills in places like Canada and Australia that require online platforms to pay journalism outlets for articles featured on their websites.

"We have long said that this is the wrong approach to supporting journalism," Google's vice president for global news partnerships, Jaffer Zaidi, said in a Friday blog post. Zaidi warned the bill could "result in significant changes to the services we can offer Californians and the traffic we can provide to California publishers."

Sacramento is hosting the latest round of a global fight over the journalism industry's future in the digital age, and California's battle has taken on additional resonance because the state is home to tech titans. Advocates for such legislation argue companies like Google and Meta have helped decimate already flagging newsroom revenues through their control over digital advertising, and outlets deserve compensation for content that users may see on their platforms for free.

The companies counter that these laws could stifle vital sources of information — and they've fought back by attempting to preview what they say that would look like.

Google made similar threats to block content in Canada over its online news legislation before reaching a deal there with the government. Meta, meanwhile, permanently erased news content from its social feed in Canada and has threatened to do the same if Congress and California advance similar legislation.

In California, the company has lobbied heavily against the measures currently before the California Legislature, channeling more than $1 million to an organization that ran an ad campaign decrying the bill as a "link tax." Zaidi used the same phrase in his blog post.

Assemblymember Buffy Wicks parked the legislation in the state Senate Judiciary committee last year after it cleared the Assembly on a bipartisan vote. The bill must pass the Senate and win Gov. Gavin Newsom's approval this year to become law.

It could get a boost from Wicks' increased political clout: A leadership change in November vaulted the Oakland Democrat into the chair of the powerful Assembly Appropriations Committee, a key chokepoint for consequential bills.

Despite the industry's counteroffensive, many Democrats have embraced Wicks' argument that the journalism industry needs a financial lifeline. At an informational hearing in December, some senators pushed back on a Google representative who decried Wicks' bill.

"Newspaper publishers and the journalists provide a really important service as a part of [Google's] broader business model, and meanwhile they're going bankrupt and you guys have record profits," state Sen. Ben Allen said.

To: CLRC

From: Tom Campbell

Re: Citations relevant to my testimony on May 2

I provide citations to scholarly literature for two main propositions.

> Proposition 1: The most practical goal of antitrust is to maximize what economics calls allocative efficiency: the total value of goods and services produced minus the cost of producing them. This has also been called the "consumer welfare test." It argues against guiding antitrust by other social objectives.

"[T]he most significant benefit of embracing the modern consumer welfare test is that it makes assessing a transaction relatively straightforward. One only needs to know whether output has gone down or price has gone up. That is the only issue to be considered, and the size of the output reduction or price increase does not matter. Relative to any general welfare test the administrative cost savings from a consumer welfare test seems to be substantial."

> Herbert Hovenkamp, "Antitrust in 2018: The Meaning of Consumer Welfare Now" Penn Wharton Public Policy Initiative volume 6 no. 89, September, 2018, at p. 3.

"[A] third rationale for use of total surplus as antitrust's measure of social welfare . . . is a division of labor among public policies: if antitrust enforcement and some other public policies focus on total surplus, other public policies can redistribute that surplus in accord with notions of fairness. A number of reasons suggest that antitrust policy is poorly suited as a redistribution vehicle in comparison with various tax and subsidy schemes."

Joseph Farrell & Michael Katz, ‘The Economics of Welfare Standards in Antitrust,” at p. 11 – 12 (footnotes omitted). https://escholarship.org/uc/item/1tw2d426 (2006); published in **Competition Policy International**, October, 2006.

Proposition 2: There is a complex relationship between firm size and innovation, with substantial evidence that larger firm size might result in more research and development, and that it might not. The lack of a conclusive nature of this body of research argues for caution against the approach of the Working Group that “the California Legislature could instruct the courts to err on the side of enforcement when the effect of the conduct at issue on competition is uncertain” (p. 2) and “the risk of under-enforcement of the antitrust laws is greater than the risk of over-enforcement.” (p. 15) (The latter quote was taken from the California Supreme Court case which dealt with standing to sue, not with the risk of depressing innovation. *Clayworth v. Pfizer, Inc*., 49 Cal. 4th 758, 783 (2010).) If the effect of a firm’s behavior on competition is uncertain, even if it is a firm with market power, antitrust enforcement could be undesirable as it could depress innovation.

> “Joseph A. Schumpeter (1950) started this debate by contending that large corporations with monopoly power were likely to advance industrial technology because of superior access to capital, ability to pool risks, and economies of scale in the maintenance of R&D laboratories. Critics argue that large bureaucracies stultify R&D.”
>
> > Dennis Carlton & Jeffrey Perloff, Modern Industrial Organization (3d ed., 2000) at 533, citing studies.
>
> “The Schumpeterian hypothesis is, broadly speaking, that oligopolistic market structures are best in this regard [of promoting R&D].

"Both theory and empirical data give ambiguous evidence as to the market structure most conducive to R&D effort. Competitive markets can sometimes fail to be as innovative as their less-competitive counterparts but a surprising number of key inventions have come from small firms."

> Lynne Pepal, Dan Richards, Geroge Norman, Industrial Organization Contemporary Theory and Empirical Applications (5th ed., 2014) at 573.

"If incentives were all that mattered, Toyota and GM (with larger market shares) would have less incentives than say, tiny Mazda to innovate with new products. Clearly, this is not the behavior we observe, as both GM and Toyota are making great progress with electric and autonomous vehicles, more so than Mazda."

. . .

"Fortunately, a large body of research in evolutionary economics, the behavioral theory of the firm, management, information science, entrepreneurship, complexity economics and strategic management is available. . . . Existing concepts and frameworks beyond the current purview of competition economics can be used to hasten the transition toward a more enlightened approach that better approximates real-world conditions and minimizes the negative consequences of (static) antitrust analysis. If nothing else, the recognition of innovation-related dynamic issues will temper the false certainty that is often attributed to competition analyses. Mastering these literatures is by no means an impossible task but will require enforcement agencies to broaden their talent base."

> David Teece, "The Dynamic Competition Paradigm: Insights and Implications," 2023 Columbia Business Law Review 373, 405-406, 453.

"[A]n exigent intellectual effort is the only way to ensure that competition authorities will avoid the risks of inadvertently giving in to the political pressure of economic populism or ideology or issuing misguided decisions which may be ineffective or, even worse, restrict competition or innovation."

> Frederic Jenny, "Competition Law and Digital Ecosystems: Learning to Walk Before We Run," 30 Industrial and Corporate Change 1142, 1165 (2021).

Estimates of Potential Harm to U.S. Small and Medium-Sized Businesses from Proposed Abuse-of-Dominance Antitrust Legislation Aimed at Large Digital Platforms

John T. Scott, Dartmouth College

Technical Report

January 2024

DATA CATALYST INSTITUTE

EX 33

Overview

For over a century, U.S. competition law has focused on protecting consumers from specific harms that result from a lack of marketplace competition: higher prices, fewer choices, declining service, and less innovation. Recently, some U.S. policymakers have tried to adopt a more "European-style" approach to competition that focuses less on consumer harm and more on the competition between businesses. This report uses a bespoke economic model to estimate that if European-style competition concepts, also called "abuse of dominance" (AOD), become law in the U.S., it could cost small and medium-sized businesses (SMBs) more than $600 billion in lost sales revenue annually.

State policymakers are considering AOD bills in response to the success of America's leading digital platforms, including Amazon's online marketplace, Google's search and advertising platforms and app store business, Meta's Facebook, and Apple's app stores. These bills would, among other things, make it illegal for these platforms, or any platform that meets an arbitrary definition of "dominant," to engage in any practices that harm competitors, including practices that benefit consumers, such as lowering prices or improving security.

The model estimated the harm to SMBs from the disruption of digital online marketplaces, digital advertising, and other digital tools that SMBs use to run and grow their businesses. First, we modeled a "heavy" scenario where AOD becomes the de facto standard for U.S. competition law nationwide, following several states passing such a law, and companies implement the standards nationwide (similar to automobile emissions standards) or if the federal government passes a similar law. Under this scenario, for the SMBs selling physical goods, nationwide SMB revenue losses are estimated to total $670 billion annually, translating into an average sales loss of $14,000 per month per U.S. SMB in the manufacturing, wholesale trade, and retail trade sectors.

We also modeled more limited scenarios in which, for example, AOD becomes law in only New York (which has recently considered such legislation) and found that the harm to SMB revenue both in-state and in other states is still significant. For example, AOD laws would reduce NY-based SMB sales by $41 billion annually and SMB sales in other states (because of interstate commerce) by another $19.9 billion annually, for a total harm of $60.9 billion per year, or an average of $1,270 per month per U.S. SMB.

Lawmakers at all levels of government should strongly consider the wide-ranging economic implications of a potential European-style revision of longstanding U.S. antitrust law.

Executive Summary

Several U.S. states are currently considering antitrust legislation that abandons the long-held, objective, and empirical “consumer welfare standard” for assessing alleged monopolization and adopts a vague “abuse of dominance” standard. While the details of various states’ bills differ somewhat, at the core, under such legislation, it would become illegal for a company to (a) obtain a “dominant position” in a market, which would be presumed to exist when a company reaches an arbitrary and below-majority market share, and (b) “abuse” such a dominant position, where “abuse” is defined very broadly, often in vague and speculative ways.

State legislators promoting such bills understandably wish to help the business community by preventing dominant companies from reducing competition. But as written, these proposed laws will likely have a disproportionately negative impact on small and medium-sized businesses (SMBs) by creating arbitrary, vague, and confusing state business environments that will surely cause companies—that could under AOD law be perceived as dominant and abusing their dominance—to avoid providing services to SMBs in the states with AOD laws. Even SMBs could be perceived as dominant in local or regional niche markets. Moreover, in states with AOD laws, both SMBs as well as the companies they rely on for business services may choose to incur the costs of relocating to states without AOD laws. This report uses a bespoke economic model to estimate the harm to SMB sales revenue due to “abuse of dominance” (AOD) bills becoming law in one or more states, presumably disrupting popular digital tools, platforms, and marketplaces that SMBs rely on to communicate, advertise, sell, and fulfill orders.

State-level AOD legislation considered during 2023

State	Bill	Intro Date	Bill Information
NJ	S3778	May 2023	Amends "New Jersey Antitrust Act" to make monopsony illegal and regulate entity in dominant position in market
NY	S6748	May 2023	Relates to actions or practices that establish or maintain a monopoly, monopsony or restraint of trade, and authorizes a class action lawsuit in the state anti-trust law
ME	No. 1815	April 2023	An Act to Protect Maine's Consumers by Establishing an Abuse of Dominance Right of Action and Requiring Notification of Mergers
MN	HF 1563	Feb 2023	A bill for an act relating to trade regulations; prohibiting abuse of dominance

There are several reasons that AOD laws would cause harm for SMBs. The AOD laws (1) would disrupt digital platform services that SMBs rely on for digital online marketplaces, digital advertising, and other online business tools, (2) would disrupt markets for technology acquisition on which SMBs rely to ensure a return on R&D investment, (3) would create uncertainty for SMBs about anticipated returns from investments in sales, product development, and marketing, and (4) would cause SMBs to face significant costs of dealing with the disruptions and uncertainty. Those costs for SMBs are especially significant in states that pass AOD laws, but because of interstate commerce, SMBs in other states would also incur costs.

For each state where an AOD law is modeled, there are “direct” effects on SMBs based within that state and “indirect effects” on SMBs based outside the state but doing business in it (i.e., interstate commerce). Thus, an AOD law passed in, say, New York, harms New York-based SMBs directly, and can also harm businesses in Connecticut or Massachusetts indirectly. To some degree, but not entirely, this is a function of geography, as states close to each other tend to transact more commerce with each other).

This report describes conservative estimates of harm to U.S. SMB sales in dollars. We modeled three scenarios: (1) AOD laws take effect in a single state (“lite” scenario) - for which we individually modeled the states of New Jersey, New York, Maine, and Minnesota, which have considered AOD legislation in the last year; (2) a “domino effect” scenario in which AOD becomes law in one of the above states and quickly spreads to the other states currently considering the legislation (“medium”); and (3) AOD de facto becomes the national standard either because it becomes widespread enough that national and international companies are forced to use it as the standard, and/or it eventually is enforced at a federal level (“heavy”).

Nationwide harm to U.S. SMBs from an AOD competition standard

In a “heavy” scenario, where the U.S. effectively shifts to a national AOD standard, for the U.S. manufacturing, wholesale trade, and retail trade sectors, the total harm to U.S. SMBs as measured by lost sales per year is estimated to be $670 billion, or roughly $14,000 per SMB monthly, on average.

That said, under any scenario of AOD laws being passed, the estimated harm to SMBs is substantial. For example, in the “lite” scenario of only New York state becoming an AOD jurisdiction (third column, below), the estimated total annual harm to U.S. SMBs is $60.9 billion, or an average of $1,270 in monthly sales revenue harm. Moreover, this is the average across all U.S. SMBs, and as seen just below in the analysis of state-by-state harm to SMBs, the average harm to the SMBs in New York state would $13,000 per New York SMB per month—an order of magnitude greater than the U.S. average. Local SMBs are disproportionately affected when their own state has an AOD law. For the SMBs within a state with an AOD law, the damage caused is

local, not simply a matter of costs of dealing in interstate commerce with other states with AOD laws, but instead the costs are imposed by their own state's law.

Under the "medium" scenario of these four states all passing AOD legislation in a "domino effect," the total harm to U.S. SMBs is estimated to be $113.4 billion annually or an average of $2,400 per SMB per month.

Estimated annual harm in dollars to nationwide U.S. SMB sales under AOD scenarios.

	Lite – NJ	Lite - NY	Lite – ME	Lite – MN	Medium	Heavy
Total annual harm	$34.2 B	$60.9 B	$5.1 B	$21.5 B	$113.4 B	$670 B
Direct harm	$21.1 B	$41.0 B	$3.45 B	$15.3 B	$80.8 B	$670 B
Indirect harm	$13.1 B	$19.9 B	$1.65 B	$6.2 B	$32.6 B	N/A
Avg. annual harm per SMB	$8,550	$15,230	$1,280	$5,380	$28,350	$167,500
Avg. monthly harm per SMB	$710	$1,270	$110	$450	$2,400	$14,000

Direct harm is harm to SMBs within the state(s) where AOD becomes law. Indirect harm is harm to SMBs in states outside AOD jurisdictions. The effects of different "lite" scenarios vary depending on the economics of the state that passes AOD into law. The "medium" scenario is one in which all four state bills become law.

State-by-state harm to SMBs from an AOD competition standard

We can also measure harm to SMBs under AOD scenarios on a state-by-state basis. Harm is greater for non-AOD jurisdiction states if there are substantial sales from those states to AOD jurisdiction states, as those sales become subject to the AOD standard. Thus, the harm per SMB varies largely across the states, with the greatest harm being to SMBs in states where AOD legislation would be enacted, but also with substantial harm for SMBs in other states that have substantial sales to states with AOD legislation.

We present two examples below. First, we consider the case of New York, which is considering its own AOD law (direct harm) and can also be affected by other states passing AOD laws to the extent that New York-based SMBs do business in those other states (indirect harm).[1] The model estimates that if New York passed an AOD bill, the direct harm to New York-based SMBs would

be $41 billion in annual lost sales, or $13,000 per New York SMB per month on average. Under a different scenario in which New York did not pass such legislation but its neighbor New Jersey did, New York-based SMBs would still experience $3.5 billion in annual reduced sales, or an average of $1,110 per NY SMB per month, due to interstate commerce. The effects on New York-based SMBs from Maine and Minnesota AOD legislation are estimated to be smaller because of relatively less trade between New York and those states.

Estimated annual harm in dollars to New York SMB sales under AOD scenarios.

	Lite – NJ	Lite - NY	Lite - ME	Lite - MN	Medium	Heavy
Total annual harm	$3.5 B	$41.0 B	$0.15 B	$0.20 B	$41.0 B	$41.0 B
Direct harm	N/A	$41.0 B	N/A	N/A	$41.0 B	$41.0 B
Indirect harm	$3.5 B	N/A	$0.15 B	$0.20 B	N/A	N/A
Avg. annual harm per SMB	$13,340	$155,600	$570	$760	$155,600	$155,600
Avg. monthly harm per SMB	$1,110	$13,000	$50	$60	$13,000	$13,000

Direct harm is harm to SMBs within the state(s) where AOD becomes law. Indirect harm is harm to SMBs in states outside AOD jurisdictions. The effects of different "lite" scenarios vary depending on the economics of the state that passes AOD into law. The "medium" scenario is one in which all four state bills become law.

As a second example, we consider Connecticut, which is not currently considering AOD laws but whose SMBs would be harmed indirectly through other states' AOD laws. Here, the model estimates that a New York AOD law would indirectly harm Connecticut-based SMBs to the tune of $1.7 billion a year, or an average of $3,500 per Connecticut SMB per month. The effects from other states (New Jersey, Maine, Minnesota) are smaller but would still be noticeable to a typical SMB owner. The harm to Connecticut-based SMBs in a "heavy" scenario (national AOD standard) is estimated to be $8.6 billion, or an average of $17,500 per Connecticut SMB per month. As can be seen in the table, all of the sales harm to CT-based SMBs is indirect (i.e., caused by other states' AOD laws), except in the "heavy" scenario in which every state has AOD laws, including CT.

Complete estimates of SMB harm in the form of lost sales revenue state-by-state (50 states plus DC) across all AOD scenarios can be found in the Technical Appendix to this report.

Estimated annual harm in dollars to Connecticut SMB sales under AOD scenarios.

	Lite – NJ	Lite - NY	Lite - ME	Lite - MN	Medium	Heavy
Total annual harm	$0.4 B	$1.7 B	$0.07 B	$0.05 B	$2.2 B	$8.6 B
Direct harm	N/A	N/A	N/A	N/A	N/A	$8.6 B
Indirect harm	$0.4 B	$1.7 B	$0.07 B	$0.05 B	$2.2 B	N/A
Avg. annual harm per SMB	$9,300	$41,700	$1,800	$1,150	$54,000	$210,000
Avg. monthly harm per SMB	$780	$3,500	$150	$100	$4,500	$17,500

Direct harm is harm to SMBs within the state(s) where AOD becomes law. Indirect harm is harm to SMBs in states outside AOD jurisdictions. The effects of different “lite” scenarios vary depending on the economics of the state that passes AOD into law. The “medium” scenario is one in which all four state bills become law.

Conclusion

Considered against the backdrop of decades of precedent of well-developed law about monopolization as proscribed by the Sherman Act and elsewhere, AOD legislation leaves the definition of “dominance” up to state law enforcement and defines behaviors as “abuse” where other reasonable minds might define them as promoting efficiency and creating value for users of a popular business’ services. In sum, AOD legislation, should it become law in one or more U.S. states, could actually harm successful, efficient, and innovative small firms that use digital platforms and tools to sell physical goods. Based on this report’s findings, lawmakers at every level of government should abandon consideration of European-style legislation that would have such serious negative economic consequences for small businesses across America.

Introduction

Several U.S. state legislatures have recently considered European-influenced "abuse of dominance" (AOD) antitrust legislation. This legislation parallels proposed Congressional antitrust legislation aimed at large digital platforms and also parallels new directions in national-level antitrust enforcement actions. Just during 2023, state legislatures in New York, Minnesota, Maine, and New Jersey have proposed AOD legislation[2], and such legislation is likely to be proposed in other states, for example, in California.[3]

Various experts have had concerns about the negative effects of European-influenced antitrust law on the SMBs that comprise much of the U.S. private sector economy. For example, Miller (2023) specifically analyzed New York's proposed AOD legislation - which has been the closest to becoming law - and provided a detailed list of how and why the legislation would harm businesses of various sizes. In a separate publication, the Data Catalyst Institute (DCI) (June 2023) outlined the major problems that SMBs would face following the enactment of AOD legislation in U.S. states. DCI (June 2023) concludes that the AOD legislation would harm SMBs because the bills would create uncertainty and "…will have a range of economic consequences, including hindering the ability to raise capital, attract and hire talent, and reduce entrepreneurship, job creation, and economic growth. Ultimately, the effect would be to harm AOD state economies in the global marketplace."

In August 2023, DCI published a read-out from its assembling a "Working Group" of experts in antitrust law and economics who discussed state-level AOD legislation and its implications for SMBs.[4] An important reason for the emergence of the proposed AOD legislation at the state level is the belief by the supporters of the proposals that, because of the way the federal courts have interpreted the statutes, federal antitrust law has not produced sufficiently aggressive action against monopoly and monopsony power of dominant firms. Federal antitrust policy evolves from the combination of three key things: the statute (for governing the behavior of dominant firms, primarily Section 2 of the Sherman Act), the enforcement actions (that could be filed by private parties, by the states' attorneys general, or by the U.S. Department of Justice and the Federal Trade Commission), and finally, the interpretation of the U.S. courts, with the controlling interpretation coming from the U.S. Supreme Court.

Philosophically, federal case law aims to avoid "false positives" (finding an antitrust violation when none exists and thereby inhibiting efficient behavior by a dominant firm). In contrast, newly emerging state-level AOD legislation implicitly places more weight on avoiding "false negatives" (finding there is no antitrust violation when, in fact, the behavior is anticompetitive). To this point, consider the following statement in New York's proposed AOD legislation: "The [New York state] legislature further finds and declares that effective enforcement against unilateral anti-competitive conduct has been impeded by courts, for example, applying narrow definitions of

monopolies and monopolization, limiting the scope of unilateral conduct covered by the federal anti-trust laws, and unreasonably heightening the legal standards that plaintiffs and government enforcers must overcome to establish violations of those laws."[5]

Across states, the proposed AOD legislation embodies an approach to antitrust law akin to European Union (EU) competition policies. As Fox (2014) explains, U.S. antitrust case law sets a very high bar for a plaintiff alleging that a firm's behavior is an abuse of dominance, while EU law makes it much more likely that the behavior of a firm will be found to be an abuse of dominance.

However, the proposed AOD laws at the state level, while akin to the EU approach, do not incorporate the controls—including an effects-based analysis—provided by the well-developed, established institutional framework grounded in the needs and perspectives of the European Union's history. The state-level AOD legislation, with vague, uncertainty-creating pronouncements about abuse of dominance, may share with EU law concerns about a level playing field for all firms and fairness and efficiency. However, the U.S. states proposing AOD legislation do not have the institutional history of case law that has been developed before the European Court of Justice.[6]

Moreover, the decisions by states' attorneys general about the meaning of abuse of dominance in their states' AOD legislation would not have the shared decision-making quality of the EU framework with the interplay among the Directorate General for Competition of the European Commission, supervised by its commissioner and responsible for the EU competition cases, the European Parliament, and the European Commission and its president, and the European Court of Justice.[7]

The state-level AOD legislation, as currently proposed, clearly does not agree with current U.S. law, differing from the federal statute law and the interpretation of that law in the U.S. courts. As discussed in the DCI Working Group on this topic, New York and other states proposing AOD antitrust legislation are drawing on EU law, but the proposed state AOD laws go beyond the EU approach, which—although emphasizing fairness, lower barriers to entry, and level playing fields in addition to efficiency and innovation—entails an effect-based analysis, essentially similar in that regard to rule of reason analysis in federal case law.

The state-level AOD proposals roll antitrust back to the U.S. courts' interpretations of antitrust statutes during what Fox (2023) refers to as "the pro-little-guy, anti-concentration model of the Warren Court in the 1960s" before the dramatic shift in the courts' interpretations that have emphasized the economic efficiency possibilities for the behavior that the proposed AOD legislation sees as abuse of dominance. So, these new AOD laws go further than Article 102 of the EU Treaty because they take away the discipline of effect-based analysis.

Summarizing, the state AOD proposals will not perform as well as EU AOD law: The state AOD proposals lack the institutional context—including case law—of the EU, and thus are expected to have much worse economic outcomes than EU AOD law. The proposed state AOD laws do not allow for the effects-based analysis that is used in EU case law, and instead simply (overly so) declare abuse for circumstances defined broadly, often in vague and speculative ways. It is important to understand that state AOD proposals will not perform as well as EU AOD law. Without that understanding, some people might erroneously think, “Well it couldn’t be too much of a disaster if it would be the same results as in the EU.”

There is an additional institutional detail distinguishing EU competition policy and proposed state AOD laws that is expected to make the proposed state AOD laws costly for businesses and ultimately their customers to whom higher costs are passed. The EU policy does not entail class actions in the same way that the state-level proposed AOD laws make AOD a cause for actions.[8] While there aren’t EU-wide collective actions, they do occur in member states, most notably the Netherlands (and in former EU member UK), and can be brought based on abuse of dominance. However, they generally are brought only where a government enforcer already has established the fact of an abuse, so the plaintiffs’ lawyer only has to show the level of damages. Under state AOD laws, the class action lawsuits would not be so restricted. Notably, as observed in DCI’s Working Group, the proposed New York statute introduces the element of class action lawyers who will inevitably bring frivolous claims emanating from a statute that is vague and from which the attorney general can define cases of AOD and promulgate rules in which decisions become binding after just 60 days of legislative review, public comment, and time to deny the rules.[9]

Under these conditions, to paraphrase one DCI Working Group expert, “I'd move somewhere else if I were a business in New York starting up…in this environment, big or small, I’d expect businesses to decide to take their business elsewhere.” The tech sector is clearly a target of the new AOD legislation, which is especially important because of the application of the AOD legislation to acquisitions. More than 90% of the startups that succeed exit via acquisition. So, startups will simply move outside AOD states to have a chance at being acquired.

The DCI Working Group also discussed several other issues relevant to understanding the emergence of state-level AOD legislation and its impacts. Those additional issues included (a) the connections between efficiency (especially non-dominant firms’ roles in innovation and dynamic efficiency) and the concerns about fairness, level playing fields, and access of nondominant firms to markets, and (b) the elastic or multiple-definitions aspect of the “consumer welfare standard” (on this, see Fox (2023)) for evaluating antitrust issues, and its inclusion, at least in some of its incarnations, of innovation and dynamic efficiency as well as static efficiency; (c) in addition to the economic concerns about Big Tech such as efficiency implications of self-preferencing by digital-platform firms, the noneconomic concerns (such as addiction, privacy, and “social poisoning”) that require legislation other than new antitrust legislation. These noneconomic issues have played a role in the support for proposed AOD legislation that clearly targets the dominant firms providing digital platform services.

The wide-ranging DCI Working Group discussion identified two key problems with state-level AOD legislation that imply the need for estimates of harm developed in this technical report:

> (1) A lack of any development of understanding of the effects of behavior that the legislation would proscribe as abuses of dominance;[10] and
>
> (2) A patchwork of state AOD antitrust laws, with the lack of uniformity across states disrupting commerce. Some states would have such laws while others would not, and the various AOD laws would be applied differently in general and with respect to targeting particular sectors. The situation would not promote a level playing field or easy entry and operation of businesses across the states.[11]

The potential harm to SMBs posed by the proposed AOD legislation comes because the legislation enumerates direct and indirect evidence of dominance and enumerates behavior that could imply abuse of dominance that could very well describe the most innovative, entrepreneurial SMBs that have surged ahead of the competition because of innovating — whether with a better product, or lower costs, or better management. Moreover, what the legislation enumerates as evidence of dominance and as behavior indicating abuse of dominance could also describe the behavior of large firms that provide helpful, supportive services that enable the success of SMBs. The upshot is that when confronted by these proposed state AOD laws, efficient firms, small and large, would be expected to change their behavior—including deciding not to do business in the states with such laws—to avoid being caught in the snare of the laws.

Key Results

Overview of Conservative Estimates of Harm to SMBs

This technical report provides conservative dollar estimates of the potential harm for U.S. SMB sellers/retailers (technically, for the purposes of this analysis, those ~4 million SMBs classified in the manufacturing, wholesale trade, and retail trade sectors) if a patchwork of state-level AOD legislation becomes law. Three scenarios were modeled; the first scenario having four variations: (1) AOD laws take effect in a single state ("lite" scenario); (2) a "domino effect" in which AOD becomes law in one state and quickly spreads to other states considering the legislation ("medium"); (3) AOD de facto becomes the national standard either because it becomes widespread enough that national and international companies are forced to use it as the standard, and/or it eventually is enforced at a national level ("heavy").

The report provides estimates of the harm to SMB sales stemming from AOD bills becoming law in one or more states, which we predict to disrupt popular digital tools, platforms, and marketplaces that SMBs rely on. It is important to note that for each state where AOD law is modeled, there are "direct" effects on SMBs based within that state and "indirect effects" on SMBs based outside the state but doing business in it; thus, an AOD law passed in, say, New York, can also harm businesses in Connecticut or Massachusetts.

Nationwide harm to U.S. SMBs from an AOD competition standard

First, for the SMBs in the U.S. manufacturing, wholesale trade, and retail trade sectors, we investigated the harm to all U.S. SMBs across several scenarios. For the conservative assumptions used, in a "heavy" scenario in which the U.S. shifts to a national AOD standard, the total harm to U.S. SMBs, as measured by lost sales per year, is estimated to be $670 billion or an average of $14,000 per SMB per month.

Under the "medium" scenario in which the four states where the AOD legislation has been prominently proposed (New York, Minnesota, Maine, and New Jersey) all pass it into law (which, for example, could happen because of a "domino effect" in which one state passes it and that creates momentum for the others to do so, too), the harm to U.S. SMBs sales revenue is estimated to have a lower bound of $113.4 billion per year, with $80.8 billion from "direct" effects on the four states themselves, and an additional $32.6 billion in "indirect effects" from SMBs based in other states but conducting commerce within the boundaries of the four states. This harm is an average of $2,400 per month per SMB nationwide.

Estimated annual harm in dollars to nationwide U.S. SMB sales under AOD scenarios.

	Lite – NJ	Lite - NY	Lite – ME	Lite – MN	Medium	Heavy
Total annual harm	$34.2 B	$60.9 B	$5.1 B	$21.5 B	$113.4 B	$670 B
Direct harm	$21.1 B	$41.0 B	$3.45 B	$15.3 B	$80.8 B	$670 B
Indirect harm	$13.1 B	$19.9 B	$1.65 B	$6.2 B	$32.6 B	N/A
Avg. annual harm per SMB	$8,550	$15,230	$1,280	$5,380	$28,350	$167,500
Avg. monthly harm per SMB	$710	$1,270	$110	$450	$2,400	$14,000

Direct harm is harm to SMBs within the state(s) where AOD becomes law. Indirect harm is harm to SMBs in states outside AOD jurisdictions. The effects of different "lite" scenarios vary depending on the economics of the state that passes AOD into law. The "medium" scenario is one in which all four state bills become law.

Under any scenario of AOD laws being passed, the estimated harm to SMB sales revenue is substantial. Take the "lite" scenario of just New York state becoming an AOD jurisdiction - the estimated total harm to U.S. SMBs is $60.9 billion annually. This amounts to $15,230 in potential annual harm per SMB or $1,270 monthly.

State-by-state harm to U.S. SMBs from an AOD competition standard

We also investigated sales harm to SMBs for several AOD scenarios on a state-by-state basis. Consider the case of New York, which is considering its own AOD law and can also be affected by other states passing AOD laws. For a state, such as New York in this example, that passes its own AOD law, all of the state's SMB sales, whether sold to customers in other states or not, are exposed to the harm of AOD law, and so the state's total annual harm, direct harm, and hence harm per SMB will be the same for the Heavy and Medium (when it is among the AOD states) scenarios and for the Lite scenario when it is the state with AOD law.

Estimated annual harm in dollars to New York SMB sales under AOD scenarios.

	Lite – NJ	Lite - NY	Lite - ME	Lite - MN	Medium	Heavy
Total annual harm	$3.5 B	$41.0 B	$0.15 B	$0.20 B	$41.0 B	$41.0 B
Direct harm	N/A	$41.0 B	N/A	N/A	$41.0 B	$41.0 B
Indirect harm	$3.5 B	N/A	$0.15 B	$0.20 B	N/A	N/A
Avg. annual harm per SMB	$13,340	$155,600	$570	$760	$155,600	$155,600
Avg. monthly harm per SMB	$1,110	$13,000	$50	$60	$13,000	$13,000

Direct harm is harm to SMBs within the state(s) where AOD becomes law. Indirect harm is harm to SMBs in states outside AOD jurisdictions. The effects of different "lite" scenarios vary depending on the economics of the state that passes AOD into law. The "medium" scenario is one in which all four state bills become law.

However, even in states without AOD legislation, when the states' businesses have substantial sales in the states with AOD legislation, the states' business sales would be exposed to substantial harm by AOD legislation. Consider Connecticut, a state like Alabama without pending AOD legislation, and a state that the report shows would face similar potential harm if the U.S. Congress enacted national-level AOD legislation. The noteworthy difference between Connecticut and Alabama is that Connecticut has a substantial amount of business sales to customers in New York, and so those sales would be exposed to harm from New York's AOD legislation if it were enacted. As a result, as shown in the report, for the scenario in which just New York, Minnesota, Maine, and New Jersey enact AOD antitrust laws (the NY-MN-ME-NJ scenario), the estimated potential annual harm per SMB in manufacturing, wholesale trade, or retail trade in Connecticut is about $54,000 annually or $4,500 monthly.

There is a large variance across the states in the harm per SMB, with the greatest harm coming for states where AOD legislation would be enacted, but also with substantial harm for states, like Connecticut in the foregoing discussion, that have substantial sales to states with AOD legislation. With the patchwork of state-level AOD legislation, in the estimation of harm, most states have neither AOD legislation nor substantial sales to the states that do. Consequently, on average, for the roughly 4 million SMBs in the U.S. manufacturing, wholesale trade, and retail trade sectors, the estimated average annual harm per SMB is relatively (in comparison with the harm per SMB in the AOD-legislation states) low—$28,350 in 2021 dollars ($113.4 billion/4 million SMBs = $28,350 per SMB).

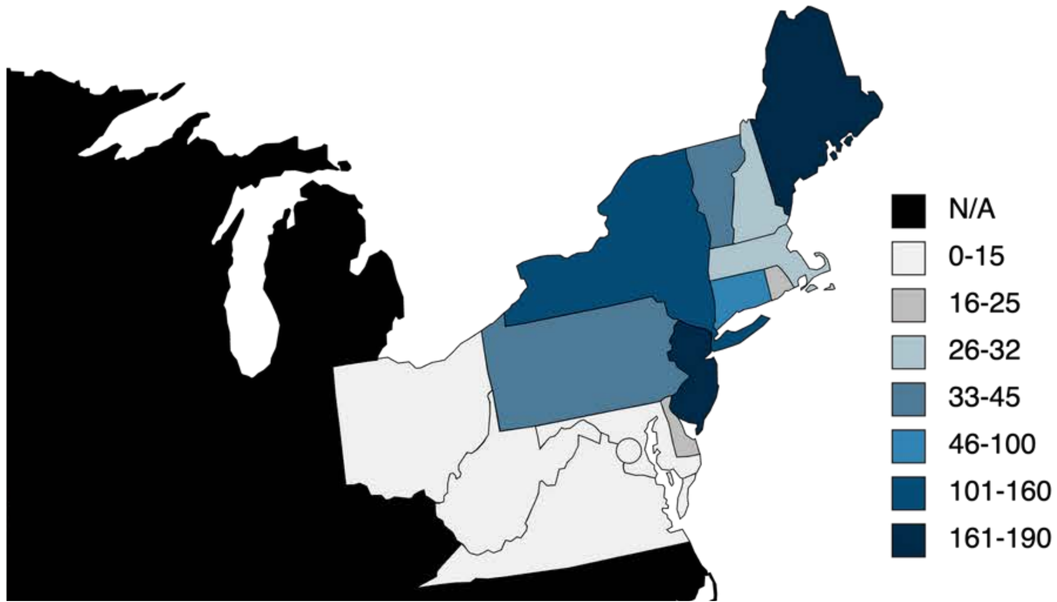
Estimated annual harm in dollars to Connecticut SMB sales under AOD scenarios.

	Lite – NJ	Lite - NY	Lite - ME	Lite - MN	Medium	Heavy
Total annual harm	$0.4 B	$1.7 B	$0.07 B	$0.05 B	$2.2 B	$8.6 B
Direct harm	N/A	N/A	N/A	N/A	N/A	$8.6 B
Indirect harm	$0.4 B	$1.7 B	$0.07 B	$0.05 B	$2.2 B	N/A
Avg. annual harm per SMB	$9,300	$41,700	$1,800	$1,150	$54,000	$210,000
Avg. monthly harm per SMB	$780	$3,500	$150	$100	$4,500	$17,500

Direct harm is harm to SMBs within the state(s) where AOD becomes law. Indirect harm is harm to SMBs in states outside AOD jurisdictions. The effects of different "lite" scenarios vary depending on the economics of the state that passes AOD into law. The "medium" scenario is one in which all four state bills become law.

For the NY-MN-ME-NJ "medium" scenario, Figure 1 visually illustrates how the harm would be greater for states, like New York, Maine, and New Jersey, that enact AOD legislation. The figure also shows the harm is greater for non-AOD-legislation states if, like Connecticut, there are substantial sales to AOD-legislation states. Figure 1 shows the collection of states, including New York, Maine, and New Jersey, along with surrounding states, with the intensity of the color increasing as the annual harm per SMB increases. The harm is greatest in the AOD-legislation states, New York, Maine, and New Jersey, but is also substantial for Connecticut and the other states bordering those states and having substantial sales to customers in the AOD-legislation states.

Figure 1. Annual Harm per SMB in Manufacturing, Wholesale Trade, and Retail Trade in New York, Maine, New Jersey, and Surrounding States



Legend: Thousands of 2021 dollars; Source: Author's construction.

Nationwide harm to U.S. SMBs from an AOD competition standard in California, New York, Minnesota, Maine, and New Jersey ("medium plus" scenario)

To provide an understanding of how the estimates of potential harm would change if there were additional states that enacted AOD legislation, the report also develops the estimates if California's Law Revision Commission concludes that the state should revise its law to include AOD antitrust proscriptions and that California, as well as New York, Minnesota, Maine, and New Jersey, enacts AOD legislation ("medium-plus"). If California proposes and passes AOD legislation, joining the other four, the estimated U.S. total annual harm is $212 billion. This is almost double the "medium" scenario because California has such a large state economy and because other states have such a large volume of sales in California.

Extended analysis and results detailing SMB harm from AOD laws

Results showing harm in lost sales revenue for SMBs based in each of the 50 U.S. states plus the District of Columbia, under all four "lite" scenarios, the "medium" and "medium plus" scenarios, and the "heavy" scenario, are available in the Technical Appendix to this report.

Methodology

Outlining a 14-step Approach to Estimate Harm to SMBs

This technical report uses a 14-step approach to create the foregoing estimates and comparable estimates for all 50 U.S. states and the District of Columbia. The report explains why the estimates are a very conservative lower bound for the harm to SMBs that state legislatures' AOD legislation would cause. For this introduction, a brief statement describing each of the 14 steps follows. Then, in the sections of the report following the introduction, each of the 14 steps is presented in detail.

Step 1. Digital Marketplaces and Digital Advertising Contributions to U.S. Physical Goods Creation and Sales. Over the first two decades of the new millennium, Step 1 estimates a model of U.S. physical goods creation and sales (the sum of the sales for all of the industries in the U.S. manufacturing, wholesale trade, and retail trade sectors) that identifies the contributions to sales of (a) the buildout of the Internet during the ICT revolution, (b) digital advertising, and (c) R&D investment.

Step 2. Annual Digital-Marketplace-Enabled Sales at Risk Estimate if the U.S. Congress Enacted National AOD Legislation. Step 2 uses the model in Step 1 to estimate the annual digital-marketplace-enabled sales at risk if the U.S. Congress enacted national AOD legislation—i.e., legislation from the U.S. Congress that would affect the business sales in each of the 50 states and the District of Columbia.

Step 3. The Lost Proportion of Digital-Marketplace-Enabled Sales at Risk. For Step 2 at-risk sales enabled by digital marketplaces and related services (other than digital advertising services addressed separately in subsequent steps) provided by digital platforms, Step 3 uses the stock-market reaction to key legislative events in the U.S. Congress to estimate the proportion of the sales at risk that would be lost because of national-level AOD legislation.

Step 4. The Annual Harm to U.S. Physical Goods Creation and Sales from Disruption of Digital Marketplace Services and Other Digital Tools. Step 4 estimates the total annual harm to U.S. business sales because national AOD legislation disrupts digital marketplaces and related services. That estimate is the proportion in Step 3 multiplied by the sales at risk estimated in Step 2.

Step 5. The Annual Harm to U.S. SMBs' Physical Goods Creation and Sales from Disruption of Digital Marketplace Services and Other Digital Tools. Step 5 estimates the total annual harm to

business sales of U.S. SMBs because of AOD legislation disrupting digital marketplaces and related services. That estimate is the Step-4 total digital-marketplace-related harm to U.S. business sales multiplied by the SMB share of U.S. physical goods creation and sales.

Step 6. Estimate of Annual Digital-Advertising-Induced Sales at Risk if the U.S. Congress Enacted National AOD Legislation. Step 6 uses the model in Step 1 to estimate the digital-advertising-induced sales at risk from U.S. national AOD legislation—i.e., legislation from the U.S. Congress that would affect business sales in each of the 50 states and the District of Columbia.

Step 7. The Lost Proportion of Digital-Advertising-Induced Sales at Risk. For the at-risk business sales enabled by digital advertising, step 7 uses the stock market reaction to a key antitrust enforcement action by the U.S. DOJ to estimate the proportion of the sales at risk that would be lost because of national-level AOD legislation.

Step 8. The Annual Harm to U.S. Physical Goods Creation and Sales from Disruption of Digital Advertising Services. Step 8 estimates the total annual harm to U.S. business sales because national-level AOD legislation disrupts digital advertising services. That estimate is the proportion in Step 7 multiplied by the sales at risk estimated in Step 6.

Step 9. The Annual Harm to U.S. SMBs' Physical Goods Creation and Sales from Disruption of Digital Advertising Services. Step 9 estimates the total annual harm to the physical goods creation and sales of U.S. SMBs because of AOD legislation disrupting digital advertising services. That estimate is the Step-8 total advertising-related harm to U.S. business sales multiplied by the SMB share of U.S. business sales.

Step 10. The Total Annual Potential Harm to U.S. SMBs from National-Level AOD Legislation. Step 10 estimates the total annual potential harm to physical goods creation and sales of U.S. SMBs from national-level AOD legislation as the sum of the Step 5 harm (because of disruption of digital marketplaces) and the Step 9 harm (because of disruption of digital advertising).

Step 11. Estimated Harm to SMBs by State, Caused by National-Level AOD Legislation. Step 11 divides the total Step-10 U.S. harm to SMBs among the 50 states and the District of Columbia by using each state's share of U.S. SMB activity in the manufacturing, wholesale trade, and retail trade sectors (the sales for these three sectors is what is called "U.S. physical goods creation and sales") to have for each state and D.C. the annual harm to SMBs in the counterfactual scenario that there is national AOD legislation and the businesses of every one of the 50 U.S. states and D.C. are harmed by the legislation. I.e., this estimate is the harm to each state assuming that all of its SMB business sales are exposed to harm from AOD legislation. The estimated annual loss of SMB sales in Step 11 is a conservative estimate for three key reasons:

- The estimate is for the last year before the pandemic, and since the onset of the pandemic, SMB reliance on digital technologies has increased. Data Catalyst Institute (2021, 2023) describes and details the importance of digital marketplaces and digital advertising for the success of U.S. SMBs.

- The model used to estimate the harm to SMBs is specifically designed for the manufacturing, wholesale trade, and retail trade sectors, and the estimated harm is for the SMBs in just those three sectors of the U.S. economy. The estimate of harm is conservative because the loss of SMB sales would obviously be much greater if the other sectors of the U.S. economy were included.[12]

- The estimate is also conservative because the analysis in the report supports the expectation that AOD legislation would cause a loss of sales induced by a fall in R&D. However, the impact on sales of any loss of R&D spending that may be caused by AOD legislation is not estimated.

Step 12. Estimated Harm to SMBs in AOD-legislation States: by State, Caused by a Patchwork of State-level AOD Legislation. Step 12 estimates the harm to SMBs if there is no national-level AOD legislation, but instead a patchwork of state-level AOD laws with only some states that enact AOD legislation. First, for New York, Minnesota, Maine, and New Jersey where such legislation has been introduced, we use the harm to SMBs in those states as a lower bound on the harm to those states' businesses as estimated in Step 11. To avoid sanctions and litigation because of state-level AOD law, Big Tech providers of digital platform services on which SMBs rely will not want to deal with the SMBs in the states with AOD legislation. As explained in the report's explication of Step 12, the digital platforms would have the legal right to decide not to sell services to businesses in states with AOD legislation. Thus, it should be expected that state legislatures passing AOD legislation would disrupt the provision of digital platform services to their states' businesses.

Clearly, we have a lower bound because (1) Step 11 produces a lower bound estimate of the harm for the three reasons observed in Step 11 and because (2) from Miller (2023) and from DCI (June 2023), we know that there will be for these states' SMBs many other costs beyond the lost sales because of disrupting the provision of digital tools by the leading digital platforms—an important cost of AOD legislation to be sure (one target of AOD legislation would surely be the Big Tech firms that provide digital platform services on which SMBs rely), but not the only cost. For example, a business in a state with AOD legislation might decide to leave the state and locate in a state without AOD legislation. For another example, even a small SMB itself could face uncertainty about whether a state court would, pursuant to a competitor's complaint, find it to be dominant and to have abused its dominance in a particular line of business within a state with

AOD legislation. The SMB would face litigation costs and might deviate from consumer-welfare-enhancing strategies to avoid uncertain and arbitrary rulings that its behavior violated AOD law.

Step 13. Estimated Harm to SMBs in non-AOD Legislation States: by State, Caused by a Patchwork of State-level AOD Legislation. For all of the remaining states where AOD legislation has not been proposed, step 13 uses Census data to compute the proportion of each state's business sales that are sold in the states where AOD legislation has been introduced or proposed. Those sales would be exposed to the disruption of the digital marketplaces and digital tools caused by the AOD legislation in states that pass such legislation. Being exposed to the disruptions would lead to a loss of sales, even apart from SMB decisions to restrict sales to states with AOD legislation.[13] For example, platforms providing digital marketplaces might restrict third parties' sales to AOD-legislation states.

For each non-AOD-legislation state, the proportion of its business sales that are sold in the states where AOD legislation has been proposed multiplied times the harm to the non-AOD-legislation state as estimated in Step 11 is the harm for the SMBs of that state because of the state-level AOD legislation to which a portion of their sales are exposed when sales are made to customers in states with AOD legislation.

Step 14. Estimated Annual and Monthly Harm per SMB by State, Caused by a Patchwork of State-level AOD Legislation. The state harms developed in Step 12 and Step 13 are divided by each state's number of SMBs in manufacturing, wholesale trade, and retail trade, providing estimates for each state of the harm per SMB.

About the Author

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End Notes

1. For a state that passes its own AOD law, all of the state's SMB sales, whether sold to customers in other states or not, are exposed to the harm of AOD law, and so the state's total annual harm, direct harm, and hence harm per SMB will be the same for the Heavy and Medium (when it is among the AOD states) scenarios and for the Lite scenario when it is the state with AOD law.

2. New York's bill is Senate Bill S933C, "Twenty-First Century Anti-Trust Act," https://www.nysenate.gov/legislation/bills/2021/S933. Minnesota's bill is HF 1563, 93rd Legislature (2023-2024), "A bill for an act relating to trade regulations; prohibiting abuse of dominance," https://www.revisor.mn.gov/bills/text.php?number=HF1563&type=bill&version=0&session=ls93&session_year=2023&session_number=0. Maine's proposed AOD legislation is Legislative Document No. 1815, H.P. 1161, House of Representatives, April 27, 2023, "An Act to Protect Maine's Consumers by Establishing an Abuse of Dominance Right of Action and Requiring Notification of Mergers," https://legislature.maine.gov/bills/getPDF.asp?paper=HP1161&item=1&snum=131. New Jersey's proposed AOD legislation to amend the "New Jersey Antitrust Act" is Bill S3778, Session 2022-2023, introduced May 8, 2023, https://www.njleg.state.nj.us/bill-search/2022/S3778. All links in this note were accessed June 7, 2023.

3. In 2022, the California's legislature authorized the California Law Revision Commission to study "[w]hether the law should be revised to outlaw monopolies by single companies as outlawed by Section 2 of the Sherman Act, as proposed in New York State's "Twenty-First Century Anti-Trust Act" and in the "Competition and Antitrust Law Enforcement Reform Act of 2021" introduced in the United States Senate, or as outlawed in other jurisdictions." Antitrust Law - Study B-750 at http://www.clrc.ca.gov/B750.html, accessed June 7, 2023. Staff Memoranda at the site for Study B-750 show in status reports that the Commission has been active throughout 2023 to date in its consideration of whether AOD legislation should be introduced. Pennsylvania is also considering revision of its state antitrust laws, although its case is somewhat different because it does not have same AOD language and substance as the AOD legislation introduced in New York, Minnesota, Maine, and New Jersey. HB2677, ("Pennsylvania Open Markets Act," p. 2, "Providing for cause of action for antitrust conduct, for indirect purchaser recovery under State antitrust laws and for premerger notice of health care mergers and transactions; and imposing criminal penalties," p. 1) was introduced in the Pennsylvania General Assembly and referred to the Committee on Consumer Affairs, June 24, 2022, https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2021&sind=0&body=H&type=B&bn=2677, accessed June 7, 2023.

4. DCI Working Group on State-Level “Abuse of Dominance” Antitrust Legislation and its Relevance to SMBs (June 2023) brought together experts in law and economics to discuss the AOD legislation and to consider and debate its likely implications for SMBs. The discussions by the group of professors of law, economics, and management generated ideas that are used, with reference to the Working Group, in this report. DCI (August 2023) provides a policy analysis based on the discussions of the Working Group.

5. New York’s Senate Bill S933C, “Twenty-First Century Anti-Trust Act,” https://www.nysenate.gov/legislation/bills/2021/S933, p.2.

6. For example, the Court of Justice recently confirmed that enforcers alleging a company has abused its dominance through exclusive dealing must have “tangible evidence…beyond mere hypothesis” that that the conduct can have anticompetitive effects. Case C-680/20, Unilever Italia Mkt. Operations, EU:C:2023:33. The proposed AOD bills lack such an evidentiary burden on the plaintiff to show anticompetitive effects from the alleged abuse.

7. For careful, analytical description of the special institutional history and framework of EU competition policy, see Fox (2014, pp. 132-135). Discussing Article 102 of the Treaty on the Functioning of the European Union, a successor treaty to the Treaty Establishing the European Economic Community, Fox observes (2014, p. 132): “In many ways, the Treaty tries to establish a level playing field, meaning that firms should be able to compete on their merits and not be fenced out by power, privilege, or favoritism. The competition provisions embody this principle.” Fox (2014, p. 133) explains the reasons in the EU setting for the language that “in its prohibition of abuse of dominance includes language of fairness and appears to express both equity and efficiency motivations.” Further, the EU competition law (Fox, 2014, p. 134) “… strikes a different balance and creates a different relationship between antitrust, regulation, public policy, and the state in the EU than in the United States. … In Europe, the competition authority is the Directorate General for Competition of the European Commission, which is supervised by the commissioner who is entrusted with the competition portfolio. The directorate typically undertakes market studies as well as enforcement of antitrust (abuse of dominance and agreements), state aids, and merger law. It confers with the European Parliament, and it responds to and incorporates the initiatives of the European Commission as articulated by its president.” Further, (Fox, 2014, p. 135): “The European Court of Justice has developed a large body of case law on abuse of dominance. The law establishes that dominant firms have a special responsibility not to erect or maintain barriers that frustrate the access of nondominant firms to markets. Some recent judgements reveal a concern for competitiveness, efficiency, and consumer welfare, but all within the framework of general EU policy. Even the usage of the words “consumer welfare” and the phrase “to protect consumers” do not correspond with the usage of the words in the U.S. cases.”

8. For example, the New York law specifies: "The legislature further finds and declares that anti-competitive practices harm great numbers of citizens and therefore must ensure that class actions may be raised in anti-trust suits." New York's Senate Bill S933C, "Twenty-First Century Anti-Trust Act," https://www.nysenate.gov/legislation/bills/2021/S933, p.2.

9. New York's Senate Bill S933C, "Twenty-First Century Anti-Trust Act," https://www.nysenate.gov/legislation/bills/2021/S933, p.3.

10. See Hovenkamp (2022, pp. 12-15) for an exposition of how the rule of reason in U.S. antitrust law ideally works to provide understanding of the effects of alleged anticompetitive behavior. The process entails a disciplined shifting of the burden of proof during allegations by plaintiffs followed by responses by defendants. The process is designed to develop understanding of whether the practice promotes efficiency or instead simply restricts competition. Describing the "presumptions-based approach to the rule of reason", Hovenkamp (2022, p. 12) says: "Under that approach a plaintiff must prove a prima facie case, identifying with some particularity a particular practice, and why it represents an anticompetitive exercise of market power. At that point the burden of proof shifts to the defendant to offer a procompetitive justification for its restraint. If it fails to do so the plaintiff wins." If instead the defendant shows a justification for the behavior, the burden shifts back to the plaintiff to show that the benefits of the practice could have been achieved in a less restrictive way.

11. The need for uniformity suggests that if U.S. antitrust policy were to go in the direction of the proposed AOD legislation, national-level legislation would be more appropriate than a patchwork of state-level AOD antitrust laws. However, Fox (2023) observes, "There is, however, a basic problem in changing the trajectory of antitrust law by legislation, for legislation (except of the most general kind, which we already have in antitrust) is commonly black letter law, more like civil law, while antitrust law is evolutionary through the case-by-case process; heavily fact-dependent; an intermixture of fact and law, in the course of determining whether specific acts or transactions are anticompetitive." The problem that lies behind the emergence of proposals for AOD antitrust legislation, Fox observes, is not with the existing statutory language that proscribes anticompetitive behavior, but instead with the interpretation of those laws.

12. In 2019, the share of total U.S. SMB employment taken by the SMB employment in manufacturing, wholesale trade, and retail trade is 0.225 or 22.5%. Thus, economy-wide, lost revenues for SMBs may be upwards of four times the estimate for the manufacturing, wholesale trade, and retail trade sectors. There are about 33.2 million SMBs in the U.S. with about 61.7 million SMB employees (46.4% of U.S. employees), (https://advocacy.sba.gov/2022/08/31/2022-small-business-profiles-for-the-states-territories-and-nation/). In 2019, the share of total U.S. SMB employment taken by the SMB employment in manufacturing, wholesale trade, and retail trade is 0.225 or 22.5% (the share is (5093618 + 3362014 + 5439291)/(61693908) = 0.225), from "The Number of Firms and Establishments, Employment, and Annual Payroll by State, Industry, and Enterprise Employment Size: 2019," https://www.census.gov/data/tables/2019/econ/susb/2019-susb-annual.html. Many SMBs do not have employees even while having substantial sales, and taken together the sectors for manufacturing, wholesale trade, and retail trade have relatively fewer of the no employee SMBs. There are 4,003,990 SMBs in the U.S. sectors for manufacturing, wholesale trade, and retail trade (593,849 + 675,837 + 2,734,304 = 4,003,990), from the webpage for the United States as a whole, at https://advocacy.sba.gov/2022/08/31/2022-small-business-profiles-for-the-states-territories-and-nation/, using "Nonemployer Statistics" and "Statistics of U.S. Businesses" data from the 2019 Census.

13. As observed in Miller (2023) and DCI (May 24, 2023), firms in states without AOD legislation might restrict their dealings with firms in the states with AOD legislation in order to reduce the likelihood of being caught up in the snare of AOD litigation.

References

Benzell, Seth G., and Chang, Felix B., "Facebook, Welfare, and Natural Monopoly: A Quantitative Analysis of Antitrust Remedies," March 7, 2022, available at SSRN: https://ssrn.com/abstract=4052023 or http://dx.doi.org/10.2139/ssrn.4052023.

Danziger, Robert S., and Scott, John T., Government Royalties on Sales of Pharmaceutical and Other Biomedical Products Developed with Substantial Public Funding: Illustrated with the Technology Transfer of the Drug-Eluting Coronary Stent, Annals of Science and Technology Policy: Vol. 6: No. 1, print/paper version, 2022, pp. 1-104 (Online version, September 8, 2021, pp. 1-99, http://dx.doi.org/10.1561/110.00000020).

Data Catalyst Institute (DCI), Super Selling: How Contemporary Small Businesses Reach Customers and Sell Products, U.S. Research Report, Fall 2021, available at https://datacatalyst.org/wp-content/uploads/2021/12/Super-Sellers-Fall-2021-FINAL2.pdf.

Data Catalyst Institute (DCI), Maximum Impact: How Digital Ads Level the Playing Field for U.S. Small Businesses, March 2023, RXN Group and Connected Commerce Council, available at https://datacatalyst.org/reports/maximum-impact-how-digital-ads-level-the-playing-field-for-u-s-small-businesses/.

Data Catalyst Institute (DCI), "Analysis of State-Level "Abuse of Dominance" Antitrust Legislation and its Relevance to Small and Midsize Businesses," June 2023, at https://datacatalyst.org/reports/analysis-of-state-level-abuse-of-dominance-antitrust-legislation-and-its-relevance-to-small-and-midsize-businesses/.

Data Catalyst Institute (DCI), "Race to Regulation: Assessing the Impact of Proposed U.S. State Competition Bills on Small and Medium-sized Businesses," Policy Analysis Informed by the DCI State Antitrust Law and Small Business Working Group," August 2023, at https://datacatalyst.org/reports/race-to-regulation-assessing-the-impact-of-proposed-u-s-state-competition-bills-on-small-medium-sized-businesses/.

Fox, Eleanor M. "Monopolization and Abuse of Dominance: Why Europe Is Different," The Antitrust Bulletin, Volume 59, No. 1 (Spring 2014), pp. 129-152.

Fox, Eleanor M., "Consumer Welfare" and the Real Battle for the Soul of Antitrust, April 19, 2023, Promarket, Stigler Center for the Study of the Economy and the State, Booth School of Business, University of Chicago, at https://www.promarket.org/2023/04/19/consumer-welfare-and-the-real-battle-for-the-soul-of-antitrust/.

Grant, Nico, “Google Devising Radical Search Changes to Beat Back A.I. Rivals,” April 16, 2023, The New York Times, https://www.nytimes.com/2023/04/16/technology/google-search-engine-ai.html, accessed April 17, 2023.

Grant, Nico, and Weise, Karen, “In AI Race, Microsoft and Google Choose Speed Over Caution,” The New York Times, April 7, 2023, https://www.nytimes.com/2023/04/07/technology/ai-chatbots-google-microsoft.html, accessed April 7, 2023.

Guilford, Gwynn, “Inflation Report Shows Price Pressures Eased in March: Elevated Inflation has Weighed on Household Spending Decisions,” The Wall Street Journal, April 12, 2023, https://www.wsj.com/articles/us-inflation-march-2023-consumer-price-index-fa6eba99?mod=hp_user_preferences_pos3#cxrecs_s, accessed April 12, 2023.

Haggin, Patience, “Google and Meta’s Advertising Dominance Fades as TikTok, Streamers Emerge,” Updated January 4, 2023, The Wall Street Journal, https://www.wsj.com/articles/google-and-metas-advertising-dominance-fades-as-tiktok-netflix-emerge-11672711107, accessed April 1, 2023.

Haggin, Patience, and Hagey, K., “Breakup of Google’s Ad Business Would Reshape $500 Billion Sector”, The Wall Street Journal, January 29, 2023, https://www.wsj.com/articles/breakup-of-googles-ad-business-would-reshape-500-billion-sector-11674967791?mod=hp_lead_pos4, accessed January 29, 2023.

Hobbs, Kelsi G., Albert N. Link, and John T. Scott, “The Growth of U.S. Science and Technology Parks: Does Proximity to a University Matter?,” The Annals of Regional Science, Vol. 59, Issue 2 (September 2017), pp. 495-511.

Hovenkamp, Herbert, “Antitrust Presumptions for Digital Platforms,” University of Pennsylvania Institute for Law and Economics Research Paper No. 22-42, 27 September 2022, last revised 30 March 2023, available at SSRN: https://ssrn.com/abstract=4224554 or http://dx.doi.org/10.2139/ssrn.4224554.

Kruppa, Miles, “Google CEO Sundar Pichai Says Search to Feature Chat AI,” The Wall Street Journal, Updated April 6, 2023, https://www.wsj.com/articles/google-ceo-sundar-pichai-says-search-to-feature-chat-ai-2fa0f54c?mod=hp_lead_pos2, accessed April 6, 2023.

Kruppa, Miles, Schechner, Sam, and Michaels, Dave, “DOJ Sues Google, Seeking to Break Up Online Advertising Business: Suit Could Have Major Implications for Digital-Ad Industry,” The Wall Street Journal, January 24, 2023, https://www.wsj.com/articles/u-s-sues-google-for-alleged-antitrust-violations-in-its-ad-tech-business-11674582792?mod=hp_lead_pos1, accessed January 25, 2023.

Link, Albert N., and Scott, John T., Employment Growth from Public Support of Innovation in Small Firms (Kalamazoo, Michigan: W. E. Upjohn Institute for Employment Research, 2012a), http://dx.doi.org/10.17848/9780880993944 .

Link, Albert N., and Scott, John T., "The Exploitation of Publicly Funded Technology," Journal of Technology Transfer, Volume 37, Number 3 (June 2012b), pp. 375-383.

Martin, Stephen, "The Goals of Antitrust and Competition Policy," in W. D. Collins (Ed.), Issues in Competition Law and Policy, Vol. I, pp. 19-84, (Chicago: American Bar Association Section of Antitrust Law, 2008).

McCabe, David, and Grant, Nico, "U.S. Accuses Google of Abusing Monopoly in Ad Technology," The New York Times, January 24, 2023, https://www-nytimes-com.dartmouth.idm.oclc.org/2023/01/24/technology/google-ads-lawsuit.html, accessed January 25, 2023.

Metz, Cade, and Weise, Karen, "A Tech Race Begins as Microsoft Adds A.I. to Its Search Engine," The New York Times, Feb. 7, 2023, https://www.nytimes.com/2023/02/07/technology/microsoft-ai-chatgpt-bing.html, accessed April 7, 2023.

Miller, Cameron D., "Busted: How the Twenty-First Century Anti-Trust Act Will Harm New York's Economy, Disincentivize Innovation, and Open the Floodgates of Litigation," New York Civil Justice Institute, Spring 2023, at https://www.nycji.org/research.

Miller, Cameron D., and Richard D. Wang, A New Economic Lens for Exploring the Negative Effects of Digital Platform Antitrust Legislation on American Small Businesses, Data Catalyst Institute (DCI), White Paper, May 2022, available at https://datacatalyst.org/reports/a-new-economic-lens-for-exploring-the-negative-effects-of-digital-platform-antitrust-legislation-on-american-small-businesses/.

Mills, Mark, "Of Tabulators and Tractors," a presentation on February 25, 2023, at a meeting of the Global Interdependence Center in La Jolla, California, published as "Conference Roundup: Mark Mills on the Cloud, the Robot Revolution, and Machines that Think", April 2023, edited by Laurence B. Siegel, Special to AJO Vista, available at https://manhattan.institute/article/of-tabulators-and-tractors-2, accessed April 24, 2023.

Romanoff, Tom, "Comparison of Competition Law and Policy in the US, EU, UK, China, and Canada," December 16, 2021, Bipartisan Policy Center, https://bipartisanpolicy.org/blog/comparison-of-competition-law-and-policy-in-the-us-eu-uk-china-and-canada/, accessed March 30, 2023.

Scherer, F. M., Industrial market structure and economic performance (Chicago: Rand McNally, 1970).

Scott, John T., Estimates of Potential Harm to U.S. Small and Medium Sized Businesses from Proposed Antitrust Legislation Aimed at Large Digital Platforms, Technical Report, Data Catalyst Institute, August 2022. https://datacatalyst.org/wp-content/uploads/2022/08/Estimates-of-Potential-Harm-to-U.S.-Small-and-Medium-Sized-Businesses-from-Proposed-Antitrust-Legislation-Aimed-at-Large-Digital-Platforms.pdf, https://datacatalyst.org/wp-content/uploads/2022/08/Appendix-Estimates-of-Potential-Harm-to-U.S.-Small-and-Medium-Sized-Businesses-from-Proposed-Antitrust-Legislation-Aimed-at-Large-Digital-Platforms.pdf.

Tilley, Aaron, "When Apple Comes Calling, 'It's the Kiss of Death': Aspiring partners accuse tech giant of copying their ideas; Apple says it plays by the rules", April 20, 2023, The Wall Street Journal, https://www.wsj.com/articles/apple-watch-patents-5b52cda0?mod=hp_lead_pos1, accessed April 20, 2023.

Tracy, Ryan, "Senate Panel Approves Antitrust Bill Restricting Big Tech Platforms," The Wall Street Journal, January 20, 2022, https://www.wsj.com/articles/senate-panel-approves-antitrust-bill-restricting-big-tech-platforms-11642701487, accessed January 22, 2022.

U.S. House of Representatives, House Committee on the Judiciary, "Chairman Nadler Applauds Committee Passage of Bipartisan Tech Antitrust Legislation," Press Releases, June 24, 2021, https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4622, accessed April 10, 2022.

U.S. Department of Justice, Complaint, filed October 20, 2020, in the United States District Court for the District of Columbia, United States of America, U.S. Department of Justice, State of Arkansas, State of Florida, State of Georgia, State of Indiana, Commonwealth of Kentucky, State of Louisiana, State of Mississippi, State of Missouri, State of Montana, State of South Carolina, and State of Texas, Plaintiffs, v. Google LLC, Defendant, https://www.justice.gov/atr/case-document/file/1329131/download.

U.S. Department of Justice, Complaint, filed January 24, 2023, in the United States District Court for the Eastern District of Virginia, Alexandria Division, United States of America, U.S. Department of Justice, Commonwealth of Virginia, State of California, State of Colorado, State of Connecticut, State of New Jersey, State of New York, State of Rhode Island, and State of Tennessee, Plaintiffs, v. Google LLC, Defendant, https://www.justice.gov/atr/case-document/file/1566706/download.

Technical Appendix

For additional details about the data and methodology underlying the results presented here, please refer to the accompanying Technical Report Appendix.

Data Catalyst

California "Abuse of Dominance" Legislation Would Crush CA-based Small and Medium-Sized Businesses

A new economic analysis from John T. Scott, Professor Emeritus of Economics at Dartmouth College, shows that "abuse of dominance" (AOD) antitrust legislation would cost California small and medium-sized businesses (SMBs) $81 billion in lost revenue every year. California is home to almost 500,000 SMBs that create and sell physical goods, typically relying on digital platform services.

In today's digitally driven economy, even small mom-and-pop stores on Main Street sell online to customers across state lines. A boutique store in Los Angeles can use Instagram to promote themselves, and Amazon to sell to customers across California and nationwide.

California policymakers are considering proposing AOD legislation in response to the success of America's leading technology companies, including Google, Facebook, Amazon, and Apple. AOD legislation would make it illegal for these platforms to, among other things, engage in any practices that harm their competitors (many of whom are also very big), including practices that benefit consumers and small businesses, such as lowering prices, improving security, and making it easier to find customers. Passing an AOD bill in California would cause unprecedented financial damage to California SMBs.

Ramifications For SMBs That Create and Sell Physical Goods

Potential Impact on California SMBs:

The analysis shows that if California were to pass AOD legislation, SMBs within the state could face a staggering annual revenue loss of $81 billion, posing a considerable threat to businesses that leverage digital platforms to run and grow their business.

- Total annual harm among all SMBs: $81 billion
- Average annual harm per SMB: $162,000
- Average monthly harm per SMB: $13,500

Nationwide Ramifications:

In addition to harming California small businesses, CA-passed AOD legislation would cause incredible harm to small businesses nationwide.

- Total annual sales harm among all SMBs: $104.1 billion
- Average annual sales harm per SMB: $26,025
- Average monthly sales harm per SMB: $2,170

Regional Effect:

States with business ties to California, such as Oregon, Nevada, and Arizona, would face escalated harm from the proposed legislation.

Estimated sales harm to SMBs in Oregon if California passes AOD law:

- Average annual sales harm per SMB: $20,030
- Average monthly sales harm per SMB: $1,700

Estimated sales harm to SMBs in Nevada if California passes AOD law:

- Average annual sales harm per SMB: $33,700
- Average monthly sales harm per SMB: $2,810

Estimated sales harm to SMBs in Arizona if California passes AOD law:

- Average annual sales harm per SMB: $20,220
- Average monthly sales harm per SMB: $1,690

AOD legislation in California could have far-reaching and detrimental effects on SMBs statewide and nationwide. It's crucial for policymakers to carefully consider the economic implications of such far-reaching legislation and refrain from proposing and passing laws that could undermine SMB success and the SMB economy.

* * * *

About DCI

The Data Catalyst Institute (DCI) supports policymakers and other stakeholders as they undertake the important and difficult work of enacting sound public policy governing the use of technology and data. DCI reports on regulatory and legislative proposals to celebrate good policy and identify relevant challenges.

Proposals often evolve — before and even after enactment. DCI will monitor amendments, court cases, and other changes to adjust our analyses and conclusions to reflect future changes. Our objective is not to criticize or condemn but rather to support a better, broader understanding among all stakeholders.