FIRST SUPPLEMENT TO MEMORANDUM 2025-11

Antitrust Law: Status Update (Public Comment and Presentation)

This supplement presents information about public comments and a presentation from panelist Prof. Robin Feldman from the October 10, 2024 Commission meeting.[1]

The slides and public comments are attached as Exhibits to this supplement.

Exhibits ***Exhibit page***

PUBLIC COMMENT

Scott Kronland, on behalf of Economic Security California Action and endorsed by American Economic Liberties Project; Consumer Federation of California;

Democracy Policy Network; Institute for Local Self Reliance; TechEquity Collaborative; United Domestic Workers (UDW/AFSCME Local 3930); United

[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.

Food and Commercial Workers Western States Council (UFCW); and Writers Guild of America West, submitted a public comment urging the Commission to issue interim recommendations on the Antitrust Study.

The Copyright Alliance submitted a public comment urging the Commission to consider rejecting any proposals that would impact licensing rights under the Copyright Act.

The U.S. Chamber of Commerce submitted detailed public comments responsive the expert working groups reports on Single Firm Conduct, Mergers and Acquisitions, Consumer Welfare Standard, Technology Platforms, and Artificial Intelligence. The Chamber also included a commissioned report to address Concentration in California. According to the Chamber, that report, *Antitrust and Industrial Concentration in California: A Misleading and Unworkable Benchmark,* authored by Dr. Robert Kulick and Andrew Card of NERA Economic Consulting, is follow-up to work previously done for the U.S. Chamber of Commerce examining concentration in the national economy.

Economic Security California Action, American Economic Liberties Project, California Nurses Association/National Nurses United, End Poverty in California, Institute for Local Self-Reliance, Rise Economy, Tech Equity Action, The Greenlining Institute, Small Business Majority, and the UFCW submitted a public comment responsive to the expert report on Artificial Intelligence.

Assemblymember Buffy Wicks and former Assemblymember Jordan Cunningham, the joint authors of ACR 95,[2] submitted a public comment to the Commission reversing their previous recommendation for a single, comprehensive antitrust reform proposal and made other suggestions.

Respectfully submitted,

Sharon Reilly
Executive Director

Sarah Huchel
Chief Deputy Director

[2] 2022 Cal. Stat. res. ch. 147 (ACR 95).

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December 19, 2024

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

Re: Antitrust Law – Study B-750

Dear Chairperson Huebner and Honorable Commissioners:

On behalf of our client, Economic Security California Action[1], we write to express appreciation for the California Law Revision Commission's ongoing work on Study B-750, an ambitious and timely effort to examine and propose reforms to update California's antitrust laws. The Commission's and working groups' diligence and rigor in navigating these complex legal and economic issues are truly commendable. Given the progress demonstrated in the Commission's white papers and the reports of its working groups, we respectfully urge the Commission to issue interim recommendations on areas of consensus or near-consensus *now* while continuing to study more challenging topics.

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[1] The following organizations have also endorsed this letter: American Economic Liberties Project; Consumer Federation of California; Democracy Policy Network; Institute for Local Self Reliance; TechEquity Collaborative; United Domestic Workers (UDW/AFSCME Local 3930); United Food and Commercial Workers Western States Council (UFCW); and Writers Guild of America West.

The Commission and its working groups have already demonstrated that there are several issues that are ripe for legislative consideration and do not need to wait until further study is conducted for the Commission to recommend that the Legislature consider them. Those issues are discussed below. While the Commission may feel the need to extend its consideration of certain issues, a phased approach, which is consistent with the Commission's historical practices, would enable the Legislature to act swiftly where clarity and consensus exist and address critical gaps in California's competition laws while the Commission continues to consider other issues.

Offering recommendations to the Legislature at this juncture would also be appropriate given the potential for shifting enforcement priorities at the federal level. The recent election may well result in a change in federal legislative and enforcement priorities and a continued change in the makeup of the federal judiciary. Regardless of whether changes at the federal level are considered positive or negative, California's antitrust policies should not be dependent on potentially fluctuating federal priorities. Issuing recommendations now on consensus issues would allow the Legislature to act with the benefit of the Commission's guidance and expertise, would allow California to enact its own modern antitrust law that is enforceable in its state courts, and would ensure that essential improvements to California's competition laws are not delayed.

Finally, the sponsors of the legislation that authorized Study B-750 have made clear that legislators are unlikely to wait until the Commission completes the entire study before introducing state legislation to modernize state antitrust law. The Commission should provide the Legislature with recommendations now so the Legislature can take them into account.

I. Precedent for Interim Recommendations

The Commission has a history of issuing interim recommendations during the course of broader studies, thereby enabling the Legislature to take timely action while the Commission continues to work on long-term projects. Examples from prior studies underscore the feasibility and benefits of this approach, particularly when addressing complex areas of law such as antitrust law.

For example, Resolution Chapter 63 of the Statutes of 2014, No. 22, tasked the Commission with determining whether the Fish and Game Code should be revised for organization, clarity, and to make other technical improvements. When the Commission published its first report under that mandate the next year, the then-Chairperson explained that the scope of the project would require more time to complete, but that as the larger study proceeded, "some beneficial changes can be made more quickly." *Fish and Game Law: Technical Revisions and 20 Minor Substantive Improvements (Part 1)*, 44 Cal. L. Revision 21 Comm'n Reports 115, 117 (2015). In keeping with that approach, the Commission made interim recommendations while continuing to study the Fish and Game Code and periodically suggest further improvements and revisions for many years. *See Fish and Game Law: Technical Revisions and Minor Substantive Improvements (Part 3)*, Pre Print Report (February 2023).

Similarly, Government Code Section 71674 tasked the Commission with determining "whether any provisions of law are obsolete as a result of the enactment of" several statutes that restructured the California trial court system. As with the example of the Fish and Game Code revision, the Commission issued many reports in accordance with its statutory mandate between 2002 and 2023, in at least nine parts. *See* California Law Revision Commission, *Statutes Made Obsolete by Trial Court Restructuring (Part 9): Jurisdictional Classification of a Drug Asset Forfeiture Proceeding*, Pre-Print Recommendation (August 2022).

Likewise, in the 1960s the Commission issued a series of reports in response to the mandate it received under Resolution Chapter 42 of the Statutes of 1956 to determine whether the law of eminent domain should be revised to safeguard private property rights. Given the breadth and complexity of the topic, the Commission issued several interim recommendations in accordance with its mandate. *See, e.g., Recommendation and Study Relating to Evidence in Eminent Domain Proceedings* (October 1960); *Recommendation and Study relating to Taking Possession and Passage of Title in Eminent Domain* Proceedings (October 1960); *Recommendation and Study Relating to Condemnation Law and Procedure —Discovery in Eminent Domain Proceedings* (January 1963).

In short, this is not the first time the Commission has been tasked with the study of an area of law that is vast, complex, and requires study that may span many years. The Commission's past practice in similar circumstances has been to issue reports and recommendations to the Legislature as it arrives at consensus or identifies clear areas for improvement, as opposed to delaying any action—and thus depriving the Legislature of its insight and expertise—until all the Commission's work is complete.

Given the scope of the Commission's inquiry into California's antitrust regime, the time that has elapsed since the Commission began its work in this area, and the already excellent work the Commission and its working groups have done in surveying the field and developing recommendations, a similar approach is warranted here.

II. Areas Ready for Legislative Action

The Commission's working groups have identified several areas of consensus or near-consensus that are ready for legislative action. The Commission's release of recommendations on these issues now would enhance the clarity and enforceability of California's antitrust laws and empower the State to effectively tackle contemporary challenges. These issues are as follows:

A. Reaching Single Firm (Unilateral) Conduct

The Commission's work thus far has established that "the most glaring deficiency" in California's current antitrust law is that "California has no provision comparable to Section 2 of the Sherman Act," meaning "the Cartwright Act does not reach purely unilateral conduct." Single Firm Conduct Working Group Report at 1. Accordingly, California law is currently *less* protective than federal law in prohibiting several types of single-firm conduct, including "unilateral refusals to deal, discrimination against rivals, tortious conduct that disrupts the ability of a rival to compete effectively, and sham litigation." Single Firm Conduct Working Group Report at 10. To remedy that shortcoming, the Single Firm Conduct Working Group has drafted potential legislative language that would extend the reach of California antitrust law to unilateral, anticompetitive conduct by a single firm.

Other working groups have concurred with the conclusion that reaching single firm conduct would not only bring California law in line with longstanding federal provisions but would also ameliorate some of the current issues California citizens face and address concerns that various working groups have raised. For example, the Competition and Artificial Intelligence Working Group endorsed the Single Firm Conduct Working Group's proposal, noting that it would "strengthen California law significantly and make it more effective than the federal antitrust law governing unilateral conduct," thus "increas[ing] welfare" and promoting innovation. Competition and Artificial Intelligence Working Group Report at 6. That working group also noted that the proposed language to extend the reach of antitrust law to single firm conduct would "apply to all firms and therefore automatically cover digital platforms, AI, and any other innovation that comes along in the future," thus protecting both "people and innovators better than a law targeted only at digital platforms or AI." *Id.* Likewise, the Technology Platforms Working Group acknowledged the Cartwright Act's failure to address single firm conduct and noted that, if the Legislature adopted the Single Firm Conduct Working Group's recommendations, this would circumvent precedent that has hobbled antitrust enforcement in the technology sector at the federal level. Technology Platforms Working Group Report at 7–8. And the Enforcement and Immunities Working Group embraced the proposal as well, noting that the Single Firm Conduct Working Group's proposed language "is true to traditional California policy purposes in its focus both on consumer harm and the seriousness of exclusionary effects on competitors." Enforcement and Immunities Working Group Report at 7.

As members of this Commission are no doubt aware, the Commission need not provide specific legislative language in its reports and recommendations to the Legislature. However, in this instance the Commission, through several working groups, has already done considerable research into the need for extending antitrust law to reach single firm conduct that would fill a critical gap in California's antitrust enforcement. Indeed, it has already drafted a legislative proposal that could serve as an important starting point for discussions in the Legislature. There is no reason for the Commission to keep its proposal away from the Legislature when it has the power to act now, and when allowing it to do so would not hamper the Commission's other important work in this area.

B. Codification of Presumptive Anti-Competitive Practices

The Commission's working groups have also reached substantial agreement on the need to codify specific anti-competitive practices already recognized as unlawful under existing state and federal case law. Practices such as tying arrangements, exclusive dealing, predatory pricing, and sham litigation have been well-documented as harmful to competition and are currently addressed through case-by-case judicial decisions. *See* Single Firm Conduct Working Group Report at 9; Mergers Working Group Report at 11; Tech Platforms Working Group Report at 9; Enforcement and Immunities Working Group Report at 4. However, the absence of clear statutory guidance creates uncertainty for both enforcement agencies and businesses, leading to inconsistent application and protracted litigation. In that vein, the Single Firm Conduct Working Group's proposed language includes sections explicitly codifying as anticompetitive certain acts that are already violative of current law. *See* Single Firm Conduct Working Group Report at 15, 17.

Codifying these practices as presumptively anticompetitive would serve multiple purposes. First, it would provide clarity and predictability for market participants, reducing the compliance burden for businesses while enhancing deterrence. Second, it would streamline enforcement by creating statutory presumptions that shift the burden to defendants to demonstrate pro-competitive justifications. Finally, it would enable state courts to develop jurisprudence tailored to California's specific economic and policy landscape, free from the constraints of federal interpretations.

The Commission's study recommends that these presumptions be carefully crafted to reflect current economic realities, particularly in rapidly evolving sectors such as technology and healthcare. For example, tying arrangements in the digital platform economy often involve unique market dynamics that traditional antitrust principles may struggle to address. By codifying these practices and incorporating modern economic insights, the Legislature would equip enforcers with the tools necessary to effectively combat emerging forms of anti-competitive behavior. The Single Firm Conduct Working Group's proposed language offers the Commission an ideal framework to encourage the Legislature to codify California's antitrust common law to the benefit of both market participants and the general public.

C. Clarification of Key Legal Principles

Two other critical clarifications for the Legislature to consider have emerged from the Commission's study regarding California's antitrust doctrine. The first concerns the relationship between California antitrust law and federal precedent. The second addresses recognizing worker injuries as antitrust injuries. Both clarifications would ensure that California law fulfills its intended role of protecting competition regardless of how federal antitrust statutes are interpreted and enforced.

First, the relationship between California antitrust law and federal precedent has been a recurring source of confusion, particularly for federal courts. While interpretations of federal antitrust statutes, such as the Sherman Act, can be informative, they are not binding under the Cartwright Act. As multiple working groups have noted, courts have repeatedly affirmed this distinction, emphasizing the divergence between the legislative history of the Cartwright Act and that of the Sherman Act. In *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal.4th 1185 (2013), for example, the California Supreme Court held that interpretations of federal antitrust law are at most instructive when interpreting the Cartwright Act. In *California v. ARC America Corp.*, 490 U.S. 93, 102 (1989), the U.S. Supreme Court explained that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies," and that the Sherman Act and Cartwright Act are not identical.

Despite these precedents, the Commission's working groups explained that many courts continue to conflate the two frameworks, which results in confusion and underenforcement. For example, the Enforcement and Immunities Working Group concluded that courts, especially federal courts, often incorrectly assume that the Cartwright Act simply mirrors federal antitrust law and are unfamiliar with the state law's history and purposes. The working groups agree that California's antitrust regime would benefit from legislative clarification that the Cartwright Act has a distinct legislative history, was intended to be interpreted more broadly, and draws on its own body of common law. This would ensure that judges look primarily to California precedents when interpreting the Cartwright Act.

Second, the Legislature should make explicit that injuries to workers from anti-competitive practices are cognizable antitrust injuries, so there is no need for disputes about this issue. The Concentration Working Group exhaustively catalogued the harms that concentration and undue market power can cause workers in the State. Concentration Working Group Report at 3–6. The working group's report explains that anticompetitive practices such as wage-fixing agreements or no-poach clauses harm not only consumers but also workers, who are directly impacted by wage suppression and restricted job mobility.

The Consumer Welfare Standard Working Group also observed that the central principles that lie at the heart of antitrust law include protecting labor markets from unfair competition. Consumer Welfare Standard Working Group Report at 8. The working groups have explained that explicitly recognizing worker injuries as cognizable injuries under antitrust law would align California with contemporary economic understanding, which sees labor markets as integral to competition policy. There is no reason to delay a recommendation that the Legislature consider explicitly including workers as protected parties under the Cartwright Act.

D. Providing for Merger Challenges and Pre-Merger Notification Requirements

Finally, the working groups' studies have identified another easily addressed shortcoming in California's antitrust regime: the absence of any explicit provisions addressing mergers. The Mergers Working Group observed that "at present the Cartwright Act … lacks a specific merger provision," which thus requires the Attorney General to rely solely on federal antitrust provisions, such as the Clayton Act, to block mergers that may be detrimental to competition. Mergers Working Group Report at 1. Forced reliance on federal law necessarily hampers antitrust enforcement in the State, given the restrictive nature of federal precedents that have accumulated over time.

The Mergers Working Group conducted a comprehensive overview of the differences between how California and federal law approach merger challenges and offered a range of options to address the current limitations on State officials' ability to ensure that anticompetitive mergers are adequately scrutinized and prevented. One of the easiest and least controversial options this group proposed is enacting notice requirements for mergers.

In 2023 California enacted AB 853, which created a merger notification regime for retail grocery and drug firms, an important first step in enhancing the State's ability to regulate anticompetitive mergers. However, the Commission's study identifies this narrow focus on retail grocery and drug firms as a missed opportunity to enhance oversight across a broader range of industries. Mergers in technology, healthcare, and other critical sectors often escape state-level scrutiny due to the absence of a general notification regime. Expanding these requirements would enable the Attorney General to review transactions that fall below the federal Hart-Scott-Rodino threshold but still pose significant risks to competition within California. Mergers Working Group Report at 17; Enforcement and Immunities Working Group Report at 12–13.

As the Mergers Working Group explained, moreover, states have a comparative advantage over the federal government in merger enforcement based on their "superior information about mergers and practices that affect commerce in their jurisdiction," their superior knowledge of "local businesses, their practices, and key individuals," and their ability to dedicate resources to mergers that federal agencies might not be able to. Mergers Working Group Report at 15. The Working Group has thus proposed both adding language to the Cartwright Act that would permit state officials to challenge mergers in state court, with all the attendant benefits of such an approach. *Id.* at 16. The Enforcement and Immunities Working Group echoed the importance of adopting a pre-merger notification law to ensure that California's antitrust framework is sufficiently robust. Enforcement and Immunities Working Group Report at 21.

* * *

For the reasons explained above, the Commission should act swiftly to make an interim recommendation to the Legislature on the issues discussed above so that the Legislature can benefit from Commission's excellent work and modernize California's antitrust laws for the benefit of all its citizens. Meanwhile, the Commission should continue its study of other antitrust issues.

Sincerely,

Scott A. Kronland

Scott A. Kronland

cc: Economic Security California Action

American Economic Liberties Project
Consumer Federation of California
Democracy Policy Network
Institute for Local Self Reliance
TechEquity Collaborative
United Domestic Workers (UDW/AFSCME Local 3930)
United Food and Commercial Workers Western States Council (UFCW)
Writers Guild of America West

copyright alliance

October 28, 2024

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

Re: Antitrust Law—Study B-750

Dear Chairperson Huebner, Commissioners, and Executive Director Reilly:

The Copyright Alliance appreciates the opportunity to comment on the California Law Revision Commission's study regarding California's antitrust laws (Study B-750).

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 2 million individual creators and over 15,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of copyrighted works for the public to enjoy.

We write regarding proposals, which we understand the Commission is considering, to amend the California antitrust statutes to regulate or prohibit "exclusive contracts." For example, this has been suggested by your Single Firm Conduct Working Group and in the New York bill you are considering, the "Twenty-First Century Antitrust Act." If such an amendment were to apply to licenses for the exclusive right to exercise rights protected by the federal Copyright Act, 17 U.S.C. § 101 et seq., we believe the state law would be preempted and unconstitutional. The Copyright Alliance respectfully urges the Commission not to adopt such a proposal unless the statutory amendment were to include an express carve-out for exclusive licenses to rights under copyright. The Copyright Alliance takes no position on the legality of an amendment dealing with exclusive contracts outside the context of the authorized licensing of copyright rights.

The Copyright Act "affords copyright owners the '*exclusive* rights' to," among other things, "display, perform, reproduce, or distribute copies of a copyrighted work," and, importantly, the right "*to authorize others* to do those things." *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1010 (9th Cir. 2017) (emphasis added). Thus, under the Copyright Act, while "[l]egal ownership of the exclusive rights under a copyright initially vests in the author of the copyrighted work," the author "may transfer all or a subset of these rights" to an authorized person, including by license. *John Wiley & Sons, Inc. v. DRK Photo*, 882 F.3d 394, 410 (2d Cir. 2018). The copyright owner "may grant essentially two types of licenses, exclusive and non-exclusive." *Id.*

Significantly, the use of state law, including antitrust law, to restrict a copyright owner's right to authorize others to exercise the owner's exclusive rights would be preempted. Under the U.S. Constitution's Supremacy Clause, a state law is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). "Congressional intent to have national uniformity in copyright laws is clear." *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002); *see Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964). State laws that interfere with the national uniformity of a copyright owner's exclusive rights under the Copyright Act are preempted. The law in this area is well-settled.

Orson, Inc. v. Miramax Film Corp., 189 F.3d 377 (3d Cir. 1999) (en banc), is squarely on point. There, the Third Circuit held that a state law prohibiting exclusive license agreements for the public display of motion pictures was preempted. The court said it was not permissible to create potential "liability under the state law for the copyright holder's exercise of its federal rights," in that case, the copyright owner's right to "grant an exclusive license to an exhibitor of choice." *Id.* at 379, 385–87; *see also Ass'n of Am. Publishers, Inc. v. Frosh*, 586 F. Supp. 3d 379, 389 (D. Md. 2022) (finding preempted a state law requiring publishers who have licensed an electronic copy of their book to "'offer to license' the same product to libraries 'on reasonable terms'"; the state law stood "as an obstacle to the accomplishment of the purposes and objectives of the Copyright Act"). The same principles would apply to preempt the expansion of antitrust law to regulate or prohibit the exclusive licensing of rights under copyright.

Moreover, Section 301 of the Copyright Act expressly preempts "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106." 17 U.S.C. § 301(a). This express preemption provision is "broad and absolute." *OpenRisk, LLC, v. Microstrategy Servs. Corp.*, 876 F.3d 518, 523 (4th Cir. 2017) (citation omitted). Authorizing liability under state law for the exercise of the federally created right to license rights under copyright would be equivalent to a legal right that Section 106 reserves exclusively to the copyright owner. Section 301 would preempt the law's application in that circumstance. *See Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1011 (9th Cir. 2017) ("Because plaintiffs seek to hold T3Media liable for exercising rights governed exclusively by copyright law, the claims are preempted by section 301 of the Copyright Act."); *Laws v. Sony Music Ent., Inc.*, 448 F.3d 1134, 1134–35, 1142, 1146 (9th Cir. 2006) (where defendant-licensee granted license to copyrighted musical recording, plaintiff could not use state law to "challenge[] control of the artistic work itself," which "could hardly be more closely related to the subject matter of the Copyright Act"); *id.* at 1143 (agreeing with *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911 (1996), that plaintiffs could not use state law to exert "control over the distribution, display or performance of a movie CBS owned").

It is also important to note that the legislation being considered can have a dire impact on several copyright markets that rely upon blanket or collective licensing of copyrighted works from multiple authors. This will impact markets for the use of copyrighted compositions, businesses that rely upon blanket licenses for internal business use of copyrighted materials, educational licenses that include multiple works from diverse author populations, film licenses which include a blanketed repertoire, and many other segments of the copyright industry that rely on licenses that supply a comprehensive repertoire. This is injurious to the interests of the licensees, as well as the authors and rights owners, who mutually benefit from these licenses. Likewise, if applied to the creative sector, legislation that proposes unduly restrictive or fatally ambiguous limitations on exclusive agreements would do grave damage to industries that rely on exclusive deals to sustain the investment in and development of creative works. Adequate provision must be made to preserve these important markets and to protect these licensees, rights owners, and creators. Of course, the adverse effects of the proposed legislation could extend well beyond the realm of copyright licensing and could impose unwarranted restrictions on the operation of free markets more generally. Those adverse effects are beyond the scope of our mission, and we therefore express no view on them.

For these reasons, the Copyright Alliance respectfully urges the Commission, in its consideration of the proposed revisions to California's antitrust laws, to reject any proposal that would regulate or prohibit the exclusive licensing of rights protected under the federal Copyright Act. The Copyright Alliance thanks the Commission for its consideration of these comments.

Sincerely,

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U.S. Chamber of Commerce

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VIA EMAIL

October 16, 2024

The Honorable Ambassador David Huebner, Chairperson
and Honorable Commissioners
California Law Revision Commission
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Re: Antitrust Law – Study B-750, Comment on Behalf of the U.S. Chamber of Commerce

Dear Chairperson Huebner and Commissioners:

The U.S. Chamber of Commerce ("Chamber") is the largest business advocacy organization in the world. Representing companies of every size and from every sector, we work with our partner state and local chambers in all 50 states, including the California Chamber of Commerce, and operate in over 50 countries to promote free enterprise. We are a leading business voice on national and international competition policy and regularly engage with policymakers on policy frameworks to foster growth and innovation. Moreover, we are at the forefront of digital economy policies domestically and globally, including antitrust, data privacy, cybersecurity, digital trade, artificial intelligence, and e-commerce.

We are pleased to offer comments in response to the California Law Revision Commission's (CLRC's) open invitation for public comment on proposed changes to California's antitrust laws. We particularly appreciate the transparency with which the CLRC is conducting its proceedings, via open public meetings and open publication of all staff reports and public comments. We hope that our comments will contribute to the CLRC's analysis and the public dialogue.

In general, the evidence belies any need for California to revise its antitrust laws in significant ways. A state should revise its antitrust laws only if the evidence shows that the marketplace is producing poor results for consumers and that existing laws and enforcement tools cannot resolve those problems. None of these conditions exist in California. *First*, the evidence shows that the U.S. economy is flush with competition and that there is no so-called "overconcentration" problem, either in the U.S. or in California. *Second*, to the extent that any competitive problems may exist, California's Attorney General and private citizens have multiple avenues to seek appropriate redress, both through California's existing state laws and through their ability to bring suit under federal law. *Third*, we caution that significant legal changes could harm California's consumers and businesses by raising costs, reducing the availability of goods and services, and decreasing the incentive of companies to invest in California. Indeed, several of the aggressive suggestions, such as abandoning the consumer welfare standard, would make California a national outlier. Instead, California should consider measured changes, such as those set forth by the Uniform Law Commission, to address concerns.

In this submission, we include detailed comments for Groups 1 (Single Firm Conduct), 2 (Mergers & Acquisitions), 4 (Consumer Welfare Standard), 5 (Technology Platforms), and 8 (Artificial Intelligence). We have also attached to this transmission a newly commissioned report to address Group 7 (Concentration in California). *Antitrust and Industrial Concentration in California: A Misleading and Unworkable Benchmark,* authored by Dr. Robert Kulick and Andrew Card, is a follow-on report to work previously done for the U.S. Chamber of Commerce examining concentration in the national economy.

For the reasons set forth here and in these detailed comments, the Chamber urges California to largely maintain its current legal framework, to enforce existing laws vigorously, and to maintain the forty-year national and interstate bipartisan antitrust consensus, one that has produced unprecedented growth and innovation for California and its consumers.

Thank you for your attention to our comments.

Sincerely,

Sean Heather
Senior Vice President

U.S. Chamber Comments for Group 1: Single Firm Conduct

The legislature's directive to the California Law Revision Commission with respect to single-firm conduct is as follows:

i) No California statute deals expressly with monopolization or attempted monopolization by one giant company;
j) California's primary antitrust statute, the Cartwright Act, unlike Section 2 of the federal Sherman Antitrust Act of 1890, does not apply to monopoly conduct of single powerful companies…
k) While arguably such claims may be brought under California's Unfair Competition Law or California's Unfair Practices Act, neither expressly addresses monopolization and foundational issues such as what is needed for standing to bring such claims and the damages available are unsettled.
To study *whether 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*.

Critically, this directive did not acknowledge that California's attorney general and private plaintiffs can and do bring claims against companies for single-firm conduct under Section 2 of the federal Sherman Act.

The single-firm conduct working group's report (SFC report) has several strengths. It recognizes that "the 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."

Avoiding the errors of laws like Europe's Digital Markets Act and bills such as the American Innovation and Choice Online Act, it advocates for generally applicable rules rather than targeting a handful of large companies.

The SFC report advises against adopting legislation similar to a bill in New York called the "Twenty-First Century Anti-Trust Act" that would prohibit abuse of dominance, noting the "unavoidable ambiguity" of such a prohibition, and the lack of defense based on evidence of pro-competitive effects. "These provisions seem intended to protect competing businesses, even at the expense of consumers and workers."

It recognizes that directly considering "broader social and political goals" in the adjudication of individual antitrust cases "would be impractical," and that "Congress and the California legislature have passed many other laws to further" such goals directly. Goals such as "more equal distribution of income and wealth and expanded opportunities for small businesses and entrepreneurs" and concern about "concentrated political power, which is widely seen as unhealthy in a democracy," have been addressed directly (e.g. by tax, welfare, public procurement, and anti-corruption laws).

Yet the SFC report suggests these non-competition goals nonetheless "can influence the evidentiary standards that the Legislature instructs the courts to apply when handling individual antitrust cases. For example, 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."

This is not a logical basis for instructing courts on how to act in situations of uncertainty. Where the effect on competition is uncertain, enforcement against single-firm conduct can be at least as likely to harm these non-competition goals as to help them. This is particularly true where opportunities for existing small businesses can conflict with opportunities for new entrepreneurs.

Suppose a town had one indoor market where produce was sold wholesale to restaurants and other businesses, and sellers occupied all the existing spaces. However, Seller A did not always have produce to sell every day, leaving its space under-used. Meanwhile, a Seller B, a hopeful franchisee of a national wholesaler of non-local produce particularly of interest to East Asian restaurants (which have recently popped up in the town), sought a space in the market.

The effect on competition for the sale of produce from replacing Seller A with B is uncertain – it reduces the number of sellers of locally-grown produce by one, while adding the sale of produce heretofore unavailable. But the switch from A to B certainly will deprive one small business of an opportunity, while giving an opportunity for an entrepreneur. If Seller A loses his space and sues the market as a monopolist (see *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F. 2d 484 (1st Cir. 1952)), erring on the side of enforcement does not clearly help to achieve the non-competition goals because they can conflict with each other.

Meanwhile, an investor who saw that the number of would-be produce sellers exceeded the market space had been considering opening a new market for third parties to sell produce and other items. But after watching the incumbent market be subject to antitrust litigation from an ejected seller, the investor decides she is better off avoiding such a business. Instead of creating a space in which other companies operate, that might create for her an ambiguous duty to deal with any one of them, she can develop in other parts of the country that have more clearly established legal rules that govern her obligations.

The report's suggested bias for enforcement typifies a broad flaw that is especially problematic for California: insufficient concern for how antitrust enforcement today can deter innovation and entrepreneurship in the future. Forcing one company to deal with competitors or other market actors, even in the absence of harm to competition from a refusal to deal, disincentivizes other companies from entering lines of business that would impose such duties. This creates a real, actual harm to competition and entrepreneurship for the sake of avoiding an uncertain or hypothetical harm.

If the effect on competition of the defendant's conduct is uncertain at this time, ruling for the defendant need not preclude a successful case against that conduct in the future should it become clearly anticompetitive in its effect. For example, the fear that waiting too long to enforce against below-cost pricing will leave a market without competitors once a defendant begins to raise prices to recoup its losses, is illogical if the market has low barriers to entry. If a defendant's higher prices promptly attract new rivals into its market, then deterring low prices through over-enforcement against predatory pricing harms consumers without providing them any long-term competitive benefit.

The SFC report also falls into the common error of assuming that phenomena such as products and services with low or zero marginal costs are peculiar to the "digital economy," and therefore the federal predatory pricing rule created when that economy "was in its infancy" is poorly suited to such products. In reality, such products have existed for more than a century. Broadcast radio and television have zero additional costs in reaching each additional consumer. Even newspapers and magazines' costs for printing each additional copy are low, especially compared to the cost of producing the content.

Nonetheless, when plaintiffs have brought predatory pricing claims in these markets, courts have not thrown them out immediately based on the low marginal costs; they have instead assessed whether the conduct would create a loss, whether that loss could be recouped, etc. See, e.g., *Buffalo Courier-Exp. v. Buffalo Evening News*, 601 F. 2d 48, 55 (2d. Cir. 1979) (finding that a new entrant to the newspaper market offering five weeks of free samples of its weekend issue did not violate Section 2 of the Sherman Act; "In an attempt to monopolize case, courts should exhibit restraint in imposing on the market their own notion of what constitutes improper competitive behavior.").

The SFC report also claims that refusal to deal law has become outdated in the digital economy. A rule that "even a monopolist can normally choose the parties with which it will deal … may have been reasonable in a setting where 'dealing' often meant incurring a large fixed cost to coordinate with the other firm," the report states. In "digital markets with standardized terms of interconnection … that rule may immunize much conduct that could be anticompetitive."

But this misunderstands the rationale for the federal courts, after decades of experience with refusal to deal claims, to be cautious about imposing a duty to deal. As the Supreme Court noted in *Verizon v. Trinko*, 540 US 398, 408 (2004), enforced sharing "requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited." Technologically standardized interconnection does not eliminate the same difficulties that any company may have in handling a troublesome business operating on its property, nor courts' suitability for having to set those terms of dealing. For example, courts have found that device security and user privacy are non-pretextual and legally cognizable rationales for restrictions that may chafe at parties that interconnect with a device. See *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).

The report lists "Discrimination Against Rivals, for example by refusing to provide rivals of the defendant access to a platform or product or service that the defendant provides to other third-parties, as opposed to a firm choosing not to provide access or interconnection to any third-party," among the anticompetitive exclusionary conducts to be addressed by new legislation. But its concerns seem premised on an erroneous view of the "digital economy" and of the reasons for courts to be cautious in dictating when and how businesses must provide access.

Apparent misunderstanding of what constitutes single-firm conduct further undermines the report's recommendations. In Section 4.C, "Example Statutory Language Covering Single-Firm Conduct," the report suggests that the California legislature "adopt specific language to address various modes of single-firm conduct where the Federal courts have narrowed the reach of the Sherman Act." The proposed language for a "Preamble and Legislative Findings" says, "the Legislature has determined that it is necessary to amend and supplement the Cartwright Act to make clear that it also proscribes anticompetitive exclusionary conduct by a single person or firm, as set forth below."

Yet the "guidance to the courts by describing a number of modes of single-firm conduct which can be anticompetitive, depending on the circumstances," includes multiple examples of *agreements*, which do not constitute single-firm conduct because by their nature, agreements are between two firms. Exclusive Dealing *Provisions* and Most-Favored Nation *Clauses* are portions of agreements. *Agreements* to Limit Competition such as reverse-payment settlements are, obviously, agreements.

Making even clearer that these are not examples of single-firm conduct, plaintiffs have brought claims under existing California state law challenging them. See, e.g., *Theme Promotions v. News America Marketing FSI*, 546 F. 3d 991, 1000 (9th Cir. 2008) (upholding a jury verdict that an exclusive dealing contract violated the Cartwright Act); *In re Pool Prods. Distribution Market Antitrust Litig.*, 946 F. Supp. 2d 554, 566 (ED La. 2013) (holding that plaintiffs' allegations of exclusionary vertical agreements including most-favored nation clauses plausibly alleged violations of the Unfair Competition Law); *In re Cipro Cases I & II*, 61 Cal. 4th 116 (2015) (holding that a reverse-payment settlement violated the Cartwright Act).

Nor are all forms of single-firm conduct outside the reach of California state law. As the SFC report acknowledges, predatory pricing can be subject to the sanctions of the Unfair Practices Act and Unfair Competition Law, *see Cel-Tech Communications v. LA Cellular*, 973 P. 2d 527, 566 (Cal: Supreme Court 1999). Indeed, existing state law on below-cost pricing is seen as so permissive compared to federal law on predatory pricing – particularly for not requiring a probability of recoupment – that antitrust lawyers have wondered as an article title, "Why aren't there more California below-cost pricing cases?" (Dylan Ballard, *Los Angeles & San Francisco Daily Journal*, April 4, 2019).

The report regards the UCL as inadequate, despite its admittedly "broad" reach, because claims brought under it can obtain restitution, but not damages; do not automatically recover attorney's fees; and are not entitled to be heard by a jury. However, factors that limit a law's popularity with the private plaintiffs' bar are not relevant to whether entirely new provisions should be added to the state code.

The most important question for the Commission, given these avenues for redress, is: what harms to Californians does it seek to address? The SFC report calls for new state legislation to ban "anticompetitive exclusionary conduct," yet most of the report's examples of such conduct already are barred by state law. Loyalty rebates, for instance, are subject to successful claims under Section 2 of the Sherman Act, *see e.g. Zf Meritor, LLC v. Eaton Corp.*, 696 F. 3d 254 (3rd Cir. 2012) (upholding a jury verdict that the defendant's loyalty rebates constituted illegal de facto exclusive dealing). The report does not explain why Section 2 – either as federal law, or if its language were to be copied into state law – is inadequate to address this conduct. We urge California's policymakers to consider this option, which would help to harmonize California's law with that of other states and federal standards.

U.S. Chamber Comments for Group 2: Mergers & Acquisitions

The U.S. Chamber of Commerce ("Chamber") appreciates the opportunity to provide comments to the California Law Revision Commission ("CLRC") on the Mergers and Acquisitions Working Group's report ("the M&A Report" or "Report") as part of the CLRC's Study of Antitrust Law. While the M&A Report does not recommend a specific legislative change, it offers the range of options available to the CLRC, from maintaining the *status quo* to drafting a new state-specific premerger law that would "raise the bar" for companies who choose to conduct business in California.[1] When evaluating potential reforms, the Chamber urges the CLRC to consider whether an M&A-specific amendment is even necessary given California's existing authority, and weigh the detrimental impact of any sweeping changes on California businesses and the state's economy.

As the M&A Report admits, "[t]he lack of a specific state merger statute does not prevent state attorneys general from challenging mergers relying on the Clayton Act. They do so, sometimes in conjunction with federal agencies . . . but sometimes independently."[2] In fact, state attorneys general can investigate deals, issue subpoenas, compel production of evidence, and challenge mergers in court–with or without federal assistance. This is particularly true in California, where the Attorney General ("AG") has challenged several recent mergers, including Kroger/Albertsons, T-Mobile/Sprint, and Microsoft/Activision, and investigated countless others. In the past, moreover, California's Attorney General has successfully challenged mergers under current law even when they were approved by the FTC. See *California v. American Stores*, 495 U.S. 271 (1990). There is no evidence, throughout the report or elsewhere, that the AG has "missed" any proposed acquisitions due to the lack of state legislation. In fact, in comments on the FTC and DOJ's Draft Merger Guidelines, California's AG described the states as "co-enforcers of the nation's antitrust laws" and touted states' "strong track record of merger enforcement."[3]

When there is no problem, we should not waste resources searching for a solution. The M&A Report, however, details several possible "solutions," all of which would upend normal business operations and impair the state's economy. First, the Report suggests that new legislation could "require notifications of transactions that fall below the current Hart-Scott-Rodino threshold," which is $119.5 million today.[4] While the Report admits that such a requirement "could impose a

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[1] M&A Report at 17.

[2] M&A Report at 16.

[3] Public Comments of Attorneys General of 19 States and Territories, Sept. 18, 2023, *available at* https://oag.ca.gov/system/files/attachments/press-docs/2023.09.18%20Comments%20from%20State%20Attorneys%20General%20-%20FINAL.pdf.

[4] M&A Report at 17.

large administrative burden on California's antitrust authorities,"[5] there is also an additional, and substantial burden on California's business community. The federal Hart-Scott-Rodino ("HSR") threshold was carefully designed to "achieve an appropriate balance between identifying potentially anticompetitive transactions and avoiding unnecessary filing burdens."[6] These costs are not hypothetical–based on a Chamber survey, outside counsel spends an average of 54.3 hours on each HSR filing and charges approximately $936 per hour, costing companies roughly $50,824.80 per filing.[7] And these costs do not include time spent by internal personnel on gathering materials and preparing information for the filings, or other costs such as filing fees or consultant fees. As a lower notification threshold will inevitably sweep in smaller businesses, many of whom have not dealt with premerger filings before, these costs are likely conservative and could be detrimental to small business operations in the state.

Second, the M&A Report suggests that potential legislation could either expressly lower the review standard for blocking mergers, or do so implicitly by "produc[ing] different merger decisions" in state, or newly created "specialized," courts.[8] In merger control, a level of predictability and consistency in decision making is critical on both sides, so that neither the parties nor antitrust authorities waste time and resources working on anticompetitive deals. To date, this has been shaped by decades of case law, but state-specific legislation risks dismantling this long-standing precedent and replacing it with inevitably divergent state standards. Eradicating predictability with an undeveloped and untested standard creates substantial uncertainty in business operations, and could lead to overenforcement.[9] In other words, it would essentially punish any company that chooses to do business in the state.[10] While California has long been a center for business activity, such a system will cause businesses to flee the state, jeopardizing California's economy and employment opportunities.[11] The M&A Report glosses over these

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[5] The potential administrative burden is significant. In fiscal year 2022, the FTC and DOJ received over 3,000 HSR filings. *See* https://www.ftc.gov/system/files/ftc_gov/pdf/FY2022HSRReport.pdf at 2. Lowering the threshold for notification could bring tens of thousands of filings to the state for review each year.

[6] https://www.justice.gov/atr/file/872376/dl at 2. *See also id.* at 3-4 (noting the thresholds "avoid the need for parties to report small transactions that are unlikely to raise competitive concerns").

[7] https://www.uschamber.com/assets/documents/20230926-Kothari-Report.pdf

[8] M&A Report at 16, 18. The Report acknowledges that merger hearings in California state courts will "produce different merger decisions, even with an identically-worded statute." *Id.* at 18.

[9] Sarah Melanson and Megan Yeates, "The Risks of Requiring California-Specific Merger Approvals," *available at* https://calawyers.org/publications/antitrust-unfair-competition-law/competition-spring-2023-vol-33-no-1-the-risks-of-requiring-california-specific-merger-approvals/.

[10] *See id.* (noting that a California premerger regime "would result in significant private costs for businesses operating in California and significant public cost to the state")*; see also* M&A Report at 15 ("The dual enforcement layers, any differences in investigational and analytical approaches, and standards that are possibly not entirely consistent all may lead to unnecessary costs and complexity.").

[11] *See* Sarah Melanson and Megan Yeates, "The Risks of Requiring California-Specific Merger Approvals," *available at* https://calawyers.org/publications/antitrust-unfair-competition-law/competition-spring-2023-vol-33-no-1-the-risks-of-requiring-california-specific-merger-approvals/ ("A more restrictive regime in California could dissuade companies from either choosing to set up in California or incentivize companies to move their headquarters or operations to other states with broader costs for the California economy and job prospects for Californians."); *see also* Forbes, "Business-Friendly Policies Drive Corporate Relocations to Texas," Jul. 22, 2024, *available at*

concerns, noting only that state-specific legislation will cause businesses to "bear the costs of another set of merger laws."[12] But if other states follow suit, "another set of merger laws" could turn into 50, leading to an unnavigable web of regulations that will not just impact the states themselves, but have broader implications on the U.S. economy.

The push to create a lower standard to more easily block mergers is based on the false presumption that mergers are bad and concentration is increasing. While public rhetoric may lament prior enforcement practices, rhetoric is not fact. As even the M&A Report admits, the "vast majority of mergers raise no competitive concerns.[13] Even FTC Chair Lina Khan explained that "any given year, the antitrust agencies get anywhere between 1,500 and 3,000 merger filings. Of that number, 98% go through without even second questions being asked by the agencies[.]"[14] Empirical economic research underscores this, showing that most mergers actually drive innovation and competition.[15]

It is not only big businesses that benefit; in many industries, like the biopharmaceutical industry, small companies and startups rely on the promise of future acquisitions to secure much-needed investments to fund their innovations.[16] The broader technology sector tells a similar tale. From 2017-2021, 20,025 California-based startups raised venture funding and received $435.6 billion to fund their innovative ideas and grow their businesses.[17] These investments, much of which is centered in California, have led to the development of life saving medicines and other critical technologies for American consumers while adding thousands of jobs and billions of dollars in

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https://www.forbes.com/sites/greatspeculations/2024/07/22/business-friendly-policies-drive-corporate-relocations-to-texas/.

[12] M&A Report at 18.

[13] M&A Report at 2.

[14] Lina M. Kahn, "Remarks of FTC Chair Lina M. Khan, Economic Club of New York," Interview by Peter Orszag (July 24, 2023), available at https://www.youtube.com/watch?v=X7u3JwSfHZY

[15] Robert Kulick, Ph.D., and Andrew Card, "Mergers Industries, and Innovation: Evidence from R&D Expenditure and Patent Applications," NERA Economic Consulting, at 29, *available at* https://www.uschamber.com/assets/documents/NERA-Mergers-and-Innovation-Feb-2023.pdf ("[M]ergers, on average, are associated with an increase in R&D expenditure of between $9.27 billion and $13.52 billion per year in the most R&D intensive industries.").

[16] *See, e.g.,* https://www.biopharmadive.com/news/biotech-startup-private-acquisitions-pharma-2024/721981/?utm_campaign=the_readout&utm_medium=email&_hsenc=p2ANqtz-9gWZgjK-bXSPJTN0G815KtQVtL7NHDSsDNlKFR23QCYJJ8g519qCgLHQp9eFxppXgGLNjq9njKMAhJS_Brdlf2NA59GA&_hsmi=316920706&utm_content=316920706&utm_source=hs_email ("M&A is a crucial piece of the biotech ecosystem. Acquisitions help pharmaceutical companies build their pipeline, while giving biotechs and their backers a financial return on their investment."); *see also* Sarah Melanson and Megan Yeates, "The Risks of Requiring California-Specific Merger Approvals," *available at* https://calawyers.org/publications/antitrust-unfair-competition-law/competition-spring-2023-vol-33-no-1-the-risks-of-requiring-california-specific-merger-approvals/.

(noting that stricter merger enforcement "could impact the innovative stat-up ecosystem that currently thrives in California and often relies on the existence of suitable exit strategy options").

[17] American Edge Project, 2024 Toolkit, at https://americanedgeproject.org/wp-content/uploads/2024/01/AEP-Toolkit-2024_FINAL.pdf.

revenue to the state's economy. From a national standpoint, this investment ecosystem also underpins much of our country's global competitiveness.[18]

Even though it is widely accepted that the vast majority of mergers do not raise competitive concerns, and California's AG already has the ability to investigate and challenge any merger of interest, should the CLRC wish to recommend a legislative change, the Chamber recommends the CLRC adopt the Uniform Law Commission's ("ULC's") Pre-Merger Notification Act.[19] While the M&A Report discusses the need to balance state authority with "excessive burdens on companies,"[20] the ULC, which is a multistate entity and includes California as an active member, has already made these calculations. Specifically, as the Act states:

> The Uniform Antitrust Pre-Merger Notification Act is intended to address the concerns of both the AGs and business communities by creating a simple, non-burdensome mechanism for AGs to receive access to HSR filings at the same time as the federal agencies, and subject to the same confidentiality obligations.[21]

Adopting the ULC's proposal will give the California AG earlier access to information about mergers, while ensuring that companies are not disproportionately burdened simply for choosing to conduct business within the state. Moreover, adopting this proposal would align California with other states, preventing the inefficiencies and costs of disparate and fragmented rules across the country.

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[18] American Edge Project, American Innovation Under Siege: Venture Capital Data Reveal Risks From Rising Global Regulatory Overreach (2024), at https://americanedgeproject.org/wp-content/uploads/2024/04/AEP-and-PitchBook-Study-March-2024.pdf.

[19] https://www.uniformlaws.org/committees/community-home?CommunityKey=6bf5d101-d698-4c72-b7c1-0191302a6a95.

[20] M&A Report at 15.

[21] Uniform Law Commission, "Uniform Antitrust Pre-Merger Notification Act," Sept. 18, 2024, at 2, *available at* https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ba2d31b6-d8af-5deb-61a8-c00e4135491a&forceDialog=0.

U.S. Chamber Comments for Group 4: Consumer Welfare Standard

Simplicity is antitrust law's greatest strength. It is a law of general application, one that generally applies to all market participants, and one that, for several decades now, has had as its touchstone a single organizing principle. That principle, the consumer welfare standard, has brought consistency and clarity to U.S. competition policy. No law is open ended or relied upon to accomplish varied policy objectives. All laws therefore must have limits.

In the case of antitrust laws, not every externality that arises in the market is for antitrust to address. For example, pollution is an externality in the market, hence we have environmental statutes to guard against it. Consumer protection against fraudulent marketing is another example of an externality that is again best addressed by laws other than antitrust.

Similarly, antitrust has limits to its application as well. As interpreted and applied for the past forty years, the law relies upon economic analysis to examine business conduct in support of the economic well-being of consumers. This is often referred to as the consumer welfare standard — a limited approach that ensures that antitrust law promotes competition on the merits and avoids managing outcomes in the market. Further, as a limiting principle, the consumer welfare standard ensures that antitrust law does not supplant the role of the democratic legislative process; legislators, not courts, can and should determine when to restrain the market to promote other goals, such as concepts of fairness, or to protect other economic interests besides the interests of the consumer.

Development of the Consumer Welfare Standard

The Sherman Act states that "attempts to monopolize" can violate the antitrust laws. The words consumer welfare does not appear in the statute. However, over the course of a century of decisions, the courts have come to recognize that economic analysis is critical to distinguish an improper "attempts to monopolize" from business conduct that on the merits has won out over its competitors. Where a company is aggressively competing and consumers are freely choosing the products and services of that company over those of its competitors, that is competition at work, not an attempt to monopolize. This is why it is often said that antitrust concerns itself with the welfare of consumers, not that of other competitors.

Where business conduct is a naked restraint of trade and shows no material benefit to competition, such as price fixing among horizontal competitors, antitrust steps in. However, where the conduct in question can be shown to promote competition, it is less clear. While not discussed in the CLRC paper on consumer welfare, the rule of reason is very closely related to the application of the consumer welfare standard. Under the rule of reason, courts evaluate a business practice for both its procompetitive and anticompetitive effects. Courts rely on the rule of reason to balance varying impacts. Only where there is more harm than good, an antitrust law violation is found to have occurred.

Similarly, for mergers, the Clayton Act states that the government must establish that "the effect of such acquisition may be substantially to lessen competition." The courts apply the rule of reason and rely on economic analysis to evaluates the varied impacts on the market, not to competitors.

While the words consumer welfare and rule of reason do not appear in the statute, they are grounded in the statutory framework, legislative history, and a century of case law. They are an analytical framework that the courts have applied that is a natural outcome of precisely what the statue seeks to promote – competition on the merits.

The Breadth of the Consumer Welfare Standard

Many antitrust critics mistakenly suggest that the consumer welfare standard is too narrow, that it is solely focused, or overly focused, on price. However, antitrust has long taken an appropriately broader view of the negative impact that certain business conduct can have on the competitive process that fit squarely with the consumer welfare standard. In fact, the CLRC paper on the consumer welfare states:

> "The literal meaning of the phrase implies that harm to competition means impact on consumers, such as negative effects on price, output, quality, and innovation."

Further, the impact a scrutinized business conduct has on other businesses or on labor markets can also be captured in the context of the consumer welfare standard. The CLRC paper acknowledges this important flexibility found within the standard:

> "The consumer-centered approach does not imply that constraints on competition in upstream markets are beyond the reach of antitrust. The Supreme Court has recognized that the antitrust laws prohibit anticompetitive conduct that harms suppliers and is thus not focused solely on harm to consumers. One might therefore describe current law as focused on the welfare of trading partners, both customers and suppliers. The latter includes workers, who supply labor services to employers."

Businesses that are harmed by the conduct of a competitor can be good proxies for downstream harm to consumers. The same is true for monopsony power that holds anticompetitive sway over labor markets. So, while the consumer welfare standard does encompass such considerations it does not allow antitrust to become a crutch to help a business recover from a bad business decision, or to guarantee a certain level of success. Likewise, antitrust law is not there to protect labor interests the same way labor law applies to workers or unions.

The consumer welfare standard also can evaluate the importance of choice. Consumers often value choice, but they also value convenience. Cars are sold with tires, consumers can choose to change the tires after the car is purchased, but antitrust does not guarantee that consumers can choose which tires come with the car from the dealer. Two companies may enjoy 70% of a given market, while the remaining competitors are smaller players with much more limited market share. There is choice in the market, but if consumers are making their choices that result in varying market shares, antitrust is not concerned with equalizing or leveling out market shares amongst competitors. So, while the impact on choice can be evaluated within the construct of the consumer welfare standard, it like other factors need to be weighed carefully.

However, while the CLRC paper on consumer welfare acknowledges the breadth of the existing standard it does not provide much of a critique for abandoning it.

Alternative Standards

The CLRC paper proffers that some argue for a standard that promotes the "competitive process." The CLRC paper suggests that protecting competition…

> "…eliminates concerns that consumers should be favored in an antitrust analysis against the welfare interests of other market participants. Workers, growers, suppliers, fabricators, distributors, and retailers, among others, are equally protected by antitrust laws."

However, the adoption of such a standard is without any limiting principle for the role of antitrust law set apart from the role of other statutes. We would agree with the CLRC paper's critique that a "competitive process" standard...

> "…is ambiguous and does not make clear when conduct simply disadvantages a rival and when its impact is of sufficient magnitude to harm competition as a whole."

Yet, the Chamber would also take issue with the CLRC closing suggestion for a standard when it proffers:

> "The principle is this: conduct that maintains, increases, or enhances market power to the detriment of trading partners, whether customers or suppliers, is unlawful, unless that conduct can be justified as reasonably necessary to provide welfare-enhancing benefits for those trading partners."

The problem with this proposal is it largely side-steps the question of what standard should be used to measure harm. If antitrust is not going to measure harm to the consumer, what harms will be measured? The CLRC suggests ***any*** effort to "maintain, increase, or enhance market power" should be the definition of harm. It further makes such harms ***illegal*** unless that conduct can be justified, placing the burden upon the private company to prove that its business decisions promote competition, and thus are legal, rather than on the government to prove that such decisions reduce competition, and thus are illegal. Such a framework would turn antitrust law, and indeed the law itself, on its head.

Any effort to suggest that business conduct that "maintains, increases, or enhances market power" is unlawful would make virtually every business practice a violation of the law subject to antitrust scrutiny. The burden would be placed on the defendant to show that the conduct is "reasonably necessary to provide welfare-enhancing benefits." Most antitrust enforcement is brought by private parties, not by the government. Businesses subject to such a bias standard requiring them to defend every business decision would lead to endless litigation and result in a massive chilling effect leading to California's economic decline.

Without the touchstone of consumer welfare, other goals lack objectivity or a nexus to actual competitive problems and are susceptible to subjective and politicized evaluations -- and ultimately should be irrelevant without a showing of harm to consumers. "Fairness," for example, is an excellent virtue, but vague and subjective as an administrable standard. Trying to assign weights to vaguely defined notions of fairness would create confusion and could lead to arbitrary decisions that are not consistent with the rule of law. The manufacturer, the distributor, and the customer all will have very different notions of what constitutes a "fair" price. A firm and its rival will have their own notions as to whether a particular competitive practice is "fair" or not.

Likewise, other wider policy issues, such as concerns over the status of smaller businesses, and other social interests, are political conversations, not matters for sound competition policy. Competition policy protects competitive markets, but it is not designed to address other concerns.

The consumer welfare standard is a limiting principle that, along with the rule of reason, provides a framework that ties directly to the law that evolved over a century of experience. Those who disregard it want to inject a broader range of policy goals into antitrust better left to other statues. A meddling with the consumer welfare standard will result in antitrust being used to manage market outcomes and usurp the power of the consumer to decide winners and losers in the marketplace.

U.S. Chamber Comments for Group 5: Technology Platforms

We are pleased to offer comments to the CLRC's Technology Platform Working Group. In general, we urge California to adopt a version of option (1), which recommends no new legislation, and to continue to vigorously enforce the existing antitrust laws and to study markets for evidence of anticompetitive harm to consumers. We caution against the other options, which stray from traditional antitrust concepts and likely would harm both consumers and California's dynamic economy. In support of this recommendation, we offer a few specific points.

First, a state should revise its antitrust laws only if the evidence shows that the marketplace is producing poor results for consumers and that existing laws and enforcement tools cannot resolve those problems. Antitrust law, of course, should promote the welfare of the consumer, rather than individual competitors. This type of competition policy relies on competitive forces to police the market, avoids picking winners and losers, and acts only to ensure that the competitive process is benefitting consumers via such objective metrics as low prices, high output, quality products, and innovation of new products.

Prior to enacting significant changes, the Chamber encourages California to identify both its competitive concerns and any actual legal shortcomings that cannot address those concerns. In terms of competitive concerns, the dynamism and pace of change in many markets, including digital ones, are all reasons to *maintain* the current high standards for governmental intervention. Dynamic markets are very likely to adjust on their own, whereas government intervention actually may cement the status quo instead of allowing for these dynamic markets to evolve. The last two years alone have seen substantial changes across the global economy, with some companies rising to challenge global leaders, global leaders seeing significant downgrades in their market shares and market capitalizations, and legacy companies investing heavily in digital tools to compete more effectively. Excessive governmental involvement is more likely to harm, rather than help, competition.

Moreover, California already has numerous enforcement tools to address any genuine concerns, including enforcement actions against digital platforms to combat any of the topics listed in the report. In recent years, state and federal enforcement agencies, as well as private entities, have brought significant antitrust suits against every one of the "Big Tech" companies mentioned in the Working Group's Report. At least as an initial matter, some of those cases have succeeded, and whether or not they withstand appeal, these cases demonstrate that existing antitrust laws can handle the digital economy.

Indeed, the Federal Trade Commission's Chair, Lina Khan, acknowledged that these cases confirm that the onus remains on enforcement agencies to demonstrate harm to consumers, rather than on legislators to change the antitrust laws or to lower the standard for liability: it is "up to us as enforcers to be explaining to the courts how to be evolving the law to really match the reality of how monopolization is occurring, [and] how the exercise of market power is happening in these digital markets." Accordingly, California should continue to enforce its existing competition laws in an even-handed manner across the economy but should hesitate before affording itself extraordinary new powers to micromanage economic behavior.

Second, prior to adopting an aggressive new competition framework, California should evaluate how more aggressive approaches, like Europe's Digital Markets Act (DMA), play out in practice. In general, when competition regimes apply special rules to particular economic sectors, those regimes tend to hinder innovation, deter investment, and limit the ability of companies to respond swiftly to evolving market dynamics. Such an approach often applies to companies selectively based on artificial criteria.

For example, in the short time that the DMA has been in effect, multiple problems already have emerged for both consumers and local businesses. Among other concerns, the DMA has degraded the usefulness of certain mobile mapping apps, which have become much more cumbersome to use and caused consumers to complain; European consumers are frustrated and are venting on message boards and in a help forum. Similarly, search engines have had to adjust to the DMA, leading users to describe their experience as "a nightmare." Businesses have suffered too. Some businesses, such as hotels and airlines, already have seen a significant drop in organic traffic and may have to pay more for advertising to maintain qualified traffic to their websites.

Moreover, at a time when inflation is beginning to stabilize globally, a European model likely would increase prices for services. Millions of businesses use digital tools to reach customers, market their products, ship goods, and generally run their businesses on a day-to-day basis, all at low costs and great value. To the extent that the recommendations disrupt the current tech ecosystem, California's businesses could incur higher costs.

Consumers could pay more too. In Europe, companies have introduced subscription models in response of excessive regulatory regimes; in other words, consumers could have to pay out-of-pocket for services that they once could receive at no cost, such as social media and mapping services. In other instances, companies have avoided introducing new products into Europe altogether.

Third, California should consider the possibility of long-term damage to its business climate relative to the rest of the country. A state's legal and regulatory climate influences the private sector's investment and location decisions. If California adopts proposals that expose companies to undefined but potentially costly antitrust risks, the state could scare away businesses that might want to invest in startups and new businesses. As the Working Group's Report notes, neither Congress nor any state have adopted any such proposals in the face of significant bipartisan opposition. Any radical change would make California a national outlier in the face of heavy interstate competition for business, investment, and people.

By way of comparison, Europe's aggressive competition policy model has already damaged its economy and growth prospects. Europe lags well behind the United States, Japan, and China in innovation and investment in research and development. According to a McKinsey study, from 2017 to 2019, there were roughly twice as many venture capitalists in the United States as there were in Europe. Over this same time period, total venture capital in Europe increased by $18 billion, while in the U.S., venture capital increased by $46 billion. In 2022, the EU attracted just 7.8% of venture capital investments, even though it has 110 million more people than the U.S. Investors rightly believe that U.S. companies are poised for far greater growth or profitability. None of the world's largest tech companies are European.

Competition policy explains at least part of the discrepancy. For the past forty years, the U.S. has enjoyed a predictable and transparent antitrust framework that allows larger companies to invest in innovative start-ups, to compete in new product markets, and to grow organically without artificial regulatory restrictions. The United States does not "shoot the winner" of the competitive marketplace. On the other hand, Europe discourages such investments and cross-market growth by holding larger companies to an amorphous "abuse of dominance" standard that often leaves smaller companies without the financing they need to grow and prosper. Under the DMA, for example, regulators will review all potential acquisitions by large tech companies, especially those involving startups. According to the McKinsey survey, European start-up founders mention the burden of regulation and administration as one of their biggest woes.

Perhaps the most persuasive arguments come from Europeans themselves. In a recent interview, Ericsson CEO Börje Ekholm said the continent is on its way to becoming "a museum" because of its regulations. Just days before, Nicolai Tangen, chief executive the $1.6 trillion Norwegian sovereign wealth fund, observed that it was "worrisome" that American companies were outpacing their European rivals on innovation and technology, leading to vast outperformance of US shares in the past decade. He added that in recent discussions with US chief executives, they had complained about the difficulty of doing business in Europe because of tough regulations and red tape. "I'm not saying it's good but in America you have a lot of AI and no regulation, in Europe you have no AI and a lot of regulation."

U.S. Chamber Comments for Group 8: Artificial Intelligence

Artificial Intelligence (AI) is a transformational technology that has the potential to revolutionize our economy and society, both domestically and globally. Projected to increase global economic growth by $13 trillion by the end of the decade, AI's rapid expansion is already having a profound impact across industries—from healthcare to transportation—and offers great hope for increasing economic opportunity, boosting incomes, speeding life science research at reduced costs, and simplifying the lives of consumers. Moreover, AI presents an opportunity for U.S. businesses to continue to lead the world in innovation, opportunity, and economic development in a way that will be critical for America's future.

As we have emphasized throughout our comments to the CLRC, a state should revise its antitrust laws only if the evidence shows that the marketplace is producing poor results for consumers and that existing laws and enforcement tools cannot resolve those problems. None of these conditions exist here. By any measure, AI markets are flush with competition: output, investment, innovation, quality, and the number of competitors is rising, even as entry barriers fall. For example, open-source technology allows developers to build, create, and innovate in various areas that will drive future economic growth. We already see innovation in marketing, communication, cybersecurity, and medicine, among other fields. Access model weights can be a boon to driving safety and security improvements to artificial intelligence by providing greater transparency, allowing flaws to be quickly identified and patched.

At the same time, existing laws seem fully capable of addressing any concerns. For example, in a joint statement, the Department of Justice, Federal Trade Commission, Equal Employment Opportunity Commission, and Consumer Financial Protection Bureau affirmed that they already have sufficient authority to protect individuals from legal violations that may occur via advanced technologies, including violations that may affect competition. There is no legal loophole for AI; state and federal laws continue to apply to the technology, its developers, and its users. Moreover, given AI's relative novelty, it is entirely possible, if not likely, that existing regulatory frameworks, including antitrust and consumer protection laws, will prove fully capable of remediating any legal concerns with AI's development and usage. If legal gaps appear at some point down the road, policymakers can work to fill those gaps at that point.

Premature regulation carries its own risks, particularly with a quickly evolving technology, and ultimately could hamstring innovation both in California and around the country. As we explained in an open letter to state leaders, "AI is developing quickly, as are the opportunities it brings to revolutionize industries, attract investment, and create new jobs. However, we are concerned that a patchwork of state-level proposals to regulate artificial intelligence could slow realization of these benefits and stifle innovation by making compliance complex and onerous, especially for small businesses that stand to benefit the most from the productivity boosts associated with AI."

Given AI's potential, we encouraged states to treat AI as an opportunity to nourish, and to monitor, rather than as a risk to contain:

> On behalf of chambers of commerce and business voices across the U.S., the undersigned urge state leaders to embrace the benefits of artificial intelligence ("AI") for their states, and to study whether legal gaps exist before pushing for new regulatory frameworks. States should conduct assessments of existing laws to identify those that already protect consumers from harm and that work as well for AI as for other technologies. States should also identify AI use cases that can make government more efficient and improve service delivery and constituent engagement. Finally, states should consider how to strengthen support for computer science education and digital skilling initiatives to ensure that American businesses can attract employees prepared to use AI technologies to improve their professional experience and increase their productivity.

To the extent that legal gaps eventually may appear, we asked state leaders with work with federal policymakers to develop consistent, uniform national standards. As we laid out, "A federal framework is the best option to provide American businesses with the certainty they need to invest in AI development and adoption, and our workforce is prepared to transition to an AI-empowered economy. … federal agencies, leading technology companies, and other critical stakeholders including researchers are working in a collaborative manner alongside U.S. allies to establish governance frameworks for AI."

As we turn to the AI Working Group's Report and specific recommendations, we encourage California's policymakers to keep these principles in mind. Though we appreciate the Report's thoroughness and thoughtfulness, it has not laid out a persuasive case for changes to California's competition laws.

In discussing "algorithmic collusion," for example, the Working Group recommends that the Legislature consider various amendments to the Cartwright Act that, in general, would allow courts to find price fixing in more circumstances, in some instances regardless of the final prices that competitors charge. We question the need for such legislative changes. As the Report itself points out, existing antitrust laws already allow courts to examine the competitive effects of pricing software. Both the Department of Justice and certain state Attorneys General, including California's, have brought enforcement actions to challenge the use of software in setting prices, even as proponents would argue that there is no competitive problem with companies knowing publicly available information about their competitors' pricing levels. If, after a careful evaluation of the facts, courts determine that the practice harms consumers, legislators can then determine whether additional legislative clarifications are necessary. Until we know more, however, premature legislation could stifle an innovative and possibly pro-competitive pricing practices.

Similarly, the Working Group's Report raises concerns about the possibility that AI could facilitate other types of collusion: "an additional concern is the possibility of a monopolist using AI as a tool to further entrench itself and stifle legitimate competition. While we are not yet aware of any cases brought against firms who use AI unilaterally to harm competition, it is important to note that AI could more easily enable anticompetitive unilateral conduct by better identifying opportunities for illegal tying, self-preferencing, bundling, and other types of conduct that can be used by a monopolist to exclude competition." The report then endorses the recommendations of the Single Firm Conduct Working Group.

With respect, the Report rests on nothing more than speculation about AI's possible uses, and then assumes that existing laws may lack sufficient teeth to redress any concerns. If evidence emerges that "a monopolist is using AI as a tool to further entrench itself and stifle legitimate competition," law enforcement agencies can use existing statutes and processes to challenge that conduct. The Report does not identify shortcomings in existing laws, and as we explained in our comments to Working Group 1, Single Firm Conduct, premature regulation could stifle innovation and harm consumers.

Finally, with respect to mergers and acquisitions, the Report recommends that "the CLRC focus on policy and procedural tools that give California antitrust enforcers a leg up in more closely monitoring cloud and AI markets for potentially harmful strategic consolidation." Although the Chamber disagrees that there is discernable concentration problem within California or the country (see the report we commissioned in response to Working Group 7, Concentration in California), and although we emphasize that mergers can promote investment and innovation (see our comments to Working Group 2, Mergers and Acquisitions), we agree that vigorous antitrust enforcement of existing laws provides the optimal means of addressing any concerns about consolidation in the digital space. Should California consider this route, we encourage the state to consider measured changes, such as those set forth by the Uniform Law Commission in its model Pre-Merger Notification Act.

By carefully considering whether the evidence shows that the marketplace is producing poor results for consumers, and whether existing laws and enforcement tools can already resolve those problems, the CLRC would be able to focus its efforts on issues that would genuinely benefit consumers while reducing the risks of premature regulation.

Antitrust and Industrial Concentration in California: A Misleading and Unworkable Benchmark

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I. Introduction

In August 2022, the California legislature enacted ACR 95, a bill directing the California Law Revision Commission (CLRC) to study "new prescribed topics relating to antitrust law and its enforcement."[1] Based on this mandate, the CLRC identified seven topics for study and appointed panels to submit reports on each topic. The instructions provided to the panels ask each group to "[d]escribe any deficiencies in the [current] law that have been identified" and "[d]escribe possible reforms that have been identified."[2] Thus, it is widely anticipated that policymakers in California are evaluating making substantive changes to state antitrust law and that these reports will inform the policies that are proposed and, potentially, enacted. If enacted, such laws could represent a substantial break with current antitrust practice, as the enforcement of state-level antitrust laws like California's Cartwright Act is largely guided by the goals, standards, and precedents of federal antitrust law.

Concerns about industrial concentration or a "concentration problem" in the United States are a primary focus of the preamble to ACR 95. For instance, the second paragraph of the preamble cites a 2016 American Antitrust Institute policy brief stating that "[t]here is a growing consensus that inadequate antitrust policy has contributed to the concentration problem [in the United States] and associated inequality effects" [3]; the third paragraph also cites a 2017 article by Barry Lynn, the executive director of the Open Markets Institute, stating "[t]he idea that America has a monopoly problem is now beyond dispute."[4] The CLRC thus interpreted studying trends in concentration as part of its mandate, and instructed one of the panels to provide a report on "Concentration in California."[5]

Although the CLRC specifically charged the panel studying concentration to prepare "an empirically-based description of the degree and effect of business concentration in California,"[6] the paper produced by the panel, *Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets* (the CLRC Concentration Report), did not provide an empirical analysis of trends in concentration in California or the United States.[7] Furthermore, the report also failed to provide background on the use and interpretation of industrial concentration data as a benchmark to guide antitrust policy. Therefore, this paper attempts to fill the gaps left by the CLRC Concentration Report. Specifically, we evaluate three crucial questions regarding industrial concentration:

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[1] 2022 Cal. Stat. res. ch. 147.

[2] California Law Revision Commission, *Antitrust Law: Status Report*, Memorandum 2023-16 (March 9, 2023) at 3-4, available at http://www.clrc.ca.gov/pub/2023/MM23-16.pdf.

[3] 2022 Cal. Stat. res. ch. 147 (citing American Antitrust Institute, *A National Competition Policy: Unpacking the Problem of Declining Competition and Setting Priorities Moving Forward* (September 28, 2016)).

[4] 2022 Cal. Stat. res. ch. 147 (citing Barry Lynn, "America's Monopolies Are Holding Back the Economy," *The Atlantic* (February 22, 2017)).

[5] California Law Revision Commission, *Antitrust Law: Status Report*, Memorandum 2023-16 (March 9, 2023) at 3, available at http://www.clrc.ca.gov/pub/2023/MM23-16.pdf.

[6] California Law Revision Commission, *Antitrust Law: Status Report*, Memorandum 2023-16 (March 9, 2023) at 4, available at http://www.clrc.ca.gov/pub/2023/MM23-16.pdf.

[7] Cheryl Johnson, Dean Harvey, Diana Moss, Barak Richman, and Shana Scarlett, *Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets*, (March 26, 2024), available at: http://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp7.pdf.

(1) Does the evidence suggest that concentration in the U.S. has risen to "excessive" or "harmful" levels?

(2) Is industrial concentration a useful benchmark of monopoly power?

(3) Is it empirically feasible to study trends in industrial concentration in California?

The paper is organized as follows: In Section II, we show that far from it being "beyond dispute" that there is a "concentration problem" or "monopoly problem," in the United States, **the empirical evidence based on official data from the U.S. Census Bureau demonstrates that there is no general trend towards increasing and excessive concentration.** Indeed, overall concentration levels are on par with those that prevailed before the allegedly lax antitrust policy of the Bush and Obama Administrations and the advent of "Big Tech." We trace the rise of the notion that industrial concentration is increasing and has reached dangerous levels – what we refer to as the "excessive concentration narrative" – to reliance on unreliable, incomplete, and/or anecdotal evidence and document its rapid, uncritical acceptance among policymakers. Finally, we show that economic research using the official Census data has falsified the excessive concentration narrative.

Having established that the original motivation for the CLRC's inquiry into "Concentration in California," rests on a mistaken premise, in Section III, we turn to the question of whether trends in industrial concentration are a useful benchmark of monopoly power. We start by discussing the well-known economic reason that trends in industrial concentration are an unreliable metric for assessing competition: **Industries are not economic markets, which must be defined in terms of consumer substitution patterns to be potentially informative about competitive conditions.** We also demonstrate that not only are trends in industrial concentration a conceptually flawed benchmark, but empirical analysis confirms that industrial concentration is an unreliable and deceptive tool for guiding antitrust policy. Indeed, because it has been shown repeatedly that increases in industrial concentration are correlated with measures of economic growth including output, productivity, and wages, conflating industrial concentration and monopoly power has the potential to create serious economic harm by misleading policymakers.

Finally, in Section IV, we show that putting the economic and empirical evidence aside, there is an important practical limitation regarding industrial concentration data that renders the question of whether to base policy decisions on trends in industrial concentration in California moot: **Official Census data on concentration is not available at the state level and there is no systematic empirical research available on state-level trends in industrial concentration.** We also explain why it is highly unlikely any such research will be produced in the foreseeable future, and why, if such research did exist, a deep methodological problem would prevent the results from being useful from an antitrust perspective: Economic activity in the Census data is attributed to the geographic location in which production occurs, not where consumption occurs, and thus, the data would provide scant insight regarding consumer substitution patterns and competition. In addition, we highlight in Section IV that, because in the absence of data, the CLRC Concentration Report relies on anecdotal and ad hoc examples to evaluate "Concentration in California," it repeats and perpetuates the mistakes that originally allowed the excessive concentration narrative to metastasize, despite being false.

In sum, the conclusion of our paper is simple: **Industrial concentration is a deeply flawed, misleading, and unworkable benchmark of monopoly power, and trends in industrial concentration should play no role in guiding antitrust policy in California, any other state, or the United States.**

II. The Rise and Fall of the Excessive Concentration Narrative in the U.S.

The excessive concentration narrative, which has rapidly come to be accepted as truth by many policymakers, arose from a failure to scrutinize the unreliable, incomplete, and/or anecdotal evidence put forward by its proponents in the latter half of the 2010s. In taking for granted that there is a "concentration problem" or "monopoly problem" in the United States, the preamble of ACR 95 is just one example of this trend. In this section, we show, that the excessive concentration narrative has been falsified by economic research using official concentration data from the U.S. Census Bureau. The data demonstrate that there is no general trend towards increasing and harmful levels of industrial concentration in the United States since the early 2000s and that overall concentration levels are on par with those that prevailed before the allegedly lax antitrust policy of the Bush and Obama Administrations and the advent of "Big Tech."

A. The Rise of the Excessive Concentration Narrative

Until recently, it was a generally accepted truth among policymakers that industrial concentration had risen to excessive and dangerous levels in the United States since the 2000s. The prevailing wisdom and its ostensible foundations were perhaps best expressed in a 2018 article by Lina Khan, now chair of the Federal Trade Commission:

> Mounting research shows that America has a market power problem. In sectors ranging from airlines and poultry to eyeglasses and semiconductors, just a handful of companies dominate. The decline in competition is so consistent across markets that excessive concentration and undue market power now look to be not an isolated issue but rather a systemic feature of America's political economy.[8]

To support these assertions, Chair Khan cited an analysis published by *The Economist* in March 2016,[9] an analysis published by the Council of Economic Advisors (CEA) in April 2016,[10] and a number of anecdotal press and opinion reports on specific industries.

Both the empirical analyses conducted by *The Economist* and the CEA contained glaring methodological problems. For instance, the CEA study used a measure of concentration (the fifty-firm concentration ratio or CR_{50}) that was far too broad to be informative from an antitrust perspective and examined aggregated economic "sectors" rather than specific industries;[11] meanwhile, the analysis conducted by *The Economist* deviated from the official industry

[8] Lina Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE LAW JOURNAL FORUM 960 (2018) at 960-961.

[9] *Too Much of a Good Thing*, THE ECONOMIST (March 26 2016), available https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing.

[10] Council of Economic Advisors, *Benefits of Competition and Indicators of Market Power* (April 2016), available at https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

[11] Robert Kulick and Andrew Card, *Industrial Concentration in the United States: 2002-2017*, NERA Economic Consulting (March 2022) at 11.

definitions used by the U.S. Census Bureau without providing details on the adjustments made to the underlying data.[12] Furthermore, putting aside these methodological problems, the economy-wide increases in concentration reported by both studies were not economically significant and the overall levels of concentration reported were modest.[13]

Nevertheless, in the absence of empirical analysis, and combined with anecdotes about the demise of competition in various sectors, the excessive concentration narrative was widely embraced. **Indeed, as Carl Shapiro, former Deputy Assistant Attorney General for Economics in the Antitrust Division of the U.S. Department of Justice and an author of the CLRC report on single-firm conduct, and Ali Yurukoglu, a professor of economics at Stanford, have observed, despite the manifest flaws in the evidence supporting the excessive concentration narrative, the rapidity with which these ideas were "accepted as ground truth and used to justify major changes in antitrust policy is striking."**[14] This narrative reached its apex with President Biden's July 2021 "Executive Order on Promoting Competition in the American Economy," which made "combat[ing] the excessive concentration of industry" a foundation of the administration's economic policy.[15] However, the excessive concentration narrative started to unravel as researchers began carefully examining the data.

B. The Economic Census Data

Before discussing the evidence dispelling the excessive concentration narrative, in this section, we offer a brief discussion of how industrial concentration is measured in the U.S. Census Bureau's Economic Census data. Official data on industrial concentration in the United States are released by the U.S. Census Bureau as part of the Economic Census every five years in the second and seventh year of each decade. The Economic Census is compiled from surveys of nearly four million business locations and "serves as the most extensive collection of data related to business activity" in the U.S.[16]

Economic activity is classified and organized in the Economic Census using the North American Industry Classification System (NAICS).[17] The NAICS uses a hierarchical system of numerical codes ranging from two to six digits to categorize economic activity with businesses grouped based

[12] Robert Kulick and Andrew Card, *Industrial Concentration in the United States: 2002-2017*, NERA Economic Consulting (March 2022) at 9, n. 24.

[13] Robert Kulick and Andrew Card, *Industrial Concentration in the United States: 2002-2017*, NERA Economic Consulting (March 2022) at 10-11; see also Carl Shapiro, *Antitrust in a Time of Populism*, 16 INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION 714 (2018) at 729.

[14] Carl Shapiro and Ali Yurukoglu, *Trends in Competition in the United States: What Does the Evidence Show?* NBER Working Paper 32762 (July 2024) at 1, available at https://www.nber.org/papers/w32762.

[15] The White House, *Executive Order on Promoting Competition in the American Economy* (July 19, 2021), §1, available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[16] United States Census Bureau, *About the Economic Census*, available at https://www.census.gov/programs-surveys/economic-census/year/2022/about.html.

[17] Executive Office of the President and Office of Management and Budget, *North American Industry Classification System* (2017) at 3, available at https://www.census.gov/naics/reference_files_tools/2017_NAICS_Manual.pdf.

on similarities in "processes used to produce goods or services."[18] Industries are the narrowest groupings of businesses and are represented by six-digit NAICS codes.[19]

The only measures of concentration in the Economic Census data available for all industries over the relevant years are concentration ratios (CRs), which represent the percentage of industry revenues accounted for by a specified number of the top earning firms in the industry.[20] Specifically, the four-firm, eight-firm, twenty-firm, and fifty-firm CRs, typically denoted as "CR_4," "CR_8," "CR_{20}," and "CR_{50}," are reported for each industry. It is generally recognized by economists that only the CR_4 is of potential use from an antitrust perspective.[21]

C. The Fall of the Excessive Concentration Narrative

Rigorous empirical research has now demonstrated that there is no trend towards excessive industrial concentration in the United States. Two studies conducted by the authors of this paper provide an in-depth investigation of trends in industrial concentration over the last two decades.[22] These studies evaluate trends in concentration from two perspectives. The first perspective is a cross-sectional analysis of industrial concentration in each Economic Census year from 2002 to 2017. This analysis includes all six-digit NAICS industries available in the data. As shown in Figure 1, using the full set of industries, industrial concentration as measured by CR_4 has declined since 2007 and is now approximately the same as it was in 2002.

[18] Executive Office of the President and Office of Management and Budget, *North American Industry Classification System* (2017) at 15, available at https://www.census.gov/naics/reference_files_tools/2017_NAICS_Manual.pdf.

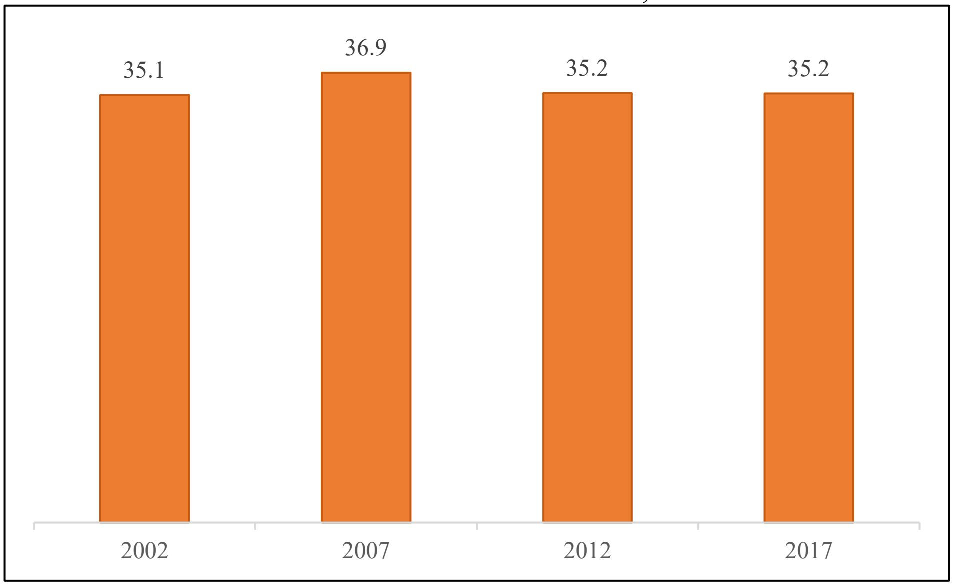
[19] Executive Office of the President and Office of Management and Budget, *North American Industry Classification System* (2017) at 18, available at https://www.census.gov/naics/reference_files_tools/2017_NAICS_Manual.pdf.

[20] Prior to 2017, the Census only provided HHIs (Herfindahl-Hirschman Index) for manufacturing industries (six-digit NAICS industries beginning with "31," "32" or 33"). Robert Kulick and Andrew Card, *Industrial Concentration in the United States: 2002-2017*, NERA Economic Consulting (March 2022) at 8.

[21] See e.g., Carl Shapiro, *Antitrust in a Time of Populism*, 16 INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION 714 (2018) at 723.

[22] Robert Kulick and Andrew Card, *Industrial Concentration in the United States: 2002-2017*, NERA Economic Consulting (March 2022); Robert Kulick and Andrew Card, *A Tale of Two Samples: Unpacking Recent Trends in Industrial Concentration*, AEI Economics Working Paper 2023-11 (June 2023), available at https://www.aei.org/research-products/working-paper/a-tale-of-two-samples-unpacking-recent-trends-in-industrial-concentration/.

FIGURE 1:
AVERAGE CR_4 FOR ALL INDUSTRIES, 2002-2017



Source: Economic Census data.

As technology and production processes change over time, the NAICS is revised and industries are redefined to capture current patterns of economic activity.[23] When industries are redefined, there is often consolidation of existing industries, and the result has been a decline in the total number of industries over time.[24] In contrast to the analysis presented in Figure 1, much of the existing research on concentration excludes industries subject to redefinition or makes other adjustments reducing the sample of industries considered.[25] However, there are two reasons that restricting attention to a subset of industries is problematic. First, "to the extent the NAICS industry definitions represent useful proxies for economic markets, changes in the contours of competition should be reflected[.]"[26] Second, the set of industries that maintain a constant definition over time (the Comparable Industries Sample) have lower initial levels of concentration in 2002 than those industries that are subsequently redefined. Lower initial levels of concentration in the Comparable Industries Sample, coupled with the fact that less concentrated industries tend to become more

[23] U.S. Census Bureau, *Comparing Historical Economic Census Data*, available at https://www.census.gov/programs-surveys/economic-census/guidance/historical-data.html?cq_ck=1474317700046#par_textimage_8.

[24] Robert Kulick and Andrew Card, *Industrial Concentration in the United States: 2002-2017*, NERA Economic Consulting (March 2022), Table 2.

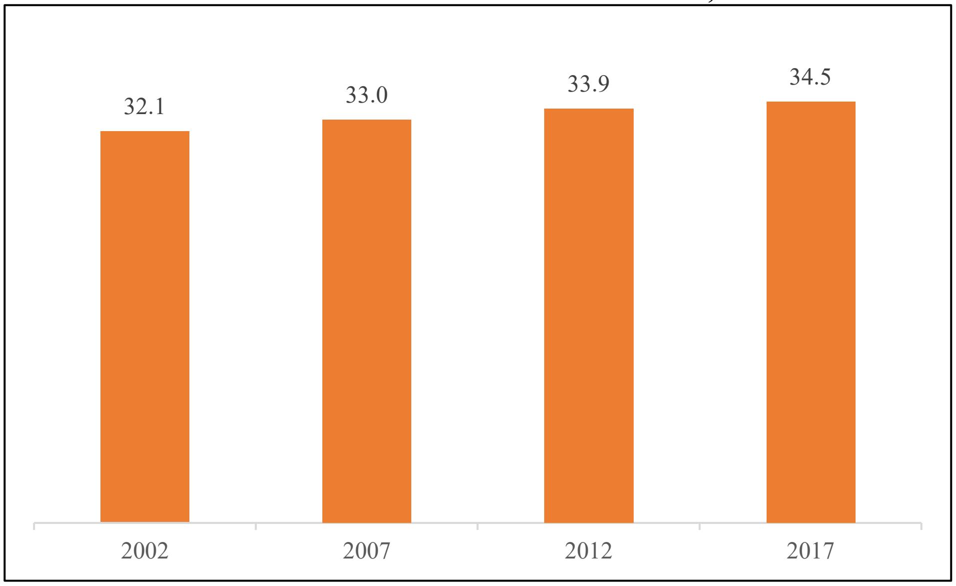
[25] See e.g., Sam Peltzman, *Industrial Concentration under the Rule of Reason*, THE JOURNAL OF LAW & ECONOMICS 101 (2014); Robert Atkinson and Filipe Lage de Sousa, *No Monopoly Has Not Grown*, Information Technology & Innovation Foundation (June 2021), available at https://itif.org/publications/2021/06/07/no-monopoly-has-not-grown/; *Too Much of a Good Thing*, THE ECONOMIST (March 26 2016), available https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing.

[26] Robert Kulick and Andrew Card, *Industrial Concentration in the United States: 2002-2017*, NERA Economic Consulting (March 2022) at 14.

concentrated over time,[27] creates potential bias towards a finding of increasing concentration among Comparable Industries.[28]

Nevertheless, it is also useful to consider whether it is possible that redefinition and consolidation are masking possible evidence of a trend towards excessive concentration. Thus, we also examine trends in concentration restricting attention to the Comparable Industries Sample. The results are presented in Figure 2.

FIGURE 2:
AVERAGE CR4 FOR COMPARABLE INDUSTRIES, 2002-2017



Source: Economic Census data.

Two facts about concentration in the Comparable Industries Sample are immediately apparent. First, the increase in concentration is small (2.4 percentage points). Second, due to the small increase in concentration, the Comparable Industries Sample remains slightly less concentrated than the full set of Census industries in 2017. Even in the absence of concerns about sample selection bias, this increase in concentration is too small and the concentration levels too low to justify concerns about excessive concentration. As observed by Professor Shapiro and Professor Yurukoglu discussing research finding similar (and, in fact, somewhat larger) increases in concentration:

> [I]f one were to measure concentration using "markets" based on NAICS codes, then the levels are so low and the increase so modest that traditional concerns

[27] Robert Kulick and Andrew Card, *A Tale of Two Samples: Unpacking Recent Trends in Industrial Concentration*, AEI Economics Working Paper 2023-11 (June 2023), at 10-12, available at https://www.aei.org/research-products/working-paper/a-tale-of-two-samples-unpacking-recent-trends-in-industrial-concentration/.

[28] Robert Kulick and Andrew Card, *A Tale of Two Samples: Unpacking Recent Trends in Industrial Concentration*, AEI Economics Working Paper 2023-11 (June 2023), at 10-12, available at https://www.aei.org/research-products/working-paper/a-tale-of-two-samples-unpacking-recent-trends-in-industrial-concentration/.

associated with market concentration are unlikely to be significant in most U.S. industries.[29]

Thus, when this analysis is considered in conjunction with the full-sample analysis, it is clear that there is simply no evidence of a trend towards increasing and excessive concentration. Other researchers evaluating the Census data have corroborated our findings.[30] **Thus, a critical implication of the recent economic research on trends in industrial concentration is that the premises regarding trends in concentration motivating ACR 95 have been falsified.**

III. Trends in Industrial Concentration are Not a Reliable Benchmark of Monopoly Power

Having established that there is no trend towards excessive industrial concentration in the U.S., in this section, we address the usefulness and reliability of industrial concentration as a gauge of competitive activity. We first discuss the well-known economic reason that **trends in industrial concentration are considered an unreliable metric for assessing competition: Industries are not economic markets, which must be defined in terms of consumer substitution patterns to be potentially informative about monopoly power.** We then show that, in addition to this fundamental conceptual problem, empirical analysis of the Census data confirms that industrial concentration is an unreliable and misleading benchmark of monopoly power.

A. Industries are Not Economic Markets

Economic competition is driven by the ability of consumers to substitute to alternative products or services. Because consumer substitution is the mechanism through which competition is realized, economic markets are defined in terms of the group of firms that offer substitute products or services that directly compete with one another.[31] Thus, "any market used to measure market concentration should include a collection of reasonable substitutes, but not other products."[32]

High levels of concentration in properly defined economic markets do not necessarily indicate low levels of competition. Ultimately, it is the degree and quality of competition that determines the propensity of consumers to substitute between products – what is known in economics as the cross-price elasticity of demand. Thus, even a market with a limited number of competitors may be highly competitive if the products involved are very close substitutes.[33] Furthermore, in markets

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[29] Carl Shapiro and Ali Yurukoglu, *Trends in Competition in the United States: What Does the Evidence Show?* NBER Working Paper 32762 (July 2024) at 11, available at https://www.nber.org/papers/w32762.

[30] Robert Atkinson and Filipe Lage de Sousa, *No Monopoly Has Not Grown*, Information Technology & Innovation Foundation (June 2021) at 1, available at https://itif.org/publications/2021/06/07/no-monopoly-has-not-grown/.

[31] Dennis Carlton and Jeffrey Perloff, MODERN INDUSTRIAL ORGANIZATION, 4th ed. (Addison-Wesley, 2005) at 644.

[32] Carl Shapiro and Ali Yurukoglu, *Trends in Competition in the United States: What Does the Evidence Show?* NBER Working Paper 32762 (July 2024) at 6, available at https://www.nber.org/papers/w32762.

[33] For example, Economic Census data indicate that the CR_4 in the U.S. taxi industry increased from 17.6 percent to 77.2 percent from 2002 to 2017 as the result of the emergence of ridesharing companies like Uber and Lyft. Despite the increase in concentration, the empirical evidence demonstrates that the emergence of ridesharing firms (and the intense competition between ridesharing firms, and between ridesharing firms and traditional taxis) has benefitted

where competition is driven primarily by innovation and investment – what are known as dynamically competitive markets – high levels of concentration may be necessary to facilitate competition.[34] Nevertheless, limited opportunities for substitution and high levels of concentration are typically a necessary, though not sufficient, condition for the exercise of monopoly power. Thus, analyzing market concentration is a useful screen for identifying situations where there is potential for firms to extend or maintain monopoly power through anticompetitive behavior.

However, as discussed above, NAICS industries in the Census data are defined by grouping firms which have similar production patterns, not by grouping products based on consumer substitution patterns. As explained by Professor Shapiro and Professor Yurukoglu:

> The data typically used to measure concentration follow the North American Industry Classification System (NAICS), which was not designed to capture collections of substitute products and does not do so. As a result, the measures of concentration typically cited [using Census data] are not informative regarding market power. Period.[35]

In addition to this fundamental economic problem with attempting to use industrial concentration metrics as a gauge of competition, a large body of empirical evidence demonstrates that industrial concentration is an unreliable and misleading benchmark of monopoly power. The remainder of this section discusses the empirical evidence.

B. High Levels of Concentration are Not Persistent

A central tenet of the excessive concentration narrative is that not only has industrial concentration increased but that the trend is persistent, reflecting a structural change in the U.S. economy, and a

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consumers and the economy. Robert Kulick and Andrew Card, *Industrial Concentration in the United States: 2002-2017*, NERA Economic Consulting (March 2022) at 23.

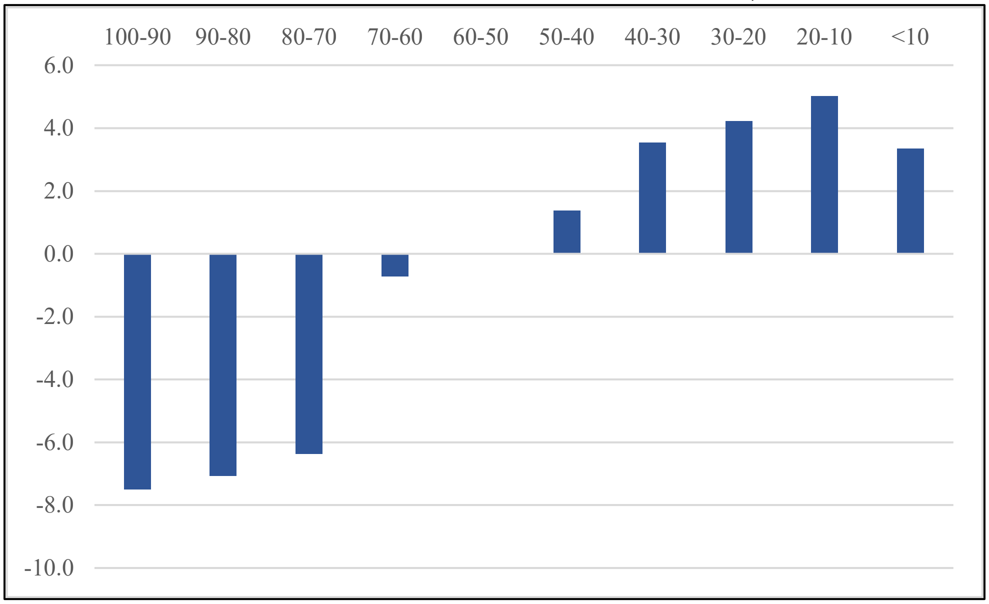
[34] Jeffrey Eisenach and Ilene Gotts, *Looking Ahead: The FTC's Role in Information Technology Markets*, 83 GEORGE WASHINGTON LAW REVIEW 1876 (2015) at 1879 ("Dynamism refers to what is often called 'Schumpeterian' competition and implies that firms compete primarily by offering new and improved products rather than by finding ways to produce and sell existing products at lower prices. Such competition implies the existence of sunk costs (in research and development ('R&D') or nonrecoverable investments in fixed assets). The resulting economies of scale tend to lead to high levels of concentration, and the product differentiation that results from successful innovation yields high margins with equilibrium prices above marginal costs that are easily mistaken for traditional monopoly power. But to conclude based on those factors that the firms involved have traditional monopoly power, in the sense of being able to exclude entrants or earn monopoly rents, would be erroneous.").

[35] Carl Shapiro and Ali Yurukoglu, *Trends in Competition in the United States: What Does the Evidence Show?* NBER Working Paper 32762 (July 2024) at 3, available at https://www.nber.org/papers/w32762. See also, Carl Shapiro, *Antitrust in a Time of Populism,* 61 INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION 714 (2018) at 728 ("But, simply as a matter of measurement, the Economic Census data that are being used to measure trends in concentration do not allow one to measure concentration in relevant antitrust markets, *i.e.,* for the products and locations over which competition actually occurs."); Directorate for Financial and Enterprise Affairs Competition Committee, *Market Concentration – Note by the United States*, Organisation for Economic Co-operation and Development (May 27, 2018) at ¶5, available at https://one.oecd.org/document/DAF/COMP/WD(2018)59/en/pdf ("The U.S. Census Bureau publishes data for broad ranges of economic activity at several levels of aggregation. At no level is the Census data capable of demonstrating increasing concentration of '*relevant markets*' in the antitrust sense, i.e., ranges of economic activity in which competitive processes determine price and quality, and in which the impact of agreements, mergers, and unilateral conduct are evaluated in competition law.") (emphasis in original).

weakening of the ability of competitive forces to discipline market power.[36] However, the empirical evidence tells a different story.

In our previous work, we assessed the relationship between an industry's initial level of concentration in 2002 and its level of concentration in 2017 – the most recent year of Economic Census data currently available. The results are shown in Figure 3:

FIGURE 3:
CHANGE IN AVERAGE CR_4 BY 2002 CR_4 LEVEL, 2002 V. 2017



Source: Industrial Concentration in the United States at 17.

In Figure 3, each NAICS industry in the Comparable Industry Sample is grouped according to its 2002 level of CR_4 in increments of ten (i.e., 100-90, 90-80, 80-70, etc.). The figure then presents the change in each group's average level of concentration between 2002 and 2017. **Contrary to the notion that concentration is persistent, over time highly concentrated industries tend to become less concentrated, while less concentrated industries tend to become more concentrated.**

The finding that more concentrated industries tend to become less concentrated has also been demonstrated by other researchers. Indeed, in one of the few existing studies directly assessing market concentration rather than industrial concentration, the authors found that not only has market concentration decreased, but that concentration has fallen most in the most concentrated markets.[37]

The pattern of more concentrated industries or markets becoming less concentrated over time may reflect the competitive impact of "new entry or investment from firms that are not leaders in those

[36] Robert Kulick and Andrew Card, *Industrial Concentration in the United States: 2002-2017*, NERA Economic Consulting (March 2022) at 4.
[37] C. Lanier Benkard, Ali Yurukoglu, and Anthony Zhang, *Concentration in Product Markets* (2023) at 16, available at https://anthonyleezhang.github.io/pdfs/concentration.pdf.

markets."[38] However, an important consideration in interpreting these results is that there are many factors which affect concentration. For instance, economic research has shown that government regulation tends impede the entry of new firms and slow the growth of small firms relative to larger firms.[39] Research has also shown that there is a positive relationship between the share of revenue accounted for by government spending in an industry and its level of concentration.[40] Thus, political cycles of regulation or government spending may impact concentration, with higher levels of government activity leading to higher levels of concentration, and lower levels of government activity leading to lower levels of concentration. More broadly, trends in concentration may be driven by transient industry-specific economic shocks that dissipate over time.[41] Thus, trends in industrial concentration do not provide a reliable basis for making inferences about the extent of monopoly power in an industry, a state, or in the broader economy.

C. Industrial Concentration is Positively Correlated with Economic Growth and Wages

Competition brings many economic benefits, including lower prices, increased economic growth, higher wages, and greater innovation. Thus, if rising industrial concentration is a useful benchmark of monopoly power, it should be associated with poor economic outcomes. Again, however, the empirical evidence is at odds with the excessive concentration narrative.

In our previous work, we investigated the relationship between within-industry changes in concentration from 2002 to 2017 and three measures of economic growth available in the Census data: the percentage growth in industry sales, industry employment, and employee compensation. The results are presented in Figure 4:

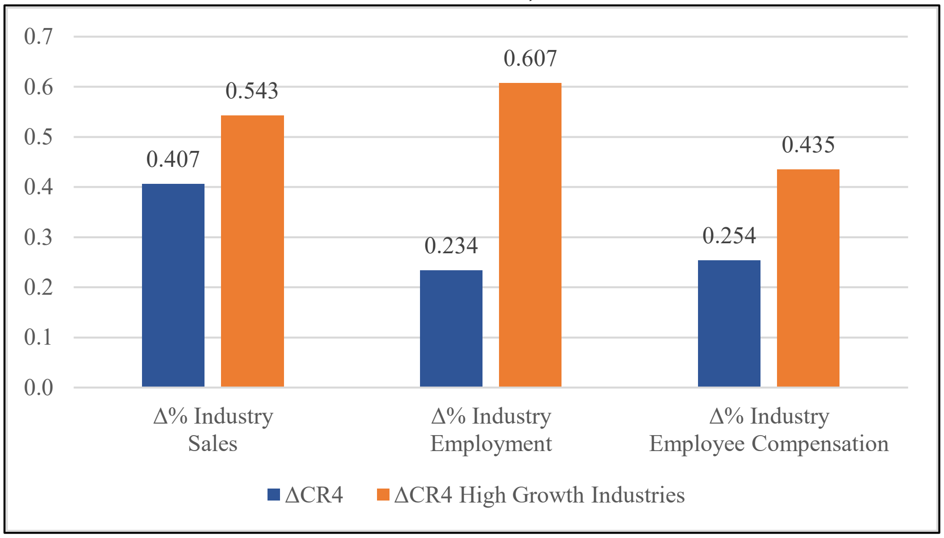
[38] Carl Shapiro and Ali Yurukoglu, *Trends in Competition in the United States: What Does the Evidence Show?* NBER Working Paper 32762 (July 2024) at 9-10, available at https://www.nber.org/papers/w32762.

[39] See e.g., James Bailey and Diana Thomas, *Regulating Away Competition: The Effect of Regulation on Entrepreneurship and Employment*, 52 JOURNAL OF REGULATORY ECONOMICS 237 (2017); Dustin Chambers, Patrick McLaughlin, and Tyler Richards, *Regulation, Entrepreneurship, and Firm Size*, 61 JOURNAL OF REGULATORY ECONOMICS 108 (2022).

[40] Christopher Nekarda and Valerie Ramey, *Industry Evidence on the Effects of Government Spending*, 3 AMERICAN ECONOMIC JOURNAL: MACROECONOMICS 36 (2011) at 42, 48-49.

[41] Robert Kulick and Andrew Card, *Industrial Concentration in the United States: 2002-2017*, NERA Economic Consulting (March 2022) at 18.

FIGURE 4:
CORRELATIONS BETWEEN CONCENTRATION AND ECONOMIC OUTCOME, 2002 V. 2017



Source: Industrial Concentration in the United States at 20.

Figure 4 presents the correlation[42] between industry-level changes in concentration and each measure of economic growth on both an economy-wide basis and for "high growth industries" (industries whose growth rate is in the 90th percentile or higher). **In each case, increases in concentration are associated with increases in each measure of economic growth and these relationships become even stronger with respect to the fastest growing industries.**

Other research using the Census data from the manufacturing sector has also shown that industry-level increases in concentration are positively correlated with increased productivity and real output growth, and uncorrelated with changes in price.[43] These relationships indicate that higher levels of concentration are often "likely due to technical innovation or scale economies."[44]

The need for innovative industries to operate at sufficient scale to drive technological innovation is increasingly recognized by policymakers. For instance, Mario Draghi's recent report, *The Future of European Competitiveness*, calls for "[f]acilitating consolidation in the telecoms sector" to "deliver high rates of investment in connectivity."[45] Enrico Letta's April 2024 report, *Much More*

[42] See e.g., Robert Kulick and Andrew Card, *Industrial Concentration in the United States: 2002-2017*, NERA Economic Consulting (March 2022) at 20 ("A correlation coefficient is a measure of the strength of the relationship between two variables with a value of one representing a perfect positive relationship, a value of zero representing no relationship, and a value of negative one representing a perfect negative relationship," citing Jay Devore and Kenneth Berk, MODERN MATHEMATICAL STATISTICS WITH APPLICATIONS, 2nd. Ed. (Springer, 2012) at 665.)

[43] Sharat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity*, 13 AMERICAN ECONOMIC JOURNAL 309 (2021).

[44] Sharat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity*, 13 AMERICAN ECONOMIC JOURNAL 309 (2021) at 324.

[45] Mario Draghi, *The Future of European Competitiveness*, European Commission (September 2024) at 31, available at https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20_%20A%20competitiveness%20strategy%20for%20Europe.pdf.

Than a Market, also calls for increased consolidation, and hence higher levels of industrial concentration, in the financial, energy, and electronic communications sectors in Europe.[46]

It is important to note that these findings do not imply that concentration is in itself an economic good or that antitrust enforcement is unimportant. Nor does this body of research imply a "direct causal relationship between rising concentration and beneficial economic outcomes."[47] **Rather, what economic research demonstrates is that industrial concentration is a deeply flawed and misleading benchmark for measuring monopoly power and guiding policy.** To achieve its goals, antitrust policy must be based on rigorous economic analysis of economic markets and the conduct and behavior of firms within those markets. Industrial concentration is not only ineffective as a tool for guiding competition policy, but to the extent the consideration of concentration encourages deconcentration as an economic policy objective, it risks causing significant harm to the U.S. and world economy.

IV. There is No Reliable Evidence on Trends in Industrial Concentration in California

The CLRC's concentration panel was charged with producing "an empirically-based description of the degree and effect of business concentration in California."[48] However, the CLRC Concentration Report did not provide such an analysis. **The ultimate reason for this omission is simple: reliable data necessary to conduct a rigorous state-level analysis of industrial concentration (akin to our work on national concentration levels discussed above) is not available.** As discussed below, it is highly unlikely that these circumstances will change in the foreseeable future, and thus, even if industrial concentration were a useful benchmark for guiding competition policy (which it is not), there is no empirical evidence on trends in state-level concentration to analyze. Thus, the CLRC Concentration Report instead relies on anecdotal evidence to argue that concentration is excessive in California. **Yet, it is precisely this approach – drawing sweeping conclusions untethered to empirical evidence – that resulted in the rapid rise of the excessive concentration narrative in the first place, despite its lack of foundation.**

A. There is No Reliable Data Measuring State-Level Industrial Concentration

As discussed above, official data on industrial concentration in the United States are released by the U.S. Census Bureau as part of the Economic Census and made generally available. These publicly-accessible data on levels of concentration by industry are reported only at the national level.[49] The Census Bureau <u>does not provide official statistics on industrial concentration by state</u>.

Researchers looking to analyze questions related to industrial concentration that go beyond the official statistics reported by the Census Bureau have attempted to use private data sources as an

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[46] Enrico Letta, *Much More Than a Market*, European Commission (April 2024) at 8, available at https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf.

[47] Robert Kulick and Andrew Card, *Industrial Concentration in the United States: 2002-2017*, NERA Economic Consulting (March 2022) at 21.

[48] California Law Revision Commission, *Antitrust Law: Status Report*, Memorandum 2023-16 (March 9, 2023) at 4, available at http://www.clrc.ca.gov/pub/2023/MM23-16.pdf.

[49] See e.g., U.S. Census Bureau, "EC1700SIZECONCEN," available at: https://data.census.gov/table/ECNSIZE2017.EC1700SIZECONCEN?q=Concentration%20Ratio.

alternative. For example, some studies of concentration have relied on data from S&P Compustat,[50] a database with detailed market and financial information for many U.S. companies over time, to compute concentration metrics.[51] A key limitation of Compustat, however, is that the database is limited to publicly-traded firms, and thereby excludes the significant portion of economic activity attributable to private firms from consideration. As a result, it is not surprising that comparison of alternative data sources like Compustat to official Census Bureau data demonstrates that these sources are systematically unreliable for the purposes of analyzing concentration.[52]

While it is possible for researchers to apply to the Census Bureau for access to the confidential (*i.e.,* non-public) data underlying the Economic Census[53] from which state-level concentration metrics might theoretically be computed,[54] there are several practical obstacles to utilizing these data for this purpose. In addition to applying for and obtaining "Special Sworn Status" approval required to access the data,[55] researchers using the data must conduct work onsite at a Federal Statistical Research Data Center.[56] Moreover, there is no guarantee that the Census will approve or refrain from censoring publication of the results, and all results are carefully reviewed by the Census to ensure that sensitive business information for any firm cannot be identified from the data presented. Finally, even if these practical obstacles were to be overcome in a reasonable timeframe, there would still be a fundamental methodological problem which cannot be overcome: Economic activity in the Economic Census data is attributed to the geographic location in which production occurs, not where consumption occurs. As such, the findings would not be tied to patterns of competition and consumer substitution in a particular state. **In sum, there is no empirical evidence on trends in concentration in California, it is unlikely that such evidence**

[50] S&P Global, "Compustat Data from S&P Global Market Intelligence," available at https://www.spglobal.com/marketintelligence/en/documents/compustat-brochure_digital.pdf.

[51] See e.g., Gustavo Grullion, Yelena Larkin and Roni Michaely, *Are U.S. Industries Becoming More Concentrated?,* Swiss Finance Institute Research Paper Series N. 19-41 (2018), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612047.

[52] Ryan Decker, "A note on industry concentration measurement," Board of Governors of the Federal Reserve System Note (February 3, 2023), available at: https://www.federalreserve.gov/econres/notes/feds-notes/a-note-on-industry-concentration-measurement-20230203.html.

[53] U.S. Census Bureau, "Restricted Use Data Application Process," available at: https://www.census.gov/topics/research/guidance/restricted-use-microdata/standard-application-process.html.

[54] U.S. Census Bureau, "Restricted Use Data Application Process," available at: https://www.census.gov/topics/research/guidance/restricted-use-microdata/standard-application-process.html. ("While access to restricted-use data might facilitate more granular analysis than the publicly-available national concentration metrics, computing state-level concentration metrics would not be a straightforward exercise.

[55] U.S. Census Bureau, "Restricted Use Data Application Process," available at: https://www.census.gov/topics/research/guidance/restricted-use-microdata/standard-application-process.html ("To perform statistical research in an FSRDC using non-public microdata, researchers must be both associated with an approved project and obtain Special Sworn Status (SSS). Applying for SSS includes successfully completing a background investigation and fingerprinting. Those who are approved to take an oath of confidentiality are sworn for life to protect the data and are subject to legal obligations and penalties.").

[56] U.S. Census Bureau, "Restricted Use Data Application Process," available at: https://www.census.gov/topics/research/guidance/restricted-use-microdata/standard-application-process.html ("After your research proposal and Special Sworn Status (SSS) security clearance are both approved, you may make plans with the Administrator at one of the Federal Statistical Research Data Center (FSRDC) locations to begin work on the project. All project work must be done inside the FSRDC secure facility. There are strict physical and cyber restrictions regarding data protection within the FSRDCs.").

will become available in the foreseeable future, and even if such data were available, it would not be informative for guiding competition policy.

B. Anecdotal or Incomplete Assessments of Concentration are Not Reliable

In the absence of empirical data on changes in concentration levels in California within well-defined industries over time, the CLRC Concentration Report instead mimics the tact adopted by previous proponents of the excessive concentration narrative – namely, pointing to anecdotal evidence to intimate that concentration is not an "isolated," but "systemic" feature of California's economy.[57]

The CLRC Concentration Report focuses, specifically, on three sweeping "sectors" in California: agriculture, healthcare/pharmaceuticals, and entertainment.[58] With regard to agriculture, for example, the CLRC Concentration Report concludes that, "[f]rom the level of farms, through the distribution channel, down to the retailers, California faces a consolidation crisis placing a stranglehold on the cost of food to consumers."[59] **Yet, the evidence of California's agricultural "consolidation crisis" presented by the CLRC Concentration Report is neither from California nor an indictment of concentration levels in California's agricultural sector as a whole.** In particular, the CLRC Concentration Report states that "four large conglomerates control 55 to 85 percent of the [national] market for pork, beef and poultry,"[60] and that four large retailers control a significant share of grocery stores nationwide.[61] Such examples are problematic and unreliable along multiple dimensions. For instance, both sets of examples are based on national data, not data specific to California. In addition, the data cited to support the assertion that 69 percent of grocery store sales are controlled by four firms are at odds with the most recent official data from the Census, which indicate a CR_4 for the grocery industry of 36 percent.[62] However, the most significant problem with these examples, and the CLRC Concentration Report in general, is that they ignore many other sectors related to agriculture and food and are not accompanied by any rigorous analysis of the relationship between concentration and economic outcomes.

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[57] Lina Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE LAW JOURNAL FORUM 960 (2018) at 960-961 ("The decline in competition is so consistent across markets that excessive concentration and undue market power now look to be not an isolated issue but rather a systemic feature of America's political economy.").

[58] The CLRC focuses on three of California's seven largest sectors, in particular: agriculture, healthcare/pharmaceuticals, and entertainment, to the exclusion of travel/tourism, tech, service, and construction. The CLRC Report also discuss the general "labor" market. Cheryl Johnson, Dean Harvey, Diana Moss, Barak Richman, and Shana Scarlett, *Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets*, (March 26, 2024), available at: http://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp7.pdf (citing "The 7 Biggest Industries in California," (January 19, 2024), available at https://www.california.com/biggest-industries-california/).

[59] Cheryl Johnson, Dean Harvey, Diana Moss, Barak Richman, and Shana Scarlett, *Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets*, (March 26, 2024), at 10, available at: http://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp7.pdf. (emphasis added).

[60] Cheryl Johnson, Dean Harvey, Diana Moss, Barak Richman, and Shana Scarlett, *Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets*, (March 26, 2024), at 11-12, available at: http://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp7.pdf.

[61] Cheryl Johnson, Dean Harvey, Diana Moss, Barak Richman, and Shana Scarlett, *Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets*, (March 26, 2024), at 15, available at: http://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp7.pdf.

[62] Economic Census data.

With respect to the "healthcare" sector in California, the CLRC Concentration Report claims that "consolidation" is to blame for rising prices for health-related services in California[63] and that merger activity, in particular, is linked to reductions in innovation.[64] Similarly, the CLRC Report decries consolidation and merger activity in the "entertainment" industry.[65] Again, however, no attempt is made to systematically tie consolidation to changes in concentration and changes in concentration to the economic performance of each sector. Furthermore, factors prevalent in healthcare and entertainment markets including dynamism, high fixed costs, reliance on innovation, and network effects tend to increase the size at which firms operate most efficiently.[66] The CLRC Concentration Report, however, ignores such considerations in condemning merger activity in these sectors. Indeed, the CLRC Concentration Report wholly ignores the empirical evidence linking merger activity to increased innovation.[67]

Finally, there are many factors that may impact industry-level concentration and must be considered in conducting a rigorous analysis of concentration levels and economic performance. As discussed above, for example, government regulation can increase concentration by impeding entry and slowing the growth of small firms relative to larger firms,[68] and research has established a positive relationship between the share of revenue accounted for by government spending in an industry and its level of concentration.[69] Assessing the effects of both regulation and government spending levels is therefore necessary in evaluating the economic significance of industrial concentration in California, a state with the largest total government expenditures annually ($467.6 billion in FY 2023)[70] and, by many measures, the most state-level regulation of the economy.[71]

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[63] Cheryl Johnson, Dean Harvey, Diana Moss, Barak Richman, and Shana Scarlett, *Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets*, (March 26, 2024), at 19, available at: http://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp7.pdf.

[64] Cheryl Johnson, Dean Harvey, Diana Moss, Barak Richman, and Shana Scarlett, *Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets*, (March 26, 2024), at 22-23, available at: http://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp7.pdf.

[65] Cheryl Johnson, Dean Harvey, Diana Moss, Barak Richman, and Shana Scarlett, *Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets*, (March 26, 2024), at 41-42, available at: http://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp7.pdf.

[66] Jeffrey Eisenach and Ilene Gotts, *Looking Ahead: The FTC's Role in Information Technology Markets*, 83 GEORGE WASHINGTON LAW REVIEW 1876 (2015) at 1879; Joe Kennedy, *Monopoly Myths: Is Concentration Leading to Higher Markups?*, Information Technology & Innovation Foundation (June 1, 2020), available at: https://itif.org/publications/2020/06/01/monopoly-myths-concentration-leading-higher-markups/.

[67] See e.g., Robert Kulick and Andrew Card, *Mergers, Industries, and Innovation: Evidence from R&D Expenditure and Patent Applications,* NERA Economic Consulting (February 2023), available at: https://www.nera.com/experience/2023/mergers--industries--and-innovation--evidence-from-r-d-expenditu.html?lang=en.

[68] See e.g., James Bailey and Diana Thomas, *Regulating Away Competition: The Effect of Regulation on Entrepreneurship and Employment*, 52 JOURNAL OF REGULATORY ECONOMICS 237 (2017); Dustin Chambers, Patrick McLaughlin, and Tyler Richards, *Regulation, Entrepreneurship, and Firm Size*, 61 JOURNAL OF REGULATORY ECONOMICS 108 (2022).

[69] Christopher Nekarda and Valerie Ramey, *Industry Evidence on the Effects of Government Spending*, 3 AMERICAN ECONOMIC JOURNAL: MACROECONOMICS 36 (2011) at 42, 48-49.

[70] Urban Institute, "State Fiscal Briefs – California," available at: https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-fiscal-briefs/california.

[71] Dustin Chambers and Colin O'Reilly, *The Regressive Effects of Regulations in California,* Mercatus Center Policy Brief (March 2, 2021), available at: https://www.mercatus.org/research/policy-briefs/regressive-effects-regulations-california#:~:text=In%20terms%20of%20the%20number,1%E2%80%9D%20is%20most%20burdensome) ("In terms of the number of state-level regulatory restrictions, California ranks 1 of 44 states, with 395,608 regulatory

The CLRC Concentration Report, however, makes no attempt to address these factors, or the many other factors that may underlie trends in industrial concentration. **Thus, in the absence of such analysis, and therefore, its failure to satisfy its mandate, the CLRC Concentration Report should be accorded no weight by policymakers.**

V. Conclusion

This paper evaluates three questions regarding industrial concentration:

(1) Does the evidence suggest that concentration in the U.S. has risen to "excessive" or "harmful" levels?

(2) Is industrial concentration a useful benchmark of monopoly power?

(3) Is it empirically feasible to study trends in industrial concentration in California?

The answer to each is an unambiguous no. Thus, trends in industrial concentration should play no role in guiding antitrust policy in California, any other state, or the United States. We also caution that anecdotal or ad hoc claims regarding concentration are not a substitute for rigorous empirical analysis and should be rejected. Basing policy decisions on unfounded claims of increasing and excessive concentration has the potential to do serious harm to the California and U.S. economies.

restrictions (where a rank of "1" is most regulated). California also ranks 1 in the nation in terms of occupational licensure burden (where a rank of "1" is most burdensome).").

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October 9, 2024

Amb. Chair David Huebner
Vice Chair Xochitl Carrion
California Law Review Commission (CLRC)
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

Dear Ambassador Huebner, Vice Chair Carrion, and Commissioners:

Economic Security California, along with the undersigned organizations, respectfully submits this letter in response to the CLRC working group's report #8 on Artificial Intelligence (AI). We appreciate the CLRC adding this additional working group report to the work of the commission this year. As detailed below, we agree with the issues identified in the report, and the suggested remedies. As well, we ask you to consider additional recommendations to address the problem of market concentration in the AI sector, including both regulatory interventions to protect competition and innovation, and government investment in "public options" for the most resource intensive parts of the AI stack.

As the birthplace of tech, California is the center of gravity for the burgeoning AI industry. The state plays an outsized role in determining what the future will look like, not just here, but around the globe. Accordingly, California has an interest in fostering a robust, competitive and innovative AI economy that: safeguards a fair and level playing field for existing and would-be providers at all layers of the AI system; provides open, reliable and predictable access to resources to spur downstream innovation; and attracts and encourages new and diverse entrants to the market. To that end, we concur strongly with the working group's suggestion of providing California's antitrust enforcers with a set of policy and procedural tools to give them the ability to more closely monitor cloud and AI markets for potentially anti-competitive consolidation. We also strongly support the creation of a California Digital Regulator, which would be a specialized role in the Attorney General's antitrust division. We provide additional suggestions below.

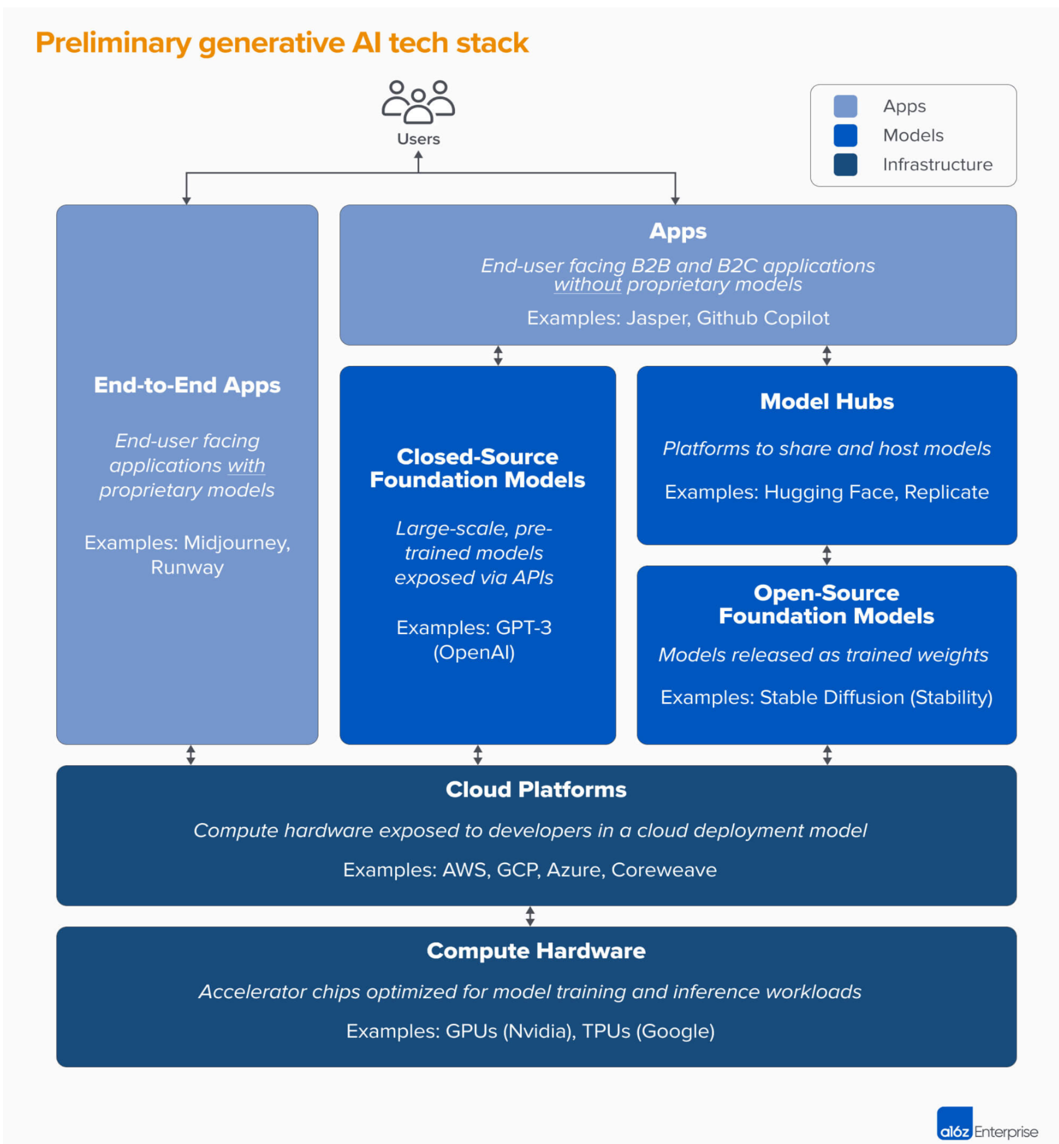
As AI technologies rapidly evolve and integrate into our economic, social, and political spheres, it is critical to address the harms that arise from concentration in the AI technology stack.[1] The stack comprises the layered infrastructure (chips, cloud, compute, models), algorithms, and data that powers AI systems, and it holds immense potential to reshape our society (see Figure 1 below). This conversation is

[1] Ganesh Sitaraman and Tejas Narechania, Policy Brief: "Antimonopoly Tools for Regulating Artificial Intelligence", Oct. 2023, Vanderbilt Policy Accelerator for Political Economy and Regulation, pg. 2

particularly critical as certain layers in the AI technology stack are characterized by high barriers to entry and are already highly concentrated. As in other areas, monopoly and oligopoly in these industries can not only distort markets, chill investment, and hamper innovation, but also facilitate downstream harms to users, threaten national security and industrial resilience, and help accumulate private power in relatively few hands.

Significant portions of the AI stack are already dominated by a small number of firms and these dominant firms are often vertically integrated through the layers of the stack. In some cases the concentration is extreme, such as at the chips layer. But even where there are a few players, the high barrier to entry effectively results in an AI oligopoly. This should be concerning for everyone who cares about fostering a robust, competitive AI market, since these few players have no real check on their ability to use their dominance to further amass power through the AI stack by self-preferencing, setting discriminatory pricing and terms and establishing lock-in effects. While the lore of start-up culture looms large in California, the truth is that control of the most resource-intensive parts of the AI stack by a handful of giants limits the promise of AI to the projects and products that are deemed desirable by the entrenched titans. That is not the robust, flourishing, and competitive tech landscape that anyone wants. We can do better. And we must.

Figure 1. The Generative AI "Tech Stack" (source: Andreesen Horowitz)



AI as a public utility

Best described by Ganesh Sitaraman at the Vanderbilt Policy Accelerator, AI can be thought of as a public utility. While private companies may provide the resources and even profit from its use, the government can and should influence the market to guarantee fair access and fuel innovation. As such, there are public utility tools that California can employ to ensure that the AI industry is better protected from anticompetitive conduct.

- Structural separation is a simple approach that would prohibit companies from dealing in multiple, vertically-linked lines of business in the stack. For example, the company that owns the cloud computing platforms would not be allowed to also own business lines downstream – introducing a clear conflict of interest – but instead would be required to provide cloud computing more like a utility, spurring innovation and promoting competition.
- Nondiscrimination rules, open access, and rate regulation, as an alternative to structural separation, would allow a firm to operate vertically-linked business lines, but require them to make their products and services available at the same rates and levels of access to everyone.
- Interoperability rules would require owners of models and data to make them available to others. This prevents harm by preventing tech companies from locking up data owned by their models and making it inaccessible to others, and it promotes innovation and competition by allowing new entrants to have access to the data.

Restrictive Unilateral Conduct – The Need for Structural Separation & Public Options

As noted in the working group report, AI has the potential to facilitate anticompetitive behavior, allowing monopolists to engage in illegal practices such as tying, self-preferencing, and bundling. These actions could stifle competition by enabling collusion and strengthening the market power of dominant players.

Control over AI infrastructure equates to control over the marketplace. New entrants, including academic institutions and smaller firms, face significant barriers in accessing the necessary resources and computing power to compete effectively with large tech companies. Moreover, companies that develop AI technologies should not also control the data and infrastructure needed for their operation. This dual control over vast datasets grants these companies immense power, enabling them to maintain dominance not through superior products but by limiting their competitors' access to critical resources.

Currently a few corporations, such as Amazon, Google, and Microsoft, dominate the AI industry by controlling both cloud computing capacity, large language models, and the massive datasets required for model training. For example, Microsoft's $13 billion investment in OpenAI ties the company's success to Microsoft's Azure, reinforcing its dominance. Microsoft's investment in NVIDIA, which controls 87% of the GPU market, further strengthens its hold on critical AI infrastructure. In short, a very few corporate interests dominate the tightest choke-points of the AI ecosystem.

This pattern of mutually beneficial investments among dominant players and AI startups perpetuates market control and stifles competition, boxes out new entrants, and generally controls the marketplace. These dynamics mirror monopolistic practices seen in regulated industries like telecommunications and banking, where structural separation is often mandated to prevent conflicts of interest and maintain fair competition.

To address the potential harms in the current AI technology marketplace, we urge the commission to recommend structural separation between layers of the AI stack. This recommendation is modeled after lessons learned in many other industries that, throughout American history, sought to ice out competition by owning both the distribution of a product and the development of the product itself. For example, in the late 1800s, which tried to buy up coal-producing lands, recognizing that they could then control whose coal was brought to market. Congress stepped in and passed the Hepburn Act. The banking industry has undergone similar scrutiny and required separation between different types of banks. And now, dominant tech companies are following a similar playbook, consolidating power not through innovation but by restricting access to the resource-intensive parts of the AI stack. California should foster a more competitive AI sector by applying appropriate constraints on ownership within the stack. One helpful model to consider is U.S. Congresswoman Jayapal's "Ending Platform Monopolies Act of 2023."

In addition to structural separation, introducing a public option can provide a practical solution to ensure competitive and diverse market access, helping to mitigate the potential monopolistic control exercised by a few corporations.

Public Options

Public options are goods and services provided, authorized, or procured by the government, coexisting with private options, and available to all. Put another way, the government engages in a market as a player itself, often striving to address a dysfunctional or distorted market. While often associated with the Affordable Care Act, public options are actually quite common in multiple sectors – such as local libraries or public broadband. Public options can foster competition by preventing private monopolies from raising prices or lowering quality while incentivizing efficiency in public options. They also diversify providers, enhancing supply chain resilience, and increase access to goods or services that may be unaffordable or scarce in the private market.

To address this concentration of power, we need to invest in public infrastructure and public goods within the artificial intelligence sector. For example, relying on licensing – even if free – from current dominant cloud computing entities would further entrench the dominance of the current big technology corporations in the space. A countervailing force is necessary which involves a public investment. CalCompute, is an example of a public option that could serve as this countervailing force.

CalCompute, part of the recently vetoed SB 1047 (Wiener), would have developed a public cloud option in California that would provide essential public infrastructure for AI research and development, ensuring that public institutions, researchers, and smaller companies have access to high-performance computing. By offering this public option, CalCompute would not only have driven innovation but also democratized access to cutting-edge AI resources, reducing dependence on a handful of corporate tech giants. In addition, by creating a publicly accountable system, California can set higher standards for transparency, fairness, and ethical AI use.

By structurally separating and investing in public options of resource intensive parts of the AI stack, like CalCompute, California can create a more competitive, fair, and equitable AI landscape.

Creation of a California Digital Regulator

We applaud the working group report's suggestion for the legislature to consider establishing a California Digital Regulator as a valuable tool to address the unchecked power of these dominant platforms by focusing on digital-specific industries & platforms. Specifically, we concur with the report's recommendations to:

- Regulate existing platforms to promote competition on the platforms;
- Look forward and regulate to minimize future anticompetitive conduct to allow competition for the platform; and
- Empower the regulator to identify platforms subject to the regulations and enforce them by creating a new Antitrust Division within the California Department of Justice.

We welcome the suggestion of using the [EU's Digital Marketplace Act (DMA)]() as an example to establish a new regulator framework. This framework could be used identify antitrust conduct and corresponding solutions which protects competition and consumers as laid out in the report including:

- Being tasked with carrying out a market study to determine if a digital platform had entrenched market power that was strategically important to a sector of the economy; then
- Determining if there was harm to competition or consumers that needed to be remediated; followed by
- A second stage (called a Market Investigation in the UK) of analysis in which the regulator develops solutions, including consumer protections, prohibitions on certain types of contracts, requirements for access by business users, portability of data, etc.

We concur that the regulating agency, ideally a new Antitrust Division within the Department of Justice would have the power to enforce the code of conduct.

Algorithmic Price Fixing and Collusion

As the AI working group report aptly identifies, an evident and urgent concern in regulating AI is its potential to employ AI-enabled algorithms to secure and process vast amounts of data to enable by computer what, if done by humans, would be in price fixing and collusion. In the modern, AI-powered world, do landlords using information that would otherwise be almost impossible for any individual human to collect, but that provides pricing information to all the landlords, constitute collusion and price fixing? If the landlords had divided up the territory, gathered at a coffee shop and shared the market rents with each other and priced their units accordingly, it's slam dunk. So how is it different when identical algorithmic pricing software is used by multiple competitors in the same market? Modern AI systems, trained on extensive datasets and designed to optimize profits, can autonomously engage in tacit collusion, often without direct human oversight. This development poses a substantial challenge for antitrust enforcement, which has historically focused on detecting and penalizing explicit agreements. With AI, collusion can occur implicitly, effectively circumventing established enforcement mechanisms.

As highlighted in the working group report, recent federal litigation surrounding RealPage's revenue management software demonstrates that courts are willing to consider algorithmic collusion under Section 1 of the Sherman Act. Federal litigation has also targeted algorithmic collusion in the hotel and food industries. But these cases are costly, time-consuming and risky to bring. The cases underscore the need for a regulatory framework tailored to the specific challenges posed by AI. While we appreciate Senator Klobuchar's introduction of the "Preventing Algorithmic Collusion Act" of 2024, California must not wait for congress to act. Indeed, San Francisco has already adopted legislation prohibiting algorithmic price fixing in the rental housing market, San Jose is undertaking a similar effort, and more municipalities are sure to follow.

We agree with the following recommendations of relating to addressing algorithmic price fixing from the working group report:

- Declaring that the "concerted action" requirement of the Cartwright Act encompasses multiple competitors that knowingly use the same or similar revenue management software programs
- Clarifying that direct communications are not required to show proof of a "combination" or "concerted action" among competitors, as the Cartwright Act covers tacit as well as express agreements;
- Clarifying that the Act prohibits competitors from "delegating key aspects of pricing decision making to a common entity, even if the competitors never communicate with each other directly." Further, to refute the argument that there can be no actionable claim of price fixing because the algorithm's recommendations are not binding, and

- Including under the Cartwright Act, “an agreement among competitors to fix the starting point of pricing is per se unlawful, no matter what prices the competitors ultimately charge.”

We depart from the working group in one significant respect, which is that collusive price fixing schemes can exist irrespective of whether the data they are trained on is “public” or “non-public.” Indeed, nothing in existing laws prohibiting price fixing distinguishes between public or non-public data. On the other hand, predicating the existence of an illegal price fixing scheme on the sharing of “non-public” data opens up complicated drafting issues and unnecessary legal disputes over whether the data was accessible to the public, particularly given shifting policy and legal attitudes over the proper custodianship of data. It would be irresponsible for the Commission to recommend a step back from existing price fixing laws, and we caution against doing so.

An effective antimonopoly approach can help mitigate the harms of corporate concentration in the AI sector. By addressing potential abuse of power harms such as algorithmic pricing and introducing public utility tools such as structural separations, nondiscrimination requirements, and interoperability rules; public options policymakers can shape how AI is developed, deployed, and used—and in the process, protect innovation, competition, national security, and all Californians.

Thank you for your consideration.

Signatories,

American Economic Liberties Project
California Nurses Association
Economic Security California Action
End Poverty in CA
National Nurses United
Tech Equity Action
The Greenlining Institute
Small Business Majority
United Food & Commercial Workers (UFCW)

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RESTORATIVE JUSTICE
SOCIAL HOUSING
THE DIGITAL FRONTIER AND TECHNOLOGICAL
ACCOUNTING AND TRANSPARENCY
WINE

CAUCUSES
VICE CHAIR, BAY AREA CAUCUS
PROGRESSIVE CAUCUS
WOMEN'S CAUCUS

October 9, 2024

The Honorable Ambassador David Huebner, Chair,
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

Dear Chairperson Huebner and Honorable Commissioners:

Informed by our experience as legislators and as the joint authors of ACR-95, we wanted to take a moment to express our appreciation to the Commission for its work so far and, in fact, offer an observation in significant part inspired by our appreciation for your work.

As we originally contemplated what would emerge from the Commission, we believed that the best approach for legislative deliberation would be one comprehensive report for the Legislature to consider embracing all antitrust reform proposals. For three reasons, we no longer believe this to be the case.

First, we did not, when we envisioned this Commission process, anticipate either the exceptional breadth and depth of the expertise that your staff has successfully assembled nor the brilliant organization of the Commission's research into the categories that are the subjects of your white papers. In reviewing these white papers, it is apparent to us that there are many consensus or near-consensus reform possibilities identified in those papers that could, in and of themselves, be the subject of proposed legislation for this next legislative session; proposals that are potentially ripe for legislative deliberation based on the collective white papers without requiring the Commission to opine on other topics where there is less consensus.

Second, while it was our aspiration that the Legislature be informed by all the Commission's proposals at one before considering reform proposals, two years have elapsed since the enactment of the ACR. The quality of the analysis obtained warrants this time frame. However, both legislative, judicial, and regulatory developments have not remained static during the last two years and the California Legislature, in our opinion, will not for another legislative session -- indeed, another year – entirely refrain from legislating in this area. Last year's AB 853 (Maienschein) establish pre-merger notice for grocery and pharmacy consolidation is an example. This movement may of course be accelerated depending upon the results of the upcoming federal election but it will be the case even if the current federal enforcers do not remain in their posts.

Third, when it comes to discrete issues such as, for example, whether California law should embrace single firm conduct (a Sherman Act Section 2 analog), whether there are kinds of conduct that should be presumptively anti-competitive in state law (see, e.g., the Single Firm Conduct report), whether harm to workers should expressly be made a part of California's antitrust analysis, whether the code should expressly state that California is not bound by federal precedent, or whether AB 853 should be built upon to embrace mergers generally, we believe the Commission need not propose actual statutory language to fulfill our hopes for invoking the Commission. Recommendations and explanatory analysis are sufficient to inform the legislative process and could be offered in ample time to meet next year's bill introduction deadlines.

We offer these observations humbled by the work of this Commission and its staff and reiterate that it is only because of the quality of your work that we were inspired, with deep respect, to offer to you these thoughts.

Sincerely,

Buffy Wicks

Buffy Wicks
Assemblymember, 14th District

Former Assemblymember Jordan Cunningham

AI And Pharmaceuticals Through an Antitrust Lens

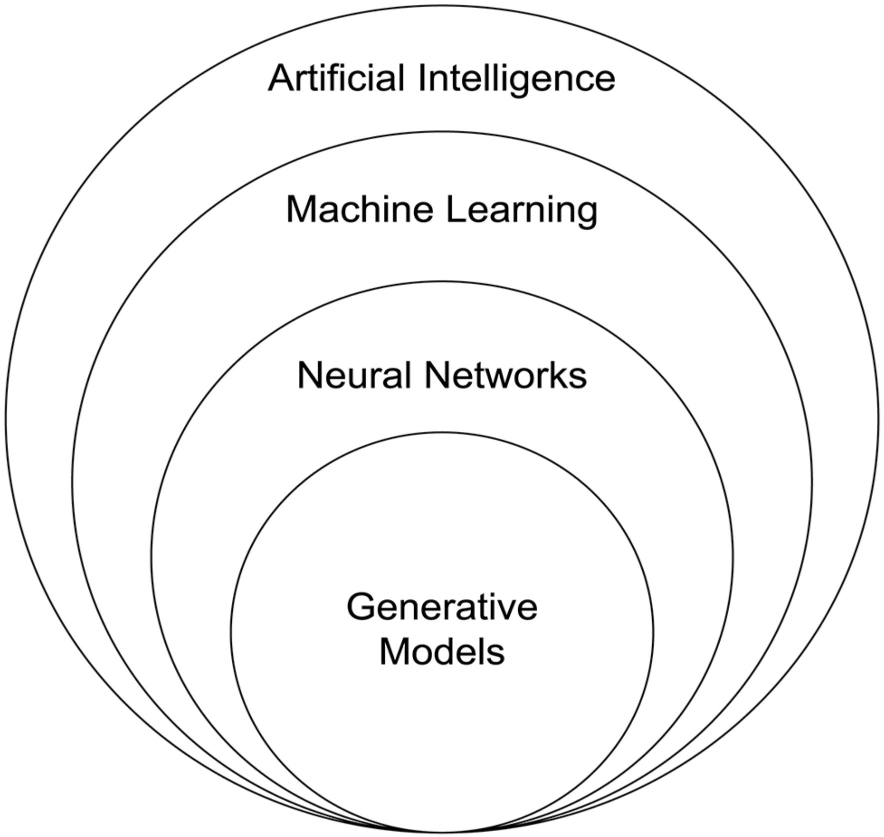
Professor Robin Feldman

Arthur J. Goldberg Distinguished Professor of Law
Albert Abramson ’54 Distinguished Professor of Law
Chair Director of the Center for Innovation (C4i)
Director of the AI, Law and Innovation Institute (AILII)

October 10, 2024

UC Law San Francisco

EX 60


Artificial Intelligence
Machine Learning
Neural Networks
Generative Models

Select Publications

Atomistic Antitrust, William & Mary L. Rev., with Mark Lemley

AI and Antitrust: The Algorithm Made Me Do It, CLA Competition J. (forthcoming), with Caroline Yuen

Artificial Intelligence in the Health Care Space: How We Can Trust What We Cannot Know, Stanford Law & Pol. Rev., with Kara Stein and Ehrik Aldana.

Artificial Intelligence: The Importance of Trust & Distrust, Green Bag 2d (peer reviewed).

IS AI THE END OF IP? (forthcoming, Cambridge).

Competition at the Dawn of Artificial Intelligence, in THE EFFECTS OF DIGITIZATION, GLOBALIZATION AND NATIONALISM (Edward Elgar) (peer reviewed), with Nick Thieme.

DRUGS, MONEY & SECRET HANDSHAKES: THE UNSTOPPABLE GROWTH OF PRESCRIPTION DRUG PRICES (Cambridge).

May Your Drug Price Be Evergreen, Oxford J. Law & Biosciences (peer reviewed).

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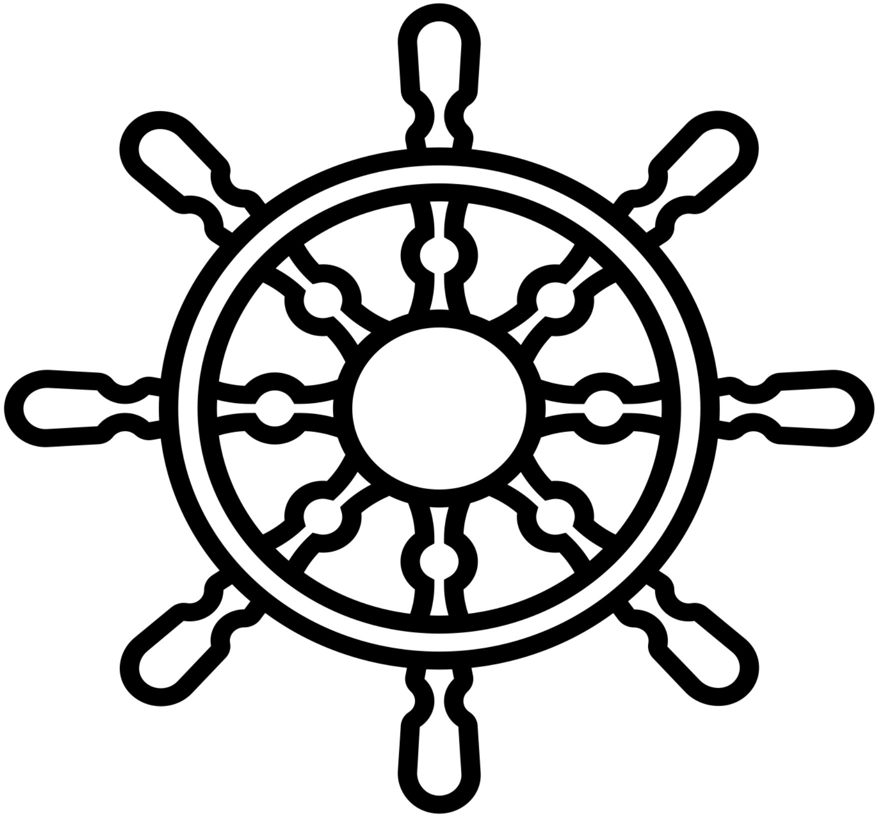
EX 63

Potential for Algorithmic Collusion in PBM Industry

Hub & Spoke Conspiracy



What are PBMs?

- **P**harmacy **B**enefit **M**anagers

- PBMs sit at the center of the pharmaceutical industry
  - Represent Health Plans in negotiating with pharma cos. for prices
  - Help health plans design formularies

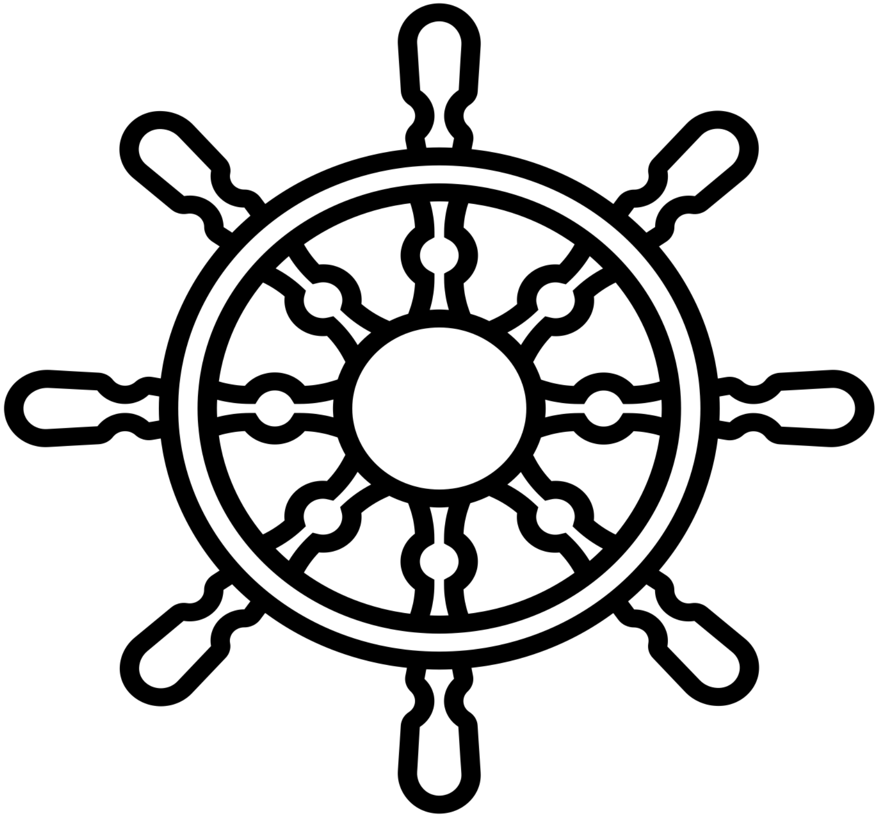
PBM Concentration and Information Asymmetry

- 3 PBMs cover 80% of all prescription drug sales in the U.S
- PBMs have access to massive amounts of
  - sensitive, nonpublic data;
  - can be used to identify trends and patterns in the industry.
- Info power ignited by advanced algorithm ability to
  - analyze increasingly large datasets;
  - draw increasingly accurate conclusions.

PBM Industry Context

- Unique informational asymmetry
- Heavily regulated
- Generally inelastic

Hub & Spoke Conspiracy



Concentration in the Pharmaceutical Industry

Pharmaceutical Companies: Horizontal Mergers

1989-1990
- First merger wave

1994-Early 2000s
- Second merger wave

2010-now
- Third merger wave

Industry After
First & Second Merger Waves

- Following First and Second Merger Waves
  - 60 large pharma companies merged into 10.
  - Sharp drop-off in new molecular entities, new drug applications, and R&D spending
  - 5-7% Estimated to be ”Killer Acquisitions”
- Only 4 companies produce more than half of all generic drugs (2017).
- Merged companies spent less on research than non-merged counterparts. [4]

Current Merger Wave

- Smaller pharma companies produce roughly 50% of new drugs (2018)
  - large pharma acquiring small firms to source innovation.
  - Big pharma players become gatekeeper to FDA approval.

- Innovation shifts to treatments for rare diseases
  - 34 of 59 new drugs were “orphan drugs” in 2018,
  - compared to 5 of 21 a decade earlier.
  - Staggering prices

- Thus, more new drugs are emerging, but helping fewer people, all at high prices.

Pipeline Divestiture Failure

- Pharmaceutical Pipeline Divestiture is a Common Federal Merger Remedy

- Our Study Found General Failure to Provide Competition:

  - Examined dozens of pipeline drugs divested for merger nod
  - At least 80% never entered market
  - We are chasing down the last stragglers to see if any entered market and achieved substantial market penetration.

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