MEMORANDUM 2025-30

Draft Language for Single Firm Conduct Provision and Public Comment

This Memorandum[1] presents analysis of public comments received on Memorandum 2025-21 regarding draft legislation to address single firm conduct (SFC) in California, as requested by the Commission at its April 3, 2025 meeting.[2] At that meeting, the Commission also directed the staff to (1) do no further work on Option Three pending public comment, (2) consider, factoring in public comments, developing an additional option between Options One and Two, and (3) propose mandatory, codified language based on the legislative findings and declarations. In addition to encouraging individuals on the Commission Antitrust study listserv to provide comment, staff reached out to the expert working groups for comment.

Memorandum 2025-21 presented three options for SFC to be added to the Cartwright Act, with the advantages and disadvantages of adopting each. In addition to the three base provisions, the staff proposed options for findings and declarations that would explain the statute's purpose and guide judicial interpretation. These findings and declaration could be included in any SFC option.

The staff requests Commission feedback on the three draft options and findings and declarations, including whether the Commission would like the staff to make revisions or conduct further analysis. The staff recommends the Commission direct the staff to discontinue work on draft Option Three as it only received favorable comments from the Single Firm Conduct Working Group.

This Memorandum was compiled with the assistance of the Commission's Antitrust Study consultant, Cheryl Johnson. The staff would also like to recognize the working group members for their important and foundational work and the Commission's externs from UC Law San Francisco for their background research.[3]

---

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.

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 posted after the meeting and/or without staff analysis.

2 Memorandum 2025-22, p. 4.

3 Florence Chang, Gregory Mabra, Ryan Partovi, and Kassandra Williams.

PUBLIC COMMENTS RECEIVED IN RESPONSE TO THE SINGLE FIRM CONDUCT DRAFT OPTIONS AND FINDINGS AND DECLARATIONS

The public comments received by the Commission after its April 3, 2025 meeting are listed below and appended to this memorandum.

Exhibits — ***Exhibit pages***

As with prior memoranda, a brief description of each commentator is below.

Tom Campbell (4/25/2025)

Professor Tom Campbell is the Doy and Dee Henley Distinguished Professor of Jurisprudence at the Fowler School of Law, Chapman University. Professor Campbell states:

> These views are my own. I have received support in preparing these comments, and for my earlier submissions to the Commission, from NetChoice, a trade association focused on promoting free expression and free enterprise, that includes Google, Amazon, and Meta.

According to its website, "NetChoice works to make the Internet safe for free enterprise and free expression." A list of association members can also be found on that website.

California Life Sciences (5/23/2025)

This comment was submitted by Sam Chung, the Vice President of State Government Relations at California Life Sciences (CLS). According to its website:

> [CLS] is the state's leading advocacy organization for the life sciences. CLS advances public policy that promotes innovation and improves access to transformative technologies. With offices in South San Francisco, San Diego, Sacramento, Los Angeles, and Washington DC, CLS has spent the past 30 years supporting organizations of all sizes, from early-stage innovators and startups to established leaders in the fields of biotechnology, pharmaceuticals, and medical technology. CLS' core mission is to advocate for a world class life sciences ecosystem in California, whose innovation leads to healthier lives around the world.

Civil Justice Association of California (5/23/2025)

This comment was submitted by Lucy Chinkezian, Senior Counsel at Civil Justice Association of California (CJAC). According to its website, "CJAC is the only statewide association dedicated solely to improving California's civil liability system, in the legislature, the regulatory arena, and the courts. Our membership base consists of businesses and associations from a broad cross-section of California industries."

California Chamber of Commerce (5/23/2025)

This comment was submitted by Eric Enson of Crowell & Moring LLP on behalf of the California Chamber of Commerce. According to its website "[t]he California Chamber of Commerce is the largest broad-based business advocate to government in California, working at the state and federal levels for policies to strengthen California."

Economic Security California Action with American Economic Liberties Project, California Nurses Association, Democracy Policy Network, End Poverty in California, *Institute for Local Self-Reliance, Liberation in a Generation, Rise Economy, TechEquity Action, United Food and Commercial Workers Western States Council (UFCW) (5/23/2025)*

This comment was submitted by Teri Olle, the Director of Economic Security California Action (ESCA) along with American Economic Liberties Project, California Nurses Association, Democracy Policy Network, End Poverty in California, Institute for Local Self-Reliance, Liberation in a Generation, Rise Economy, TechEquity Action, and United Food and Commercial Workers Western States Council (UFCW)

According to its website, ESCA is "working to make the California Dream a reality for everyone in this state…by fighting corporate concentration that stifles opportunity, harms workers, and disadvantages consumers."

Their submission is a report titled *Updating California Antitrust Law to Promote a Vibrant, Inclusive, and Competitive State Economy*, which makes recommendations on Antitrust Law reform, including Single Firm Conduct.

International Center for Law and Economics (5/23/2025)

This comment was submitted by Dirk Auer, the Director of Competition Policy at International Center for Law and Economics (ICLE). According to its website, ICLE is "A nonprofit, nonpartisan research center working with a roster of more than eighty academic affiliates and research centers from around the globe."

Motion Pictures Association (5/22/2025)

This comment was submitted by Dan Robbins, the Senior Vice President and Associate General Counsel of the Motion Picture Association (MPA). According to the comment, the MPA:

> is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. Its members are Amazon Studios LLC, Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment, Inc.; Universal City Studios, LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment, Inc. These companies and their affiliates are producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment sectors. These companies, plus some new entrants in the market such as Apple Studios, along with other key producers and distributors including companies like Lionsgate, You Tube TV and Legendary, comprise California's world-leading motion picture and television sector (a.k.a. Hollywood).

Single Firm Conduct Working Group (6/5/2025)

Aaron Edlin is the Richard W. Jennings Professor of Law and Professor of Economics at the University of California at Berkeley; Doug Melamed is a Visiting Fellow at Stanford

Law School and Scholar in Residence at the University of Southern California Gould School of Law; Sam Miller is Adjunct Professor at the University of California Law, San Francisco; Fiona Scott Morton is the Theodore Nierenberg Professor of Economics at the Yale School of Management; and Carl Shapiro is a Professor at Berkeley Haas and the Department of Economics at the University of California at Berkeley.

Comments on Option One: Basic SFC Provision

The staff is first summarizing public comments on the SFC option that uses language similar to the Sherman Act § 2.[4]

> **Section 16720.1 is added to the Business and Professions Code, to read:**
> It is unlawful for a person to monopolize or monopsonize,[5] to attempt to monopolize or monopsonize, to maintain a monopoly or monopsony, or to combine or conspire with another person to monopolize or monopsonize, in any part of trade or commerce.

CalChamber, CJAC, ICLE, and CLS all object to Option One. Their objections relate to the draft Legislative Findings and Declarations which seek to untether draft Option One from federal law. Since this concern is primarily directed at the draft Findings and Declarations, the staff will address them further in that section of the memorandum.

MPA also raises concerns about the draft Findings and Declarations that would seek to untether draft Option One from federal law. However, it appears that MPA favors draft Option One but suggests rather than having a more general finding and declaration rejecting federal law, the Commission instead adopt language rejecting specific federal cases that the Commission believes should be inapplicable in California. More specifically, the MPA states "we can achieve that through the legislation in the exact same way as we successfully rejected the Supreme Court's *Illinois Brick* decision on indirect purchasers in Cal. Bus. & Prof. Code § 16750(a)."[6] Again, because this concern is primarily related to the draft Findings and Declarations, the issue will be addressed later in the memorandum.

ESCA and their partners organizations' report on recommendations to reform antitrust law did not specifically speak to Option One. However, in a previous comment, they urged

---

[4] 15 U.S.C. § 2 states in part, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…." For a full discussion of this option see Memorandum 2025-21, pp. 2-3.

[5] The inclusion of "monopsonize," although commonly understood as encompassed within the broader term "monopolize," is intended to help address the historical underenforcement of buyer-side monopolies that impact labor, among others. See also Memoranda 2024-14, pp. 4-6; 2024-25, p. 17.

[6] California amended Bus. & Prof. Code § 16720 to allow indirect purchasers to seek damages for claims brought under state antitrust and unfair consumer protection statutes, rejecting *Illinois Brick Co. v. Illinois* (1977) 430 U.S. 720, which prohibited indirect purchasers from seeking damages under federal antitrust law.

the Commission to reject Option One.[7]

The Single Firm Conduct Working Group's public comments also object to Option 1, arguing it would "not be effective."[8] They referenced comments made in their earlier report:

> … while adding such language would be an important starting point, without further elucidation, using language that mimics the Sherman Act would come with a potentially severe disadvantage: California state courts might then believe that they should apply 130 years of federal jurisprudence to cases brought under California state law. In recent decades, that jurisprudence has substantially narrowed the scope of the Sherman Act, as described above, so relying on it could well rob California law of the power it needs to protect competition. This drawback is accentuated if California seeks to enact stronger antitrust laws to protect its citizens than has the United States.[9]

Would the Commission like the staff to make revisions or conduct further analysis on this option despite not having received comments expressly in support?

Comments on Option Two: Enhanced SFC Provision

This memorandum next presents comments on the draft Option Two, which expands on the basic SFC provision presented in Option One by combining it with a prohibition on "restraints of trade," a phrase used in both the Cartwright Act[10] and the Sherman Act § 1.[11]

> **Section 16720.1 is added to the Business and Professions Code, to read:**
> (a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events:
> (1) In restraint of trade, or to attempt to restrain the free exercise of competition or the freedom of trade or production; or,
> (2) To monopolize or monopsonize, to attempt to monopolize or monopsonize, to maintain a monopoly or monopsony, or to combine or conspire with another person to monopolize or monopsonize in any part of trade or commerce.
> (b) As used in this section, "restraint of trade" shall include, but not be limited to, any actions, measures, or acts included or cognizable under Section 16720, whether directed, caused, or performed by one or more persons.[12]

The most recent submission from ESCA and its partners did not specifically address

---

[7] Second Supplement to Memorandum 2025-21, EX 2-3.

[8] EX 110.

[9] Memorandum 2024-15, p. 13.

[10] Bus. & Prof. Code § 16721.5 establishes additional circumstances constituting an unlawful trust and unlawful restraint of trade.

[11] 15 U.S.C. § 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal…."

[12] For a full discussion of draft Option Two, see Memorandum 2025-21, pp. 3-5.

Option Two. However, in previously submitted public comments, ESCA and its partners urged the Commission to adopt and recommend to the Legislature the approach presented as Option Two and to reject Options One and Three.[13]

CalChamber and MPA raise concerns about including "restraint of trade" in Option Two.[14] CalChamber asserts that adding this phrase will bar all restraints of trade, not just unreasonable ones. Further, CalChamber is concerned that common business practices such exclusive contracts that can be pro-competitive would become per se illegal. The staff notes that Option Two does not declare any specific conduct as per se illegal, and instead would rely on established California precedent establishing the methods of evaluating the effects and legality of the restraint.[15] This would include the recognized forms of analysis, including rule of reason, per se, quick look and a "structured rule of reason" to evaluate the effect and legality of antitrust conduct. Further, "restraint of trade" is used in many other state statues pertaining to Single Firm Conduct.[16]

"Restraint of trade" is on its face broad and general, and both federal and California courts have substantial experience adjudicating this term, as explained by the Concerted Action Working Group:[17]

> The California Supreme Court has held that the text of the Cartwright Act should not be interpreted literally. The *Cipro* Court noted that "[t]hough the Cartwright Act is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed illegal."[18] Like the Sherman Act, courts interpret the Cartwright Act to prohibit only unreasonable restraints of trade.[19]

CLS also argues that including a "restraint of trade" provision in Option Two would chill collaborative agreements.[20] CLS states:

> In option two, CLRC staff proposes to expand upon option one by combining

---

[13] Second Supplement to Memorandum 2025-21, p. EX 2.

[14] EX 11, EX 101.

[15] Memorandum 2025-21, p. 4. "The addition of a prohibition on unilateral 'restraints of trade' is intended to capture the broad range of anticompetitive conduct that may not fall within the currently restricted scope of federal law but is more broadly interpreted in state law for multiple actors." *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 917-18.

[16] See Memorandum 2025-21, EX A.

[17] Memorandum 2024-34, p. 8.

[18] *In re Cipro Cases I & II* (2015) 61 Cal. 4th 116, 136 (citing *Morrison v. Viacom, Inc.* (1998) 66 Cal.App.4th 534, 540).

[19] *Ben-E-Lect v. Anthem Blue Cross Life & Health Ins. Co.* (2020) 51 Cal.App.5th 867, 872, "The Cartwright Act prohibits all combinations created for or carrying out unreasonable restrictions in trade or commerce." See *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*(2020) 55 Cal.App.5th 381, 398–99, "The distinction between per se and rule of reason analysis stems from the fact that the Cartwright Act, like its federal counterpart the Sherman Act, prohibits not all agreements restraining trade, but rather agreements that unreasonably restrain trade."

[20] EX 5.

> it with a prohibition on "restraints of trade" behavior by single firms. This is broadly defined to cover a wider range of collaborative agreements and activities, which in our industry is critical to the development and commercialization of novel and life-saving treatments. California's current antitrust law already outlaws any combinations or agreements which restrain trade or competition, or which fix or control prices. Enacting a single firm conduct provision in California that includes a new "restraint of trade" violation risks deterring collaborations within the dynamic life sciences ecosystem, in which larger companies routinely invest in smaller ones to bring their innovations to market. A novel single firm conduct provision that captures even procompetitive patent and licensing agreements under "restraints of trade" could seriously hamper biotechnology innovation in California and drive smaller firms into other states. This option by nature creates uncertainty as state courts have never ruled on what defines a behavior that retrains trade in a single-firm context.[21]

But as CLS notes, California's law already prohibits agreements in restraint of trade, and Option Two does not create a new law with respect to the collaborative agreements.

CJAC, MPA, and CLS question use of the "restraint of trade" language which is referenced in the Sherman and Cartwright Act in relation to prohibiting multi-party conduct and agreements. CJAC states:

> Draft language Option 2 erroneously conflates the monopolization and restraint of trade concepts, which creates confusion about standards for unilateral conduct and leads to business uncertainty. Further, broad "restraint of trade" language in the context of single-firm conduct without well-defined standards further compounds this uncertainty and could chill legitimate competitive actions.[22]

These parties suggest that the term "restraint of trade" necessarily infers and requires multi-firm conduct or is exclusively used to govern multi-firm conduct and hence can't be used with single firm conduct.[23] The staff considers this a misplaced concern. The "restraint of trade" language is intended to refer to a negative effect on competition.[24] Moreover, the U.S. Supreme Court has made it clear that restraints of trade can be performed by single firm actors as well as muti-companies.[25]

---

[21] EX 7.

[22] EX 10.

[23] EX 9, EX 101, EX 5.

[24] See e.g., *Am. Needle, Inc. v. Nat'l Football League* (2010) 560 U.S. 183, 186, "The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade."

[25] *Copperweld Corp. v. Indep. Tube Corp*. (1984) 467 U.S. 752, 775 "an unreasonable restraint of trade may be affected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints affected by a contract, combination, or conspiracy—it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may

Public comments from the Single Firm Conduct Working Group raise concerns about the broadness of the phrase "restraint of trade," stating:

> Option Two, "Enhanced SFC Provision," expands on Option One by combining it with a prohibition on "restraints of trade." We agree with staff that this expansion "defuses the Sherman Act §2's singular focus on monopolistic behavior, with its high market thresholds and its decades of narrow interpretations and applications." However, the term "restraint of trade" is extremely broad and vague.
>
> Option Two gives the courts no useful guidance on how to distinguish restraints that promote competition from those than suppress or even destroy competition. This is a major missed opportunity. We also are concerned that the vagueness of Option Two would create harmful legal uncertainty.[26]

Cal Chamber's comment seems to suggest that clarifying the statute to indicate it refers to "unreasonable restraint of trade" may help to mitigate its concerns.[27] CalChamber cites two other state statutes on Single Firm Conduct that are listed in the appendix to Memorandum 2025-21:

> We note that state antitrust laws at times are explicit about restraint of trade language. For example, as detailed in the state law summary provided as Exhibit A to the Staff Memo, statutory language in Massachusetts includes, "It is the purpose of this chapter to encourage free and open competition in the interests of the general welfare and economy by prohibiting unreasonable restraints of trade and monopolistic practices in the commonwealth." Similarly, that in Rhode Island includes, "The purposes of this chapter are … (2) To promote the unhampered growth of commerce and industry throughout the state by prohibiting unreasonable restraints of trade and monopolistic practices, inasmuch as these have the effect of hampering, preventing, or decreasing competition."[28]

The staff recommends that the Commission consider including adding similar language to subdivision (b) of Option Two address these concerns along the lines of "This section is intended to encourage free and open competition by prohibiting unreasonable restraints of trade."

Would the Commission like the staff to provide additional analysis of the comments on Option Two? Does the Commission want to adopt Option Two with or without changes to clarify its intent?

---

be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability." *Am. Needle, Inc. v. Nat'l Football League* (2010) 560 U.S. 183, 186.

[26] EX 110.

[27] EX 11.

[28] Memorandum 2025-21, Exhibit A.

Comments on Option Three: "Exclusionary Conduct" Provision

Draft Option Three represents a clean break from existing federal SFC law and its decades of restrictive jurisprudence. While Options One and Two rely heavily on existing antitrust terms and principles to analyze restraints of trade and monopolistic behavior, Option Three uses new terminology and a different analytical framework.

This option draws on the "exclusionary conduct" provision recommended by the SFC Working Group Report.[29] This formulation defines unlawful SFC in relation to its harm to trading partners and balanced against the benefits of the conduct:

> **Section 16720.1 is added to the Business and Professions Code, to read:**
> (a) It shall be unlawful for one or more persons to engage in anticompetitive exclusionary conduct that affects any part of the trade or commerce within the State.
> (b) Conduct, whether by one or multiple actors, is deemed to be anticompetitive exclusionary conduct, if the conduct tends to:
> (1) Diminish or create a meaningful risk of diminishing the competitive constraints imposed by the defendant's rivals and thereby increase or create a meaningful risk of increasing the defendant's market power, and
> (2) Does not provide sufficient benefits to prevent the defendant's trading partners from being harmed by that increased market power.
> (c) "Trading partners" are parties with which the defendant deals, either as a customer or as a supplier.[30]

The Single Firm Conduct Working Group submitted a comment[31] clarifying some points in the Option Three formula, and graciously offered additional work if desired:

> Our January 25, 2024, report recommended this approach and provided example statutory language. This approach has the benefit of being far less ambiguous than Options One and Two while incorporating into California Law sound, widely accepted economic and legal principles.
>
> Under Option Three, single-firm conduct is deemed to be anticompetitive exclusionary conduct if it meets two conditions. First, it must diminish the competitive constraints imposed by the defendant's rivals. Second, it must harm trading partners, which typically but not always are the defendant's customers. Put simply, anticompetitive exclusionary conduct weakens rivals and harms customers.
>
> The staff memo states: "While this new framework is attractive as a fresh alternative, the staff suggests this proposal would benefit from additional

---

[29] Memorandum 2024-15, p. 16. Where applicable, the staff distinguishes between the language presented in this memo as Option Three and language included in the Single Firm Conduct Working Report. and a version of this exclusionary conduct formula that can also be found in CALERA, Sen. No. 130, 119th Cong. 1st Sess. § 10 (2025), but is not included in Option Three.

[30] For a fuller discussion of draft Option Three, see Memorandum 2025-21, pp. 5-9.

[31] EX 110.

clarifications as to its operation and interpretation." We now address the specific points about Option Three made in the staff memo.

- Regarding harm to trading partners, the staff memo states that "it is unclear whose benefits are being measured and to which trading partners the harm must be negated in balancing the increased market power." This question is easy to answer: in the typical case where the plaintiff alleges that the defendant's customers are harmed, the defendant can prevail by showing that the benefits to these same customers are large enough that they are not in fact harmed.
- Regarding the term "trading partners," the staff memo states that "existing California antitrust law protects all participants in the trading chain whether directly or indirectly. The staff suggests clarifying the term 'trading partner' to avoid confusion." We welcome such a clarification. Logically, basing liability on showing harm to direct customers does not rule out cases brought by indirect customers. Indeed, when direct customers are harmed, it is reasonable to presume that indirect customers will be harmed as well.
- Regarding the burden of proof, the staff memo states: "The second prong of Option 3 requires a finding that any benefits do not prevent the defendant's trading partners from being harmed, leaving unclear who has the burden on this prong and whether it is intended to alter the rule of reason standard of weighing the benefits and harms." We find this remark baffling, since the staff memo then cites the following passage from our report (p. 18): "The burden is on the defendant to prove that any procompetitive justification for the challenged conduct is nonpretextual and does not weaken competitive discipline more than reasonably necessary to accomplish the procompetitive goal." Put simply, the defendant bears the burden of establishing any benefits of its challenged conduct. In other words, if the plaintiff establishes. the first prong, the burden then shifts to the defendant for the second prong.
- Regarding how one distinguishes pro-competitive conduct from anticompetitive exclusionary conduct, the staff report notes that our report offered a number of supplemental provisions intended to guide the courts. We agree with staff that these supplemental provisions could be reexamined as part of preparing overall recommended language for the legislature. We would like to stress that Option Three provides far more guidance to the courts about what conduct is prohibited than do Options One and Two.

If the Commission is seriously interested in proposing something along the lines of Option Three to the legislature, we would be happy to provide "additional clarifications as to its operation and interpretation," including adjustments to the example statutory language from our report.[32]

The Single Firm Conduct Working Group has made invaluable recommendations to improve and distinguish California antitrust law from federal law, and its recommendations have guided many of the Findings and Declarations options set forth in this memorandum.

---

[32] EX 111.

Option Three represents a more substantial and innovative departure from federal law, which is both its virtue and drawback. Given the full range of challenges before the Commission in this study, the Commission should decide whether it wants to pursue a more unique and potentially clearer formulation at this point when the unique terms —like any departure from federal law—are likely to continue to elicit objections of uncertainty and confusion. Should the Commission wish to further explore this option, the Single Firm Conduct Working Group has graciously offered its assistance.

Below is a summary of the comments objecting to Option Three that assert that the new approach of Option Three will cause uncertainty and litigation:

CalChamber

> Option Three is similarly broad and covers common business conduct that is considered pro-competitive. The Staff Memo notes that Option Three uses new terminology and a new analytical framework. It is, therefore, subject to uncertainty regarding how it will be interpreted by courts. Uncertainty itself increases costs for business and is, therefore, harmful to California businesses, consumers, and workers.[33]

CLS

> This option would upend the traditional framework for assessing anticompetitive single firm conduct and cause widespread uncertainty among businesses regarding what conduct is legal. This will likely lead to increased litigation by competitors hoping to gain a competitive edge by exploiting the ambiguity of the new language and its interpretation.[34]

CJAC

> Option 3 poses even greater challenges for businesses. The vague "meaningful risk" standard creates excessive uncertainty that could chill procompetitive conduct. Even the working group has acknowledged the difficulty in distinguishing between anticompetitive exclusion and lawful competition on the merits. Further, the balancing test between competitive constraints and benefits lacks clear standards for how to weigh benefits against harms to competition, and whether and how efficiency benefits should be counted. The focus on "trading partners" rather than broader competitive effects risks protecting competitors at the expense of consumers.[35]

ESCA and its partners, who support antitrust reforms, express other cautions:

> For different reasons, we recommend rejecting Option Three. According to

[33] EX 17.
[34] EX 7.
[35] EX 10.

staff, "[w]hile Options One and Two rely heavily on using existing underlying antitrust terms and principles governing the analysis of restraints of trade and monopolistic behavior, Option Three uses new terminology and a different analytical framework" drawn from one of the expert reports. In our opposition to this Option, we are in apparent agreement with some business public commentators. ("Some business groups have commented that the first prong's focus on harm to competitors will incentivize litigation by disappointed rivals, and the protection of competitors may detract from the goal of protecting consumer welfare.")

As the staff memorandum notes, while the Option would offer a "clean break" from current law, it would inject different—and not necessarily better—uncertainty as to how to measure the benefits or burdens of certain challenged conduct, what burdens of proof to apply in certain cases, and to what extent existing antitrust doctrine, such as the rule of reason analytical framework, applies.

For instance, covenants are generally prohibited when they restrict anyone from "engaging in a lawful profession." If plaintiffs were forced to instead use the procedure set out in Option Three, they not only would have to demonstrate that they are prohibited from engaging in lawful competition, but also that the covenant itself reduced the competitive incentives of their counterparty's rivals and that the covenant does not create offsetting benefits to any number of possible trading partners. These requirements are unnecessarily burdensome, would balloon the cost of every litigation by millions of dollars, and could make even routine violations take years to litigate. Indeed, such a procedure would replicate the inequities that currently plague federal antitrust law. The procedure would deprive California law of its existing clarity while denying access to justice to Californians who have neither the time nor the wealth to engage in prolonged litigation. Instead, California would be better served by codifying many of its existing standards into a comprehensive single-firm conduct statute and providing judges and the Office of the Attorney General with the tools to craft efficient procedures to address novel methods of competition. That is what Option Two proposes.[36]

Would the Commission like the staff to continue or discontinue to work on Option Three, given the majority of the comments from a broad range of perspectives object to this option?

Comments on Findings and Declarations

In Memorandum 2025-21, the staff proposed draft findings and declarations drawn from the legislative findings of this study's enabling legislation,[37] other states' antitrust

[36] Memorandum 2025-21 (footnotes omitted).

[37] 2022 Cal. Stat. res. ch. 147 (ACR 95). For a full discussion of the draft Findings and Declarations see Memorandum 2025-21, pp. 9-14.

laws,[38] and from the working group reports.[39] All of these proposals can be used individually or in combination with any SFC option.

This section analyzes public comments on the draft findings and declarations and proposes changes based on Commission requests at its April 3, 2025 meeting[40] that staff codify some of the findings and declarations and make them mandatory.

CalChamber, MPA, CLS, CJAC, and ICLE all raised significant concerns about any draft provisions untethering the proposed options from federal law and advised the Commission against adopting them.[41]

For example, CalChamber raises concerns that untethering "is likely to outlaw common pricing and distribution practices that are generally viewed as good for competition, consumers, and workers."[42] Regarding predatory pricing:

> Without requiring a showing that pricing is below some measure of cost or that the defendant can recoup its losses, a predatory pricing claim loses its economic foundations. Without these foundations, ***all price cutting***, especially to relatively low prices, would be at risk under a new SFC provision.[43] (emphasis in original)

Regarding loyalty programs:

> Because loyalty programs encourage consumers to purchase products from one provider over that provider's rival(s), they can reduce the demand for a rival's offerings, and can diminish a rival's profitability, they could give rise to lawsuits and adverse rulings under the proposed SFC provisions. One consequence would be the chilling of incentives to offer such programs even though they are popular with consumers, lower their prices, and are generally pro-competitive.[44]

MPA argues that untethering California antitrust law from following federal law:

> …would create enormous uncertainty by creating a whole new standard and by indiscriminately rejecting all the single firm law created since 1890. This includes

---

[38] Approximately 20 states have legislative declarations of purpose. See e.g., Colo. Rev. Stat. § 6-4-102, which states in part:

> (1) The general assembly finds and declares that (a) Competition is fundamental to (I) The free market system; and (II) a healthy marketplace that protects workers and consumers; and (b) The unrestrained and fair interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality commodities and services, and the greatest material progress while at the same time providing an environment that is conducive to the preservation of our democratic, political, and social institutions and to the protection of consumers.

See also Memorandum 2025-21, Exhibit A.

[39] Memoranda 2024-15, pp. 14-15, 2024-33, p. 8.

[40] Memorandum 2025-22, p. 4.

[41] EX 11, EX 101, EX 5, EX 9, EX 81.

[42] EX 19.

[43] EX 20.

[44] EX 22.

> key tools for evaluating risk and real harm like relevant market and market share. It also includes the 135 years of guidance on what conduct is anticompetitive.[45]

These comments arguing that any departure from federal law will cause enormous uncertainty and outlaw procompetitive conduct are not borne out by the long history of California's adoption of antitrust provisions distinct from and often stricter than federal law. Also "untethering" California law is not a wholesale rejection of federal jurisprudence; the intent is to allow California courts the flexibility to adopt the federal caselaw it finds persuasive and consistent with California law and interests.

In contrast, ESCA and its partners urged the Commission to "[a]dopt and recommend to the Legislature the Enhanced Purpose Statement, Statement Rejecting Federal Principles, and Statement Rejecting Federal Precedents."[46]

The Commission should consider whether to adopt one or more of the proposed revised draft options for Legislative Findings and Declarations/Codified Intent Language with or without changes.

REVISED STAFF DRAFT FINDINGS AND DECLARATIONS/CODIFIED INTENT LANGUAGE

Basic purpose statement

A succinct purpose provision could simply state that California's antitrust laws protect free competition for all marketplace participants, including consumers and workers. For example:

> The Legislature finds and declares that the promotion and protection of free and fair competition is fundamental to a healthy marketplace that protects all trade participants, including workers and consumers, and to an environment that is conducive to the preservation of our democratic, political, and social institutions.[47]

The Commission did not receive any comments specific to this language. The Commission could decide to adopt this simple statement of legislative intent, with or without changes. If the Commission chooses the "enhanced purpose statement" this basic purpose statement is not needed. **Does the Commission want to adopt this basic purpose statement with or without changes?**

---

[45] EX 103.
[46] First Supplement to Memorandum 2025-21, EX 2, 4.
[47] *In re Cipro Cases I & II* (2015) 61 Cal. 4th 116, 136.

Enhanced purpose statement

A more detailed provision modeled on ACR 95,[48] the proposed New York Twenty-First Century Anti-Trust Act,[49] Competition and Antitrust Law Enforcement Reform Act of 2025 (CALERA),[50] and the working group reports[51] could be used to describe the harms of unrestrained anticompetitive conduct and the need for reform from an economic and legal standpoint. For example:

> The Legislature hereby finds and declares all of the following:
>
> (a) That protecting competition includes protecting competition between businesses when they compete for workers and prohibiting anticompetitive business practices that impede workers' freedom to choose employment.
>
> (b) There is widespread concern about the growing consolidation in our marketplaces and that the accumulation of market power by a few dominant corporations harms our marketplace opportunities, undermines the power of workers, consumers, and small businesses, and threatens our democratic values.
>
> (c) Effective enforcement against anticompetitive activity has been limited and impeded by the federal courts by applying narrow definitions of monopolies and monopolization, limiting the scope of unilateral conduct, making it excessively difficult to challenge unfair competition, and unreasonably heightening the standards that plaintiffs and government enforcers must overcome to establish violations of those laws.
>
> (d) A goal of California's antitrust laws is ~~which includes~~ to ensure open and fair labor markets.[52]

In their March 28, 2025 letter, ESCA and its partners urged the Commission to "[a]dopt and recommend to the Legislature the Enhanced Purpose Statement, Statement Rejecting Federal Principles, and Statement Rejecting Federal Precedents."[53]

Does the Commission want to adopt this enhanced purpose statement with or without changes?

Statement reflecting California's laws, preferences, and priorities

As discussed in Memorandum 2025-21, the Consumer Welfare Standard Working Group Report identified two unfounded principles based on Chicago School[54] narratives

[48] 2022 Cal. Stat. res. ch. 147 (ACR 95).

[49] S335 (New York, Gianaris, 2025-26), § 2.

[50] Sen. No. 130, 119th Cong. 1st Sess. § 2.

[51] Memoranda 2024-15, pp. 14-18, 2024-33, p. 8.

[52] The revision to subdivision (d) is intended to be technical and clarifying.

[53] First Supplement to Memorandum 2025-21, EX 2, 4.

[54] The "Chicago School" of antitrust policy was popularized in the 1970s and emphasized the risks of over intervention. Instead, it argued for a narrowly tailored enforcement standard focused on economic metrics such as

that have limited the strength of federal antitrust laws.[55] Specifically, the report cites the false positives framework[56] and the presumption that "vertical arrangements and unilateral conduct are unlikely to harm competition"[57] as having "eroded the capacity of the antitrust enterprise to protect competition."[58] While neither are firmly established in federal law and have been widely criticized by academics and practitioners, the Commission can counter their negative effect by clarifying that California law seeks to maximize deterrence of antitrust violations.[59]

Below are potential revisions based on Commissioner feedback at its April 3, 2025 meeting to codify and mandate the interpretation of California's antitrust laws. The staff clarified subdivision (d) and inserted footnotes to indicate the California caselaw that is the basis for the language, which allays concerns raised by commentators that the language is new. The footnotes are not intended to be included in draft language submitted to the Legislature but may form the basis for Commission Comments if the Commission chooses to adopt the language. Subdivision (e) is revised to address concerns about the risks of untethering California law from federal law by clarifying that courts may look to federal precedent to the extent they find it as persuasive and consistent with California law and interests.

> ~~The Legislature hereby finds and declares all of the following:~~
>
> (a) Courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors <u>maximizing deterrence of antitrust violations.</u>[60]

---

price, output, and efficiency. As a result, decades of rather passive antitrust enforcement are associated with this policy named after a group of scholars from the University of Chicago including Robert Bork, Richard Posner and Milton Friedman. Francine McKenna, *What Made the Chicago School so Influential in Antitrust Policy?* Chicago Booth Review (Aug. 7, 2023).

[55] Memorandum 2025-21, pp. 11-12.

[56] Memorandum 2024-33, pp. 6-7. The false positives framework "rests on the premise that over-aggressive antitrust enforcement can chill competition, because 'antitrust courts are likely to make unusually serious mistakes' while the benefits of antitrust enforcement are less clear. This notion has led to the idea that antitrust courts should be more concerned about the risk of false positives (the risk of condemning conduct that increases welfare) than the risk of false negatives (the risk of permitting anticompetitive conduct)."

[57] Memorandum 2024-33, p. 7. Horizontal arrangements are agreements among, or the integration of, rivals. Vertical arrangements are agreements among, or the integration of, market participants on adjacent levels along the supply chain. Unilateral conduct refers to actions of a market participant arising from independent business decisions.

[58] Memorandum 2024-33, p. 7. These principles are criticized and addressed in the Federal Trade Commission and Department of Justice 2023 Merger Guidelines (December 18, 2023), in which the guidance notes that competition concerns can also arise in traditional vertical relationships (p.13) and unilateral conduct can harm competition (p. 37).

[59] Memorandum 2025-21, p. 11-12.

[60] See Memorandum 2025-15, pp. 8-9 citing *Clayworth v Pfizer, Inc*. (2010) 49 Cal. 4th 758, as providing support for the proposition that the Cartwright Act favors over-deterrence to under-deterrence. See also, Bus. & Prof. Code §16750(a) in which California rejected the U.S. Supreme Court decision in *Illinois Brick Co. v. Illinois* (1977) 431 U.S. 720, prohibiting injured indirect purchasers from suing for relief under federal antitrust law.

(b) Actions that unreasonably restrain trade or create or attempt to create a monopoly or monopsony, can be harmful and anticompetitive whether done by unilateral action or multiple parties and both should be subject to antitrust scrutiny.

(c) The 2023 Merger Guidelines issued by the U.S. Department of Justice and Federal Trade Commission[61] recognize that unilateral action and multiparty actions, horizontal and vertical relationships, and various forms of corporate entities can interfere with free and fair competition, and courts shall harmonize their rulings with the Guidelines ~~and the guidance of the Guidelines should be followed whenever possible~~ when construing this section to the extent consistent with California law and interests.

(d) The California Supreme Court has determined that the Cartwright Act is "broader in ~~scope~~ range and deeper in reach"[62] than the federal Sherman Act~~;~~ and that the Cartwright Act is not modeled on the Sherman Act.[63] Further California courts have recognized that the Cartwright Act departs from the Sherman Act in many respects, including, but not limited to, inclusion of indirect purchaser recovery,[64] use of a proximate cause test for Cartwright Act standing,[65] recognition of broader harms and per se conduct,[66] lower actionable market shares, structured rule of reason

---

In addition, the Enforcement and Exemptions Working Group Report stated:

> Moreover, because the overriding interest of the legislature was in deterrence of anticompetitive conduct, in close cases overdeterrence may be preferable to underdeterrence as an outcome. (citing *Clayworth*). Memorandum 2024-35, p. 5.

[61] 2023 Merger Guidelines Federal Trade Commission and Department of Justice (December 18, 2023).

[62] *California ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147.

[63] *Aryeh v. Canon Business Sols., Inc.* (2013) 55 Cal.4th 1185, 1195. "Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was not modeled on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century." (citing *California ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147); *see also Cianci v. Superior Court* (1985) 40 Cal.3d 903, 920 ("[W]e have observed that the Cartwright act is broader in range and deeper in reach than the Sherman Act."); Memorandum 2024-34, p. 3.

[64] See *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 763, "In 1978, in direct response to *Illinois Brick*, the Legislature amended the state's Cartwright Act (Bus. & Prof. Code, § 16700 et seq.) to provide that unlike federal law, state law permits indirect purchasers as well as direct purchasers to sue (§ 16750(a))." Memorandum 2024-35, p. 9.

[65] The Enforcement and Exemptions Working Group wrote:

> Instead, antitrust standing under the Cartwright Act merely requires a plaintiff show that an antitrust violation was the proximate cause of its injuries.[citing *Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723]. The "antitrust injury" must be the type of injury the antitrust laws were intended to prevent and within the area of the economy that is endangered by a breakdown of competitive conditions [citing Id. at 807]. But under the Cartwright Act, "[t]he alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury" [citing *Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23]. This standard is broader than the AGC test and federal antitrust standing would allow [citations omitted]. Memorandum 2024-35, p. 10.

[66] The Exemptions and Enforcement Working Group wrote:

> In 2015 the California Supreme Court considered the two liability standards that generally prevail under federal law, per se and "rule of reason," and further identified a third approach which some federal courts

analysis,[67] and differing burdens of proof.

(e) ~~Courts interpreting this law shall not be bound by federal precedent interpreting the Sherman Act and shall make their own determinations of whether challenged conduct by a single firm violates California law and is in keeping with the language and spirit of that law~~. <u>Federal law shall not be binding on California courts, but courts may consider federal law persuasive authority to the extent</u> they find it persuasive and <u>consistent with California law</u> and interests.

The suggested revision to subdivision (b) is consistent with the staff recommendation to clarify that "restraint of trade" refers to "unreasonable" restraint of trade as stated in Option Two.

Professor Tom Campbell expressed that the language in subdivision (a) "that California favors the risk of over-enforcement of antitrust laws over the risk of under-enforcement" misstates the California Supreme Court. That section has been revised to use the exact language in the California Supreme Court opinion.[68]

Does the Commission want the staff to conduct further analysis of these provisions? Does the Commission wish to adopt this statement reflecting California law's preferences and priorities with or without changes?

Statement rejecting specific elements of federal precedents

The statement below nullifies three of the most misused or criticized federal decisions, *Brooke,*[69] *Trinko,*[70] and *Amex*[71] and prohibits reliance on three additional approaches

---

have denominated "quick look" analysis lying in between the two. It embraced its own third, middle ground approach as the most appropriate one for courts to employ on the pharmaceutical settlements before it and described a sliding-scale judicial approach to liability determination that some academics have also discussed as a "structured rule of reason." [citing *In re Cipro Cases I & II* (2015) 61 Cal. 4th 116.] The Court implied that this standard could be applied appropriately to other areas of anticompetitive conduct as well, although it did not go further. Memorandum 2024-35, p. 7.

[67] Id.

[68] *Clayworth v Pfizer, Inc.* (2010) 49 Cal. 4th 758, 783 "The Legislature's adoption of a double damages remedy [citation omitted], later amended to treble damages (§ 16750, subd. (a)), demonstrates as much: double and treble damages may overcompensate injured plaintiffs, but they do so in order to maximize deterrence."

[69] *Brooke Group v. Brown & Williamson Tobacco* (1993) 509 U.S. 209. This case requires a plaintiff, in order to prove predatory pricing, to show that the defendant's prices are below cost and that the market structure is such that the defendant has a reasonable probability of recouping its losses from below-cost sales once rivals are driven from the market. However, the federal predatory pricing rule is poorly suited to products and services with very low or zero marginal costs, such as with the present digital products, as it immunizes virtually all prices from predation claims. See Memorandum 2024-15, p. 6.

[70] *Verizon Communications v. Law Offices of Curtis V. Trinko* (2004) 540 U.S. 398. This case is criticized because it determined that a monopolist's selective refusal to deal with another firm, even a competitor, violates antitrust law only in unusual circumstances. See Memorandum 2024-15, p. 7.

[71] *Ohio v. American Express ("Amex")* (2018) 138 S. Ct. 2274, held that a credit card network platform is a single market with a merchant services side and a consumer cardholder side, and both sides must be analyzed for anticompetitive effects sufficient to establish a violation. This created a confusing precedent.

limiting antitrust enforcement: a requirement that rivals must be as efficient as the defendant,[72] that any specific Sherman Act § 2 market thresholds need not be met, or that a relevant market needs to be defined and proven.[73] These disavowals are consistent with California case law.[74]

> The Legislature hereby finds and declares that although the following may constitute evidence of a violation of this section, liability shall not require a finding that:
>
> (a) The unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct;
> (b) The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons;
> (c) The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or service;
> (d) The defendant's conduct makes no economic sense apart from its tendency to harm competition;
> (e) The conduct's risk of harming competition or actual harm must be proven with quantitative evidence;
> (f) In cases where a defendant's business is a multi-sided platform, that the defendant's conduct presents harm to competition on more than one side of the multi-sided platform, or that the harm to competition on one side of the multi-sided platform outweighs any benefits to competition on any other side(s) of the multi-sided platform;
> (g) In a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue; [75]
> (h) The rivals whose ability to compete has been reduced or harmed are as

---

[72] See *Cascade Health Solutions v. PeaceHealth* (9th Cir. 2008) 515 F.3d 883, 906; *Ortho Diagnostic Sys., Inc. v. Abbott Labs, Inc.*, (SDNY 1996) 920 F. Supp. 455, 467, 469-70.

[73] Memorandum 2024-15, p. 18:

> (h) A single firm may violate section (a) [It is unlawful for one or more persons to engage in anticompetitive exclusionary conduct that affects any part of the trade or commerce within the State. Furthermore, any violation of Section 2 of the Sherman Act shall be deemed a violation of this Act.] regardless of whether it has or may achieve a market share above a threshold recognized under Section 2 of the Sherman Act. Furthermore, this statute does not require the plaintiff to establish any threshold of market power, as the focus of concern is on increases in market power.

[74] *Fisherman's Wharf Bay Cruise v. Superior Ct.* (2003) 114 Cal.App.4th 309, 326. In a predatory pricing case under the Unfair Competition Law, the court held that a 20% market foreclosure was enough to pursue a cause of action against a competitor. Plaintiffs need not rely on market share evidence to prove market effects and market power and can rely on direct evidence. See e.g., *Ohio v. Am. Express Co.* (2018) 138 S. Ct. 2274, 2284 ("The plaintiffs can make this showing directly or indirectly.").

[75] The Single Firm Conduct Working Group stated:

> California courts have ruled that to prevail under Section 17043, a plaintiff need not prove the defendant had the ability to recoup its losses, as required under federal law. [citing *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 454-55]. Memorandum 2024-15, p. 12.

efficient, or nearly as efficient, as the defendant's; or,

(i) A single firm or person has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power. <u>and need not define or prove a "relevant market" where there is direct evidence of market effects or power</u>.[76]

Other Public Comment

This section summarizes other comments the Commission received that do not readily fall under any previous category.

ECSA and its partners suggest role for California Attorney General

In their most recent submission, ESCA and its partners propose yet another approach to providing guidance on California antitrust law reform by suggesting that the California Attorney General be granted rulemaking authority:

> California's Attorney General currently lacks the authority to independently update and refine antitrust enforcement tools through an administrative rulemaking process, leaving critical updates to the law to one-off enforcement precedents and the whims of generalist judges. This constraint hampers timely and effective responses to evolving market dynamics and novel challenges, leaving the state's economy, consumers, and workers vulnerable to harmful anticompetitive practices in the meantime.
>
> Like the FTC, the state Attorney General should be granted rulemaking authority to enumerate unlawful conduct through a formal notice and comment process, subject to overarching statutory authority categories of illegal conduct, which may include unfair methods of competition, unfair and deceptive acts or practices, restraints of trade, illegal monopolization, or misuse (or abuse) of market power. That rulemaking authority should therefore include the Attorney General's ability to issue rules pursuant to California's Unfair Competition Law and Unfair Practices Act.
>
> Enumerating in the law or regulation specific types of conduct that would be prohibited by clear standards is beneficial to the extent it provides notice to market participants of the meaning of otherwise unclear terms in the statute. The more clarity the statute itself provides, the less risk is created by leaving broad discretion to courts to interpret its terms in inconsistent ways. Nonetheless, evolving markets will demand further clarity, and for that reason, the Office of the Attorney General should have rulemaking authority to elaborate on the statutory language.
>
> Under this structure, the Office of the Attorney General (or another expert administrative body) would be permitted to study business conduct, determine its competitive effects, and promulgate rules that provide clarity where it is lacking, in service of increased compliance with state antitrust laws. In doing so, the Attorney

---

[76] This amendment is intended to conform the language in (i) with recommendations from the Single Firm Conduct Working Group, Memorandum 2024-15, p. 18.

General should receive public comment, consider the major harms and potential benefits of certain conduct addressed by the rulemaking, and clarify its enforcement priorities. Doing so will enhance compliance, deter non-compliance, and limit unpredictable and costly delegation of discretion to generalist judges—all while making antitrust enforcement more responsive to California's dynamic economic environment.

Without rulemaking authority, generalist judges alone must design the antitrust rules of the road. These judges typically lack formal economics or antitrust training. Recent years have seen renewed efforts to encourage judicial appointments from a broader range of professional backgrounds, but even so, only a small number of nominees have labor or economics backgrounds. Prior to her appointment as FTC Chair under the Biden Administration, Lina Khan wrote, "antitrust adjudication has become highly reliant on technical evidence and complex economic analysis, but generalist judges often lack the expertise to independently assess the arguments before them

***

Rulemaking can also mitigate barriers to both public and private enforcement of California antitrust and unfair competition laws. It can provide pathways for small businesses to address monopolizing or unfair conduct without requiring them or their lawyers to raise millions of dollars for a protracted court battle; workers to report conduct without taking a publicly oppositional stand against their employer and consumers to redress harms that have a large collective impact but too small of an individual impact to rationally warrant legal action.[77]

However, this proposal would benefit from consultation with the California Attorney General on how such a proposal would be drafted identification of resources as well needed to undertake this complex rulemaking process. Additionally, the time to study, draft and enact regulations could take several years. At this time, the Commission does not know the position of the Attorney General on such an approach, and it is not yet known which portions of the proposed antitrust laws the Commission believes need further clarification.

Would the Commission like the staff to further analyze and explore granting the Attorney General rulemaking authority?

Federal Preemption

MPA and CLS raised concerns about possible federal preemption of state antitrust law by the federal patent law[78] and the federal Copyright Act of 1976.[79] MPA correctly states that state antitrust laws are generally not preempted by federal antitrust law. At the same time, MPA refers the Commission to comments from the Copyright Alliance that were

---

[77] EX 42.
[78] 35 U.S.C.§ 101.
[79] Pub. L. No. 94-553.

previously submitted to the Commission.[80] Similar to MPA, CLS recognizes that existing federal patent law would likely continue to protect procompetitive and licensing agreements under the proposed options, but emphasizes that the proposed options would create uncertainty.

While federal patent and copyright laws generally preempt state laws that seek to impact patent and copyright protections,[81] they do not expressly preempt state antitrust laws.[82] An individual antitrust claim based upon copyrighted or patented matter may be preempted by federal patent or copyright law if the claim undermines or conflicts with federal patent or copyright laws. This conflict form of preemption may occur when "it is impossible for a private party to comply with both state and federal requirements," for example when the state claim is based upon protected federal conduct, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[83] However, when conflict preemption is asserted, courts must proceed on a case-by-case basis, determining if the respective interests served by the potentially conflicting laws actually conflict and decide if they outweigh the interests

---

[80] First Supplement to Memorandum 2025-11, EX. 9-11. The Copyright Alliance urged the Commission Copyright Alliance to "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."

[81] The federal Copyright Act in 17 U.S.C. § 301 expressly preempts claims involving "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright…. However, any state law claims for violations that are not the equivalent to the exclusive rights granted by the Copyright Act are not preempted. The MPA argues *Orson, Inc. v. Miramax Film Corp*. (3rd. Cir. 1999) 189 F.3d 377, 385 (en banc) suggests otherwise, but this case simply held that a specific Pennsylvania statute that restricted distributors licensing rights after 42 days conflicted and interfered with the exclusive right to distribute given in the Copyright Act.

[82] California Antitrust & Unfair Comp., Sections 23.05[A], fn.15; 23.09 [a] 2. There is a presumption against preemption of California's antitrust laws as they regulate an area of historic state power. *In re Farm Raised Salmon Cases* (2008) 42 Cal. 4th 1077, 1088.

[83] See *Viva International Voice for Animals v. Adidas Promotional Retail Operations* (2007) 41 Cal.3d 929, 935-926, which stated:

> There are four species of federal preemption: express, conflict, obstacle, and field. (See *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955).
>
> First, express preemption arises when Congress "define[s] explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent, [citation], and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." (*English v. General Electric Co.* (1990) 496 U.S. 72, 78–79) Second, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. (*Hillsborough County v. Automated Medical Labs.* (1985) 471 U.S. 707, 713; *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815) Third, obstacle preemption arises when " 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (*Crosby v. National Foreign Trade* Council (2000) 530 U.S. 363, 373 quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67). Finally, field preemption, i.e., "Congress' intent to pre-empt all state law in a particular area," applies "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." (*Hillsborough County v. Automated Medical Labs.* (1985) 471 U.S. 707, 713, quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230).

served by the state's antitrust laws. Accordingly, since these antitrust proposals do not interfere with specific patent or copyright-like protections, no express preemption issue is presented. Nor are any prohibitions on exclusive licensing envisaged by any of these proposals. Any alleged conflicts with exclusive copyright licensing presented by a specific antitrust claim would be adjudicated just as they are under existing law on a case-by-case basis.[84]

Would the Commission like the staff to provide additional analysis of preemption concerns?

Monopsony

ICLE objects to including the term "monopsony" arguing that there is "currently a lack of consensus on such fundamental issues as market definition, competitive effects, and how to balance harms to workers versus consumers."[85] However, the Working Group on Concentration in California states:

> The [U.S. Department of Justice and the Federal Trade Commission] have concluded that the effects of monopsony power in labor markets are just as pernicious as the effects of monopoly in project markets. Leading scholars put it this way: a "lack of competition in the labor market enables employers to suppress the wages of their workers." That, in turn, harms the economy: "[T]he low wages force workers out of the workforce" and "suppress[] economic growth" by restricting the pool of available workers from which potentially new competitors can draw. Wage suppression also enhances societal income inequality by separating those who work in concentrated markets from those who work in competitive labor markets. Workers that already have low incomes are affected the most because they lack bargaining power and alternatives.[86]

Moreover, the Commission has received numerous public comments on the importance of addressing monopsony power.[87]

---

[84] California courts follow a three-step process to resolve conflicts of law. First, the court determines whether the relevant laws of the potentially affected jurisdictions are the same or different. If there is a difference, the court examines each jurisdiction's interest in applying its own law to determine whether a true conflict exists. Finally, if a true conflict is found, the court evaluates and compares the nature and strength of each jurisdiction's interest to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state. The law of the state whose interest would be more impaired is ultimately applied. See *Mireskandari v. Gallagher* (2020) 59 Cal.App.5th 346, 382-383.

[85] EX 83.

[86] Memorandum 2024-14, p. 4.

[87] Memorandum 2025-30, EX 6, "we strongly urge the Commission recommend explicitly codifying key aspects of current caselaw that differ from federal interpretation, including: Recognition of harm to workers and labor markets as cognizable antitrust injury. This is particularly important given the growing body of evidence showing how market concentration and employer monopsony power can depress wages and working conditions…Recognition of

The staff believes that additional analysis of this issue is not needed. Does the Commission agree?

Respectfully submitted,

Sharon Reilly
Executive Director

Sarah Huchel
Chief Deputy Director

monopsonies should be subject to the same standards as monopolies. This is especially crucial for protecting workers, suppliers, and small businesses from exploitation by dominant buyers."; see also Id., EX. 1 and Memorandum 2024-25, p. 5.

MEMO FROM TOM CAMPBELL TO THE CALIFORNIA LAW REVISION COMMISSION
April 25, 2025

Dear Members of the California Law Revision Commission,

I remain grateful for having been permitted to testify before the Commission on May 2, 2024, when the Single-Firm Conduct Working Group presented its preliminary report.

The Staff Memorandum of March 24, 2025, 2025-21, at page 11, has now recommended the following for inclusion in legislation:

> The Legislature hereby finds and declares all of the following: (a) Courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors the risk of over-enforcement of antitrust laws over the risk of under-enforcement.

I write solely to urge the Commission not to include the language "that California favors the risk of over-enforcement of antitrust laws over the risk of under-enforcement."

Four reasons motivate my recommendation.

1) The statement misstates what the California Supreme Court has said.
2) This statement would enshrine a preference for enforcement when the defendant may not have violated the law.
3) Over-enforcement cannot be corrected by private causes of action; but under-enforcement can
4) There was dissent within the Single Firm Conduct Working Group on whether this statement is appropriate.

1) The statement misstates what the California Supreme Court has said.

No provision of statute or legislative history was adduced by the Single-Firm Working Group or the Staff Memorandum for the proposition that California favors over-enforcement over under-enforcement.

Rather, the only support cited is in the Working Group's claim that "The California Supreme Court case of Clayworth v Pfizer, Inc., 49 Cal. 4th 758 (2010), provides support for the proposition that the Cartwright Act favors over-deterrence to under-deterrence." Page 9.

In Clayworth, the Court was not weighing over-deterrence over under-deterrence, or over-enforcement versus under-enforcement. It was weighing the "goal of deterring antitrust violations" against "concerns that a given private party may receive a windfall."[1]

[1] "In divining the Legislature's intent, we consider as well overarching legislative goals evident from the Legislature's adoption and amendment of the Cartwright Act over the years. From its inception, the Cartwright Act has always been focused on the punishment of violators for the larger purpose of promoting free

A successful antitrust plaintiff that has passed along a higher charge imposed by an illegal monopolist might thereby receive a windfall; but allowing such a plaintiff to collect anyway would help deter the violation—similar to the effect of awarding treble damages for a violation that has been found. But *in deciding whether or not there was, in fact, a violation of law*, it is wrong to say public policy favors reaching such a conclusion over not reaching such a conclusion. The Clayworth v. Pfizer, Inc., Court did not say that. Rather, the Clayworth Court took as given, for purposes of appeal of a summary judgment motion, that a price-fixing conspiracy had occurred. "This motion assumed arguendo that Manufacturers had engaged in price fixing. For purposes of this appeal, we do likewise." [2]

2) This statement would enshrine a preference for enforcement when the defendant may not have violated the law.

From "overcompensate"—the word used by the California Supreme Court—the Working Group modified the word to be "over-deter," and the Staff Memorandum has now modified it further to become the word "over-enforcement."

"Overcompensate" means forcing an antitrust violator to pay more than the harm it caused to the plaintiff in any particular case. Assuming the violation actually occurred, this becomes a question of the consequences of moral culpability. Not all victims might come forward, for instance; so, if only those who do come forward receive compensation, and for only single damages, a wrong-doer might end up net-ahead. It is easy to see why the fear of overcompensation might be discounted.

"Overdeterrence" means chilling potentially beneficial conduct by a party fearful of being sued. Overdeterrence might cause some good actions not to be undertaken, but it does not create the possibility of being punished for innocent behavior.

"Over-enforcement," however, means bringing an antitrust case for which there was, in fact no violation.[3] It should be inconceivable that the Legislature would adopt such

---

competition. …. As the Cartwright Act's primary concern is with the elimination of restraints of trade and impairments of the free market, we can and should select the damages rule most consistent with that focus. The goal of deterring antitrust violations and concerns that a given private party may receive a windfall are not of equal weight. The Legislature's adoption of a double damages remedy … later amended to treble damages … demonstrates as much: double and treble damages may overcompensate injured plaintiffs, but they do so in order to maximize deterrence." (49 Cal. 4th at p.783-784).

[2] 49 Cal. 4th at 765, n. 4.

[3] This is akin to the concept of "false positives." Professor Melamed, a member of the Working Group, warned of the danger of false positives from multiple enforcement by the FTC and the federal Department of Justice in his October 14, 2008, testimony submitted to the FTC.

language. It would imply that California antitrust law enforcers should charge defendants with antitrust violations that the antitrust law enforcers could not prove -- hoping for a lucky outcome at trial. Even worse, the language might be interpreted as an instruction to courts that "a tie goes to the plaintiff" in an antitrust case when the evidence is evenly balanced – an outcome with potential implications of violating due process.

3) Over-enforcement cannot be corrected by private causes of action; but under-enforcement can.

Private standing to enforce California's antitrust statutes supplements enforcement by the government. Hence, if the government fails to prosecute an antitrust violation, there is another potential route that will. That route is incentivized by treble damages. Even if a defendant is acquitted in a state prosecution, that outcome is not stare decisis against a private plaintiff pursuing the same theory. Under-enforcement, therefore, whether from the state not bringing an antitrust case, or from the state losing an antitrust case it should have won, can be cured.

Over-enforcement is different. By definition, a party that should not have been subjected to the cost and threat of an antitrust case was nevertheless forced to be so subjected. Nothing can bring back the loss of time, money, emotional stress, uncertainty, likely departure of employees and loss of suppliers and customers, suffered during the duration of the case.

Logically, therefore, if the Commission is to recommend a preference for either under-enforcement or over-enforcement, the irremediable nature of the latter suggests the preference should be for caution. The power of government is a fearsome thing. It is dangerous to over-use it; it is inconceivable that the Legislature would enact a law encouraging such over-use.

4) There was dissent within the Single Firm Conduct Working Group on whether this statement is appropriate.

Professor Carl Shapiro, Distinguished Professor of the Graduate School at UC Berkeley's Haas School of Business, and a former chief economist for the US Department of Justice Antitrust Division, stated in open testimony on May 2, 2024, that he disagreed with the recommendation for the "over-enforcement" language, but that he was out-voted.[4] This was in response to my testimony at the Commission on that day.

---

https://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-00004/537633-00004.pdf, at p. 9. He equated false positives to "the prosecution of unsound cases."

[4] The vote of the working group was not made public on this point. It is possible that Professor Melamed also agreed with Professor Shapiro, and they were outvoted by the other three members, given Professor Melamed's statement in 2008, "there is little reason to believe that there is in general a greater risk of false negatives than of false positives."
https://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-00004/537633-00004.pdf, p. 10, n. 6.

To be very careful and fair to Professor Shapiro, I invite the Commission to check the transcript of that exchange; or, even better, to solicit Professor Shapiro's views on this question. If I have mischaracterized his views in any way, I certainly apologize and would withdraw my point here. However, I believe I have remembered his statement accurately.

I sincerely appreciate the Commission's generous invitation for comment, and the Staff's never-failing courtesy to me personally. I respect greatly the professionalism and public service of the Commission and its excellent staff.

These views are my own. I have received support in preparing these comments, and for my earlier submissions to the Commission, from Net Choice, a trade association focused on promoting free expression and free enterprise, that includes Google, Amazon, and Meta.

Sincerely,

Tom Campbell
Doy and Dee Henley Distinguished Professor of Jurisprudence
Professor of Economics
Chapman University
Orange, California
tcampbell@hotmail.com
714 559 5584

CALIFORNIA LIFE SCIENCES

May 23, 2025

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

RE: Memo 2025-21 Draft Language for Single Firm Conduct Provision in California

Dear Chairperson Carrion and Honorable Commissioners,

As representatives of the life sciences industry, which directly employs upwards of 400,000 Californians. California Life Sciences (CLS) wishes to share our concerns regarding the California Law Revision Commission's (CLRC's) proposed single firm conduct provisions presented in staff Memo 2025-21 and urge the CLRC to not pursue antitrust policies that may compromise California's life sciences ecosystem. This delicate ecosystem consistently delivers life-saving treatments for patients around the world. CLS represents over 1,300 entities including pharmaceutical, biotechnology, medical technology, and academic research institutions across California committed to advancing innovation and improving health outcomes.

While we understand that rising consolidation across various sectors has raised concerns among policymakers, we believe that implementing a California-specific single firm conduct provision, especially one that deviates from federal precedent, could dramatically and negatively impact life sciences companies investing in research and development in California and compromise our state's long-term biotechnology leadership. California's world-class life sciences ecosystem is dynamic and diverse, built on complex and symbiotic relationships between the academic researchers who often make basic science discoveries, the federal institutions like the NIH who support this basic science research, the start-up companies that translate basic science discoveries into pharmaceutical innovations, the larger companies that help bring these innovations to market via drug development and clinical trials, and the network of venture capital that smooths the risks associated with this translation. California's existing antitrust laws along with federal laws on single firm conduct already allow effective legal action against anticompetitive conduct. Preserving the integrity of this symbiotic and multifaceted life sciences ecosystem is precisely why California Life Sciences wishes to highlight several concerns with the proposals in Memo 2025-21 while providing the Commission with additional context to the nuances of our sector.

The medical innovation advanced by our members reflects the dynamic and competitive life sciences ecosystem in which they operate. Mergers, acquisitions, and other transactions enable life science companies to combine the resources, expertise, and investment they need to bring treatments and cures to patients. Unlike in most other industries, 80% of life sciences companies operate without a profit as they advance new therapies, a high-stakes endeavor that can cost billions of dollars per treatment, take 10 to 15 years, and offer a less than 10% rate of success. Given these stakes, imposing a novel single firm conduct provision that is expressly written to untether California's law from federal law would only further jeopardize the ability for these companies to survive. Most life sciences companies are small, research-intensive firms that rely on the larger ecosystem to survive. The ability of life sciences companies to engage in mergers, acquisitions, and licensing could be the difference between a new treatment or cure reaching patients or stalling in the lab. Due to these unique characteristics of our industry, uncertainty in which conduct is legal can have outsized impacts on the whole ecosystem, ultimately delaying patient access and increasing cost.

Generally, we are concerned that each of the single firm conduct provision proposals in staff Memo 2025-21 is expressly intended to deviate from the federal precedent on single firm conduct. Section 2 of the federal Sherman Act already prohibits monopolization, attempts to monopolize, and conspiracies to monopolize by single firms. States can already bring cases under the Sherman Act, with State Attorneys General having the authority to enforce federal antitrust laws, including Section 2. Further, in 2023 Congress passed the State Antitrust Enforcement Venue Act, which allows state Attorneys General to select the most beneficial venue to bring their cases. Recently, the Justice Department along with several state Attorneys General including California won a civil antitrust lawsuit against Google for monopolizing advertising technologies. This ruling indicates that existing laws are functioning properly, and companies engaging in improper behavior are being punished. We urge the Commission to approach deviations from federal precedent with caution. These types of changes can have massive ripple effects for sectors like life sciences that are reliant on a unique ecosystem of small, medium, and large businesses that must be nimble and collaborative to deliver treatments for patients.

Option one presented in Memo 2025-21 uses language similar to Section 2 of the Sherman Act deeming it unlawful for a person to monopolize, attempt to monopolize, maintain a monopoly, or conspire to monopolize. As noted above, all businesses are already subject to Section 2 of the Sherman Act and California's Attorney General can already bring cases under that Act. This option is concerning because of the recommended language to be included in the findings and declarations section. This language is intended to explicitly untether California's law from federal law. Untethering California's antitrust laws from federal precedent creates significant uncertainty, which will likely lead to litigation and ultimately delay patient access to treatments and slow innovation. Section 2 of the Sherman Act has been litigated for over a century, providing certainty to industry on how the statute would be interpreted. We do not support the inclusion of language that separates California from federal precedent, as these precedents give our companies and the public a clear understanding of how antitrust laws are enforced.

In option two, CLRC staff proposes to expand upon option one by combining it with a prohibition on "restraints of trade" behavior by single firms. This is broadly defined to cover a wider range of collaborative agreements and activities, which in our industry is critical to the development and commercialization of novel and life-saving treatments. California's current antitrust law already outlaws any combinations or agreements which restrain trade or competition, or which fix or control prices. Enacting a single firm conduct provision in California that includes a new "restraint of trade" violation risks deterring collaborations within the dynamic life sciences ecosystem, in which larger companies routinely invest in smaller ones to bring their innovations to market. A novel single firm conduct provision that captures even procompetitive patent and licensing agreements under "restraints of trade" could seriously hamper biotechnology innovation in California and drive smaller firms into other states. This option by nature creates uncertainty as state courts have never ruled on what defines a behavior that retrains trade in a single-firm context. Further, it raises questions of federal preemption. Federal patent law prevents states from creating conflicting regulations that would undermine the federal patent system. Because of the broad nature of behaviors included under "restraint of trade" there is a possibility that some procompetitive patent and licensing agreements would be captured. Given existing federal preemption related to the patent system, it is likely that these behaviors would be protected. But it is unclear how a dispute like this would be resolved and it would likely be a long, expensive litigation process. This type of regulatory uncertainty is counterproductive for regulators and businesses as it slows the process of regulation implementation and compliance while driving businesses to behave more conservatively, forgoing procompetitive opportunities for fear of being punished.

CLS has significant concerns about Option 3 given that it represents a "clean break" from existing federal law. This option, unlike options one and two which rely on existing underlying antitrust terms and principles, uses new terminology and a new analytical framework. This option draws on the "exclusionary conduct" provision recommended by the Single Firm Conduct Working Group Report. This option would upend the traditional framework for assessing anticompetitive single firm conduct and cause widespread uncertainty among businesses regarding what conduct is legal. This will likely lead to increased litigation by competitors hoping to gain a competitive edge by exploiting the ambiguity of the new language and its interpretation. In fact, the memo itself notes that, "Option 3 leaves some doubt as to the burdens of proof and the extent to which there is to be some application of the traditional rule of reason analytical framework." Also, the Single Firm Conduct Working Group acknowledges that this option will create "difficulty in distinguishing between anticompetitive conduct, which is illegal, from competition on the merits, which is legal." CLS feels that moving forward the Commission should reject this option, as it is unclear how this new framework would benefit patients and consumers and will create significant issues for businesses.

Life Sciences companies, like all companies, rely on the stability of consistent, objective, and established regulatory paradigms to operate effectively. Upending the current standard for acceptable single firm conduct in the state would inject considerable risk and uncertainty into the life sciences ecosystem, deterring innovation and costing patients access to new therapies as a result. This could also lead to baseless lawsuits against California companies from competitors seeking to exploit legal ambiguities and lack of judicial precedent, increasing costs for California companies, reducing their investments in the state, and driving companies out of state.

As our biotechnology companies continually evaluate worldwide investment decisions, California's antitrust regulatory ecosystem has previously encouraged them to invest in California because the state recognized the value of high-quality research and the jobs and tax revenue that comes when that research turns into locally manufactured products. This has kept California at the epicenter of the life sciences industry, birthing and sustaining thousands of companies, employing millions of Californians, and innovating countless products that save lives and revolutionize quality-of-life. The life sciences industry provides a unique return on investment with respect to research and development. Nationwide, life sciences companies have collectively invested more than $1 trillion dollars in R&D since 2000, establishing the biopharmaceutical sector as the most R&D-intensive industry in the U.S. economy. In fact, the biopharmaceutical industry invests approximately six times more in R&D as a percentage of sales than all other manufacturing industries. However, the novel single firm conduct provisions proposed in Memo 2025-21 would upend that paradigm, saddling California life sciences companies with increased risks and costs that would force more of them to seek more stable regulatory environments out of state.

We appreciate this opportunity to express our concerns and will continue to work with the Commission to address them. If you have any questions, please feel free to contact me at schung@califesciences.org.

Sincerely,

Sam Chung
Vice President, State Government Relations
California Life Sciences

CIVIL JUSTICE
ASSOCIATION OF CALIFORNIA

May 23, 2025

Sent via Email
sreilly@clrc.ca.gov

The Honorable Xochitl Carrion, Chairperson
and Honorable Commissioners
California Law Revision Commission
c/o Office of Legislative Counsel
925 L Street, Suite 275
Sacramento, California 95814

Re: *Antitrust Law – Study B-750 – Comment on Draft Language Options for Single Firm Conduct by Civil Justice Association of California*

Dear Chairperson Xochitl Carrion and Commissioners:

Thank you for the opportunity to provide comments on the California Law Revision Commission's proposed language to address single firm conduct in California. Founded in 1979, the Civil Justice Association of California (CJAC) is the only statewide association dedicated solely to improving California's civil liability system, in the legislature, the regulatory arena, and the courts. Our membership base consists of businesses and associations from a broad cross-section of California industries.

We have reviewed the 3 draft language options provided in the staff recommendations and have various concerns about each proposal.

Of the three draft proposals, Option 1 is the least concerning as it is consistent with Section 2 of the federal Sherman Act. However, the recommendations accompanying the draft include an express desire to deviate from longstanding federal antitrust precedent, which raises serious concerns. This Commission should be mindful that reversing more than 100 years of antitrust jurisprudence will have far-reaching implications.

Proposed single firm conduct language Options 2 and 3 deviate drastically from existing state and federal standards, expanding antitrust law in a way that threatens the competitive practices of all businesses.

Draft language Option 2 erroneously conflates the monopolization and restraint of trade concepts, which creates confusion about standards for unilateral conduct and leads to business uncertainty. Further, broad "restraint of trade" language in the context of single-firm conduct without well-defined standards further compounds this uncertainty and could chill legitimate competitive actions.

Option 3 poses even greater challenges for businesses. The vague "meaningful risk" standard creates excessive uncertainty that could chill procompetitive conduct. Even the working group has acknowledged the difficulty in distinguishing between anticompetitive exclusion and lawful competition on the merits. Further, the balancing test between competitive constraints and benefits lacks clear standards for how to weigh benefits against harms to competition, and whether and how efficiency benefits should be counted. The focus on "trading partners" rather than broader competitive effects risks protecting competitors at the expense of consumers.

A key consideration in reviewing the state's antitrust laws is that clarity will be vital to finding an appropriate balance. Being sued for alleged antitrust violations is an existential threat to most small and medium entities, and even some large entities, regardless of whether they would be eventually vindicated in court. If a defendant wins at trial – andtheir conduct is eventually found *not to be wrongful* – the business will still be out millions of dollars in attorney fees and costs, they will still have spent years in litigation defending their legal conduct, and their business will still have suffered in numerous ways. These costs, along with the threat of treble damages and one-directional attorneys' fees liability,forces many businesses to settle even meritless claims early. For all of these reasons, it is important that the Commission's recommendation provide clarity, not more ambiguity.

Additionally, we note that creating a new stand-alone agency for the purpose of implementing these changes is unnecessary and could lead to added costs and increased litigation as it seeks to expand its role over time.

Conclusion

For the foregoing reasons, we urge the agency to be measured in departing from longstanding antitrust principles and precedent, to ensure that any reforms align with sound economic policy, and to use clear language that conforms to existing jurisprudence.

Respectfully submitted,

Lucy Chinkezian
Counsel

Crowell

Eric P. Enson
EEnson@crowell.com
213.310.7977 direct
310.503.1774 mobile

Crowell & Moring LLP
515 South Flower Street,
40th Floor
Los Angeles, CA 90071
+1.213.622.4750 main
+1.213.622.2690 fax

May 23, 2025

Xochitl Carrion, Chairperson
and Honorable Commissioners
California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, California 95814

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

Dear Chairperson Carrion and Commissioners:

Under California's existing antitrust laws, the California economy has grown to the fourth-largest in the world and has given rise to the most innovative technology sector on Earth, all while protecting businesses and consumers from unlawful, anticompetitive conduct. Yet the sweeping revisions being considered by the California Law Revision Commission ("CLRC" or the "Commission") threaten California's progress and economic success. As such, the California Chamber of Commerce ("CalChamber"), and its more than 14,000 members, have serious concerns about the proposals being considered and recommend caution.

CalChamber[1] thanks the Commission for the opportunity to comment further on the important work the CLRC is undertaking with respect to California's antitrust laws, Study B-750. CalChamber looks forward to continuing to work with the CLRC in attempting to develop policies that ensure a strong and dynamic business environment that benefits all Californians. We write regarding the CLRC Staff's March 24, 2025 Memorandum 2025-21 ("Staff Memo")[2] containing options for a single-firm conduct ("SFC") provision that may be added to California law. In short, these proposals all greatly risk stifling competition in California and making illegal common business practices that have long been considered pro-competitive and good for consumers. Moreover, the proposed options remain unsupported by an independent analysis suggesting that they are necessary to protect Californians, and there has been no economic study measuring the costs these proposals will inflict on Californians, all of which can be, and should be, studied empirically before proceeding.

In this comment, we first respond to questions posed by the Commission during the April 3, 2025 hearing regarding the feasibility of conducting economic studies of competition in California as and the costs, benefits and fiscal impact of the proposed revisions. We then detail the massive impact the Staff Memo proposals will have on competition, innovation and businesses, large and small, in California.

[1] CalChamber is also being advised on this matter by Dr. Henry Kahwaty and Brad Noffsker, economists with BRG.
[2] Memorandum 2025-21 "Draft Language for Single Firm Conduct Provision," March 24, 2025.

The Proposals Remain Unsupported by an Economic Analysis of Competition in California or the Costs of Implementing the Proposals, Which are Studies That Can and Should be Performed

Since our first submission to the Commission in April 2024, CalChamber has repeatedly raised two key concerns. One, there has been no study showing that California's antitrust laws are failing. Put another way, there has been no empirical or analytical analysis showing that California consumers or businesses are suffering from reduced competition, higher prices or lessened innovation because of gaps in California law. Two, there has been no cost-benefit study performed to determine whether the proposed revisions to California's antitrust laws – on balance – are likely to improve economic performance and efficiency at a cost the State is willing to bear.

At the Commission's April 2025 meeting, several Commissioners asked whether these types of economic analyses are even feasible. The short answer is, absolutely!

As an initial matter, there are scores of economic consulting firms and PhD economists who perform studies of economies, industries, and markets all the time to answer difficult questions about levels of competition and the costs of regulation. They include BRG, which is advising CalChamber in this matter, Compass Lexecon, NERA Economic Consulting, The Brattle Group, Charles River Associates, Cornerstone Research, Bates White Economic Consulting and Econic Partners, to name just a few. Major consulting firms like McKinsey & Company, Boston Consulting Group, and Bain & Company also have strong economic consulting divisions. Moreover, California's Legislative Analyst's Office is a resource available to all California legislators and could be asked to prepare a report assessing the benefits, costs, and fiscal impact of the legislative proposals in the Staff Memo in a non-partisan manner.

In fact, several economic consulting firms have already provided the Commission with economic analyses of some of these issues. For example, the Data Catalyst Institute authored a January 2024 economic analysis measuring potential costs associated with new antitrust laws and found that "based on a bespoke economic model . . . if European-style competition concepts, also called 'abuse of dominance' (AOD), become law in the U.S., it could cost small and medium-sized businesses (SMBs) more than $600 billion in lost sales revenue annually."[3] Likewise, the Computer & Communications Industry Association Research Center issued a March 2024 economic study, entitled *Assessment of Economic Costs of Imposing Abuse of Dominance Standards at the State Level*, finding that an AOD-style law in California "could reduce GDP by 1.1 percent and create 116,000 fewer jobs in the first year" and that "[b]y 2032, California could experience a whopping GDP loss of $554 billion, a 10.2 percent decrease in GDP, resulting in 1.2 million fewer jobs created."[4] In October 2024, the economic consulting firm, NERA, provided the Commission with an economic study of concentration in the United States and found that "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.'"[5] And Compass Lexecon performed an economic analysis of the levels of competition in the audiovisual industry, concluding, despite claims to

[3] Second Supplement to Memorandum 2024-13, p. EX 34.
[4] First Supplement to Memorandum 2024-13, p. EX 47.
[5] First Supplement to Memorandum 2025-11, p. EX 35.

the contrary, "that the empirical evidence supports that the audiovisual industry exhibits signs of a dynamic and highly competitive industry, benefiting both consumers and workers in the industry."[6]

While there are a number of different ways that these types of studies can be designed and performed, the economics of them can be quite basic. For example, to explore whether competition in California is less robust than it otherwise would be if California had an SFC provision, economists can compare prices in California with prices in states that have an SFC provision, such as Arizona, Colorado, Florida, and Maryland. That is, economists could compare pricing or margins for specific goods and services in states that have SFC provisions to those that do not, to test whether there are statistically significant price or margin differences between these two groups of states, while controlling for local and regional pricing effects and other variables, like the cost of living.

Likewise, the economic effects of the addition of an SFC provision to California law can be estimated using standard economic impact tools, such as input-output ("IO") analysis or computable general equilibrium ("CGE") models. These economic effects could include losses associated with businesses relocating to other states, the loss of taxes from relocating businesses and employees, and the loss of spending by relocating businesses and employees, among other impacts. IO and CGE models are designed to track direct and indirect effects from economic changes and are commonly used to study the economic effects of changes in government policies. Firms like Regional Economic Models, Inc. specialize in conducting these types of studies.

Yes, studies like these can take time and can be expensive. But the time and costs of such studies pale in comparison to the potential costs of California adopting new legal standards that may stifle competition and innovation and drive business and jobs from the State. As we have repeatedly noted, the Commission should at least study whether new laws are necessary and, if so, how much they will cost before taking further action.

The Breadth of the Potential SFC Provisions

The Staff Memo proposes three options for a Cartwright Act SFC prohibition: (i) The "Basic SFC Provision;" (ii) the "Enhanced SFC Provision;" and (iii) the "Exclusionary Conduct Provision." These are:

> Option One: Basic SFC Provision
>
> It is unlawful for a person to monopolize or monopsonize, to attempt to monopolize or monopsonize, to maintain a monopoly or monopsony, or to combine or conspire with another person to monopolize or monopsonize, in any part of trade or commerce.[7]
>
> Option Two: Enhanced SFC Provision
>
> (a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events:

[6] Second Supplement to Memorandum 2024-46, p. EX 19.
[7] Staff Memo, p. 2 (footnotes omitted).

(1) In restraint of trade, or to attempt to restrain the free exercise of competition or the freedom of trade or production; or,

(2) To monopolize or monopsonize, to attempt to monopolize or monopsonize, to maintain a monopoly or monopsony, or to combine or conspire with another person to monopolize or monopsonize in any part of trade or commerce.

(b) As used in this section, "restraint of trade" shall include, but not be limited to, any actions, measures, or acts included or cognizable under Section 16720, whether directed, caused, or performed by one or more persons.[8]

Option Three: The Exclusionary Conduct Provision

(a) It shall be unlawful for one or more persons to engage in anticompetitive exclusionary conduct that affects any part of the trade or commerce within the State.

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

(1) Diminish or create a meaningful risk of diminishing the competitive constraints imposed by the defendant's rivals and thereby increase or create a meaningful risk of increasing the defendant's market power, and

(2) Does not provide sufficient benefits to prevent the defendant's trading partners from being harmed by that increased market power.

(c) "Trading partners" are parties with which the defendant deals, either as a customer or as a supplier.[9]

Option One is designed to track the language of Section 2 of the federal Sherman Act, which prohibits monopolization, attempted monopolization and conspiracy to monopolize.[10] Option Two extends Option One by adding restrictions against restraints of trade. Restraints of trade are currently covered by the Cartwright Act and Section 1 of the Sherman Act, but in the context of joint conduct by two or more firms and not unilateral, single-firm conduct. Nevertheless, Option Two has at least some roots in current antitrust law. Option Three is altogether different, however, and the Staff Memo refers to it as a "clean break from existing federal SFC law."[11]

[8] Staff Memo, p. 4.

[9] Staff Memo, pp. 5 – 6.

[10] Option One's references to monopsonization can be thought of a being akin to monopolization by a buyer instead of by a seller.

[11] Staff Memo, p. 5.

Option One Is Problematic Given the Recommendation that
Relevant Federal Standards be Rejected

Although Option One is supposed to track Section 2 of the federal Sherman Act, it comes with a recommendation that, if adopted, the Commission should also adopt language that "explicitly untethers California's law from federal law and certain narrow precedents that might limit California's ability to effectively control competition" (the "Untethering Text").[12] Put simply, adoption of the Untethering Text would remove the traditional guardrails that have been developed over decades to assist courts in distinguishing between truly anticompetitive conduct and aggressive competition on the merits that, while perhaps weakening rivals, is the essence of competition. For example, by rejecting federal precedent there would be no requirement that a defendant be a certain size or have a certain market share (*i.e.*, be a monopolist) before the proposed SFC law would apply, no explanation of how much of an increase in market power is problematic, and no carve-out for temporary increases in market power (regardless if achieved through competition on the merits or otherwise).[13] Indeed, there would be no requirement to define a proper relevant antitrust market, which is designed by federal law to evaluate any increase in market power. Moreover, the Untethering Text states that plaintiffs need not show that "[t]he rivals whose ability to compete has been reduced are as efficient, or nearly as efficient, as the defendant," thereby protecting less efficient competitors.

If adopted, the Untethering Text will not only stifle competition and increase litigation and business costs in California, but may also outlaw business conduct that is commonly viewed as good for competition, consumers, and workers. The Untethering Text would convert Option One's language that hews closely to the Sherman Act into something very different and outlaw common business practices. We discuss several examples in the next section. Here, we simply note that the Untethering Text is designed to remove defenses to liability in antitrust litigation, even though those defenses are aimed at preserving or protecting pro-competitive or competitively neutral conduct from a finding of liability. Slashing prices to lure away competitors' customers; introducing innovative products and services aimed at pressuring outdated and inefficient competitors to either improve or exit the marketplace; giving rebates to loyal customers choosing to forego purchases from competing businesses; offering discounts to resellers seeking to invest in and promote a manufacturer's product to the exclusion of its competitors; and small or temporary gains in market power regardless of the size of the business or others in the market, would all be subject to government and private lawsuits under Option One and the Untethering Text.

While the aim of the Untethering Text may be to protect against predatory practices of dominant entities, as worded and in practice, even small companies employing common business strategies – such as price cutting – will be exposed to significant uncertainty and potential liability if Option One and the Untethering Text are adopted.

---

[12] Staff Memo, p. 3.

[13] The lack of a market share or market power threshold is included in the Untethering Text even though when discussing predatory pricing, the CLRC's antitrust advisor for this study, Cheryl Johnson, stated, "Now predatory pricing may not be unlawful. In fact, it may be procompetitive if somebody is pricing their goods very low but they are a small player and are not putting people out of business. … So size and market power does matter in terms of the effect of the conduct." California Law Revision Commission meeting, January 23, 2025, meeting video, question and answer starting at 2h 46m 7s and ending at 2h 47m 39s.

Option Two Is Extremely Broad and Captures Many Types of Common Business Conduct

A "restraint of trade" is an action that inhibits parties from entering into transactions. The federal Sherman Act has been interpreted as enjoining only "unreasonable" restraints of trade – restraints whose competitive harms outweigh any competitive benefits. As written, however, Option Two condemns as unlawful any "restraint of trade" and is not limited only to unreasonable restraints of trade. Given the Staff Memo's focus on distinguishing any new California SFC law from its federal counterpart, the failure to limit Option Two's applicability to unreasonable restraints of trade could be interpreted as an intention for the provision to apply to all restraints. Furthermore, adding a prohibition against any "attempt to restrain the free exercise of competition or the freedom of trade or production" to Section (a)(1) also demonstrates an intention that Option Two be interpreted broadly.[14]

Common business contracts such as exclusive dealing contracts, tie-ins, requirements contracts, and most-favored nation agreements could be illegal under Option Two even though these types of contracts can have strong, pro-competitive effects or be competitively neutral. Exclusive dealing contracts are an example. An exclusive dealing contract between a manufacturer and a wholesaler prevents the wholesaler from selling the products of a different manufacturer. This necessarily inhibits the wholesaler's freedom of trade with other manufacturers and other manufacturers' freedom of trade with the wholesaler. Similarly, a requirements contract between a manufacturer and an input supplier prevents the manufacturer from buying the input from a different supplier, which necessarily inhibits the freedom of the manufacturer to trade with other suppliers of the input and the freedom of other input suppliers to trade with the manufacturer. Additional examples can be found with respect to intellectual property. Under Option Two, would a business in California with rights to certain patented technology be required to license that technology to all other businesses in California so as not to restrain those businesses' freedom of production? Would a manufacturer licensing a technology be able to enforce exclusive territories in California or other use restrictions in its licenses, which is a common practice today? Would movie studios be required to give all cinemas in the State the right to show all movies, or could the studios license their movies to the cinemas of their choosing, as they do today? These types of common contracts likely would run afoul of Option Two's prohibition of attempts to restrain the freedom of trade or production.

Yet it is well recognized that these types of vertical restraints – several of which are addressed in more detail below – can be pro-competitive. This is why they are analyzed using the rule-of-reason framework under federal antitrust law. Treating these types of commercial practices as *per se* illegal because they limit or restrain someone's free exercise of competition, freedom of trade or freedom of

[14] The CLRC's antitrust advisor for this study, Cheryl Johnson, described Option Two as, "But you're also not going to let unilateral actors restrain trade, unreasonably restrain trade. I know we say, "restrain trade," but in antitrust talk, that means unreasonable restraints of trade." California Law Revision Commission meeting, April 3, 2025, meeting video starting at 1h 13m 16s and ending at 1h 14m 38s. Once untethered from federal law, the interpretation of California law cannot rely on "antitrust talk" developed around federal law. We note that state antitrust laws at times are explicit about restraint of trade language. For example, as detailed in the state law summary provided as Exhibit A to the Staff Memo, statutory language in Massachusetts includes, "It is the purpose of this chapter to encourage free and open competition in the interests of the general welfare and economy by prohibiting unreasonable restraints of trade and monopolistic practices in the commonwealth." Similarly, that in Rhode Island includes, "The purposes of this chapter are … (2) To promote the unhampered growth of commerce and industry throughout the state by prohibiting unreasonable restraints of trade and monopolistic practices, inasmuch as these have the effect of hampering, preventing, or decreasing competition." Staff Memo Exhibit A, pp. 16 and 26.

production would necessarily inhibit pro-competitive and competitively neutral conduct, which would increase costs for businesses in California and harm both California consumers and workers.

Staff indicated that it is "very important" to adopt the Untethering Text with Option Two for the same reasons as with Option One.[15] But as with Option One, the result would be to expose even small companies employing common business strategies to significant uncertainty and potential liability.

Option Three Is Expansive and May Outlaw Standard, Pro-competitive Conduct

Option Three is similarly broad and covers common business conduct that is considered pro-competitive. The Staff Memo notes that Option Three uses new terminology and a new analytical framework.[16] It is, therefore, subject to uncertainty regarding how it will be interpreted by courts. Uncertainty itself increases costs for business and is, therefore, harmful to California businesses, consumers, and workers.

The first part of the test for illegality set out in Option Three is whether the conduct diminishes or creates a meaningful risk of diminishing the competitive constraints imposed by the defendant's rivals, thereby increasing or creating a meaningful risk of increasing the defendant's market power. Many types of business conduct diminish the competitive constraints of rivals. For example, improving a firm's product quality is a type of business conduct that would diminish the competitive constraints imposed by the firm's rivals and may temporarily increase the firm's market power.

Market power is the ability to price above a competitive level for a significant period, and Option Three is based on a trade-off between market power (Section (b)(1)) and trading partner benefits (Section (b)(2)). As explained by the Staff Memo, even if conduct results in increased market power or presents a risk of increased market power, Section (b)(2) "is intended to exempt conduct that benefits trading partners, such as producing a superior product."[17] The standard for exemption would be challenging to meet in practice, however.

The market power/trading partner benefit trade-off condemns conduct that "[d]oes not provide sufficient benefits to prevent the defendant's trading partners from being harmed by that increased market power." Different customers value different competitive changes differently. Take a product improvement, for example. Some customers may place a high value on specific product improvements. Even if these customers purchase the improved product at a higher price because of the quality improvement, they are better off. Other customers may place less value on the product improvement and receive less value from the purchase of the improved product or opt to forgo making purchases at the higher price. Thus, these customers are worse off even with the quality improvement. Trading partners in this latter group are arguably "harmed," which means the conduct could be prohibited under Option Three. As this example illustrates, some type of (undefined) analysis may be required to weigh benefits accruing to some trading partners with harm to other trading partners arising from any increase in market power. Without such a trade-off, "producing a superior product" would not be exempted under Section (b)(2). In short, while the proposed Option Three may seem simple in theory, it is likely to be highly complex in application, especially without any federal precedent as guidance.

[15] California Law Revision Commission meeting, April 3, 2025, meeting video starting at 1h 2m 14s and ending at 1h 2m 53s.
[16] Staff Memo, p. 5.
[17] Staff Memo, p. 6.

In addition to chilling product improvements, consider again the example of an exclusive dealing contract between a manufacturer and a wholesaler. Such a contract would prevent the wholesaler from selling the products of the manufacturer's rivals. This necessarily imposes an additional constraint on the operations of each of these rivals, which is either competitively neutral *(e.g.*, the rivals have other, equally good wholesale options available to them) or is competitively detrimental (*e.g.*, the rivals have only less attractive wholesale options available). If only less attractive options were available, an exclusive dealing contract would reduce the constraint posed by each of the manufacturer's competitors, resulting in potential illegality under the first prong of the Option Three test. There may also be competitive harm suffered by customers of the diminished rivals, resulting in illegality under the second prong of that test. Other common vertical restraints may similarly be barred by Option Three, even though it is well recognized that vertical restraints can be pro-competitive or competitively neutral.

As with Options One and Two, the Staff Memo recommends the adoption of the Untethering Text with Option Three,[18] which will similarly expose even small companies employing common business strategies to significant uncertainty and potential liability.

The Untethering Text Will Suppress Competition and Innovation and is Likely to Make Common Business Practices Unlawful in California

The proposed Untethering Text urges a rejection of federal precedents. It also includes a list of elements that are common or required when proving liability in monopolization and attempted monopolization litigation under the Sherman Act, but that would not be required when proving liability under a Cartwright Act SFC provision:

> The Legislature hereby finds and declares that although the following may constitute evidence of a violation of this section, liability shall not require a finding that:
>
> (a) The unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct;
>
> (b) The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons;
>
> (c) Any price of the defendant for a product or service was below any measure of the costs to the defendant for providing the product or service;
>
> (d) The conduct of the defendant makes no economic sense apart from its tendency to harm competition;

[18] California Law Revision Commission meeting, April 3, 2025, meeting video starting at 1h 9m 39s and ending at 1h 10m 4s.

(e)	The risk of harming competition presented by the conduct or any resulting actual harm must be quantified or proven with quantitative evidence;
(f)	In cases where a defendant's business is a multi-sided platform, that the defendant's conduct presents harm to competition on more than one side of the multi-sided platform, or that the harm to competition on one side of the multi-sided platform outweighs any benefits to competition on any other side(s) of the multi-sided platform;
(g)	In a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue;
(h)	The rivals whose ability to compete has been reduced or harmed are as efficient, or nearly as efficient, as the defendant's; or,
(i)	A single firm or person has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power.[19]

If adopted, the Untethering Text is likely to outlaw common pricing and distribution practices that are generally viewed as good for competition, consumers, and workers.

<u>Common Pricing Practices Could Become Unlawful</u>

Cutting Prices and Predatory Pricing Claims:

One of the most frequently used competitive strategies is a simple drop in prices to attract competitors' customers. But due to efforts to "untether" from federal law on predatory pricing, standard price cutting could be challenged and deemed unlawful.

In its simplest form, predatory pricing involves an incumbent firm setting a price below its cost to drive rivals out of the market. Once the rivals have been driven from the market, the incumbent firm can raise its price because it faces no (or reduced) competition.[20] By pricing below its cost, the incumbent takes an economic loss in the short term. For this to be a rational pricing strategy, the incumbent must expect to earn more in the eventual "recoupment phase" when its price is elevated than it loses from pricing at the below-cost, predatory level.

---

[19] Staff Memo, pp. 13-14.

[20] Carlton, Dennis W. and Jeffrey M. Perloff, *Modern Industrial Organization*, 3rd Ed., 2000, pp. 338-339. Along these lines, the CLRC's antitrust advisor for this study, Cheryl Johnson, described predatory pricing as: "When a dominant party misuses their market power, for instance, to engage in predatory pricing to put out all their competitors and then to take over the market afterwards." California Law Revision Commission meeting, January 23, 2025, meeting video, question and answer starting at 2h 46m 7s and ending at 2h 47m 39s.

Thus, what distinguishes predatory pricing from aggressive price cutting is (i) pricing below some measure of cost and (ii) a likelihood that losses can be recouped once competitors are driven from the market. The Untethering Text, however, specifically abandons these standards. It states that the key economic elements of a predatory pricing claim – the below-cost pricing and recoupment period touchstones – would not be required if challenged under the proposed Cartwright Act SFC provision.[21] This significantly blurs the line between lawful price cutting and anticompetitive predatory pricing.

Without requiring a showing that pricing is below some measure of cost or that the defendant can recoup its losses, a predatory pricing claim loses its economic foundations.[22] Without these foundations, ***all price cutting***, especially to relatively low prices, would be at risk under a new SFC provision. Low and highly-competitive (but above cost) prices could be judged to be predatory under all three options presented in the Staff Memo. Price cutting could be challenged under Option One as an act of monopolization, Option Two because it restrains the freedom to trade by rival sellers priced out of the market, and Option Three because the competitive constraint from rivals diminishes as rivals exit the market. Without the need to assess whether actual prices are below cost, above cost pricing can be deemed to be predatory, and without the need to assess whether recoupment is likely, pricing can be deemed to be predatory even if exit by rivals is unlikely to result in increased prices.[23]

Loyalty Programs:

Like price cutting, loyalty programs are ubiquitous in the economy and coveted by consumers. Starbucks has a loyalty program that provides free coffee to repeat customers, as does Peet's Coffee, Dunkin', Panera Bread and Caribou Coffee. United, Delta, American, Southwest, Allegiant, JetBlue and virtually every other airline offers frequent flyer rewards programs. Gasoline retailers like Exxon Mobil, Chevron, Shell, 7-Eleven, Circle K and Speedway offer loyalty rewards programs to frequent fuel

---

[21] Untethering Text at (c) and (g). See also SFC Working Group Report, p. 17 ("liability … does not require finding … (iii) that any price of the defendant for a product or service was below any measure of the costs to the defendant for providing the product or service") and SFC Working Group Report, p. 15 ("the 'recoupment' requirement for a predatory pricing claim under federal antitrust law is not a requirement under California law."). In addition, see SFC Working Group Report, p. 17 ("liability … does not require finding … that in a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue."). We note also that there are no market share or market power threshold requirements under the Untethering Text part (i). See also SFC Working Group Report, p. 18 ("A single firm may violate section (a) regardless of whether it has or may achieve a market share above a threshold recognized under Section 2 of the Sherman Act. Furthermore, this statute is [sic] does not require the plaintiff to establish any threshold of market power.").

[22] Note also that the Untethering Text also includes that the Plaintiff need not show that the conduct of the Defendant makes no economic sense apart from its tendency to harm competition (item (d)). Below-cost pricing is only economically rational if losses can be made up later, and this, therefore, reinforces the Untethering Text related to recoupment periods.

[23] Single-Firm Conduct Working Group proponents have indicated that, with Option Three, beneficial, pro-competitive conduct would be protected by requiring challenged conduct to be that which "does not provide sufficient benefits to prevent the defendant's trading partners from being harmed by that increased market power." See SFC Working Group Report, p. 16; California Law Revision Commission Transcript of May 2, 2024, meeting, Working Group 1: Single Firm Conduct, pp. 9-14, available at Public Database linked at https://clrc.ca.gov/B750.html. Single-Firm Conduct Working Group, Presentation to the California Law Reform Commission, Aaron Edlin, Doug Melamed, Sam Miller, Fiona Scott Morton, and Carl Shapiro, May 2, 2024, available at Public Database linked at https://clrc.ca.gov/B750.html. Though customers in the near term may gain from low prices, customers in the future would be harmed by elevated prices. Without a requirement for the analysis of a recoupment period, which is when future customers would be harmed, beneficial, pro-competitive conduct cannot be distinguished from harmful anticompetitive conduct.

purchasers. Grocery stores and hotel chains offer loyalty programs, as do sporting apparel stores like The North Face, REI and Dick's. Rewards programs have the effect of reducing the prices paid by consumers who participate in the rewards program as compared to those who do not.

Loyalty programs, however, can be seen as penalizing customers who conduct more business with a firm's rivals[24] and often diminish customer switching among rivals. Any program or policy that encourages buyers to purchase products from one provider over a rival (*e.g.*, retail coupons) discourages purchases from rivals, reduces the demand for rivals' offerings and may diminish the profitability and unit sales of rivals. Such conduct necessarily reduces the competitive constraint rivals impose on other market participants in even a modestly concentrated market while also restricting the rivals' free exercise of competition and may be viewed as running afoul of both Option Two and Option Three. It also presents a risk of monopolization or attempted monopolization under Option One, especially when evaluated without a market share standard per the Untethering Text. Even so, the ubiquitous nature of these programs makes clear that competition and loyalty programs can go hand-in-hand, and indeed loyalty rewards can be an element of competition between rivals, for example, when firms compete for frequent coffee or gas purchasers or frequent travelers by improving their rewards programs.[25] The economics and antitrust literature generally views loyalty programs as being pro-competitive.[26] And consumers often belong to multiple, competing rewards programs. Yet loyalty programs have not prevented industries like airlines and gasoline retailing from having numerous rivals active in the marketplace.

Nevertheless, the SFC Working Group Report states that loyalty rewards that "penalize a customer that conducts more business with the defendant's rivals" could be anticompetitive "depending on the circumstances."[27] The Staff Memo, however, provides no guidance on how loyalty rewards should be evaluated under the various SFC provisions being considered. Because loyalty programs encourage consumers to purchase products from one provider over that provider's rival(s), they can reduce the demand for a rival's offerings, and can diminish a rival's profitability, they could give rise to

[24] SFC Working Group Report, p. 15.

[25] Maze, Jonathan, "Dutch Bros Sales Improve Despite 'Headwinds,' Thanks to Loyalty," *Restaurant Business*, November 11, 2021, available at https://www.restaurantbusinessonline.com/financing/dutch-bros-sales-improve-despite-headwinds-thanks-loyalty Kelso, Alicia, "Dutch Bros Rewards Will Play a Big Part in the Company's 'Long Game,'" *Nation's Restaurant News*, February 23, 2023, available at https://www.nrn.com/restaurant-finance/dutch-bros-rewards-will-play-a-big-part-in-the-company-s-long-game-; Koprowski, Amanda, "Shell's Fuel Rewards Marks One Year Anniversary of Platinum Status," *Convenience Store News*, July 14, 2024, available at https://csnews.com/shells-fuel-rewards-marks-one-year-anniversary-platinum-status; Griff, Zach, "American Airlines Unveils 10 Changes to the AAdvantage Program," *The Points Guy*, January 9, 2024, available at https://thepointsguy.com/news/american-aadvantage-changes-2024/.

[26] See, for example, Zenger, Hans, "Loyalty Rebates and the Competitive Process," *Journal of Competition Law & Economics*, Vol. 8, No. 4, 2012, pp. 717-768; Ware, Roger, "The Economics of Multiproduct Loyalty Programs," *Canadian Competition Law Review*, Vol. 30, No. 1, 2012, pp. 112-132; Campbell, Neil and Florence (Sze Pui) Chan, "Loyalty Is Usually Good – The Treatment of Loyalty Programs Under the Competition Act," *Canadian Competition Law Review*, Vol. 30, No. 1, 2012, pp. 51-92; Caminal, Ramón and Adina Claici, "Are Loyalty-Rewarding Pricing Schemes Anti-Competitive?" *International Journal of Industrial Organization*, Vol. 25, 2007; Spector, David, "Loyalty Rebates: An Assessment of Competition Concerns and a Proposed Rule of Reason," *Competition Policy International*, Vol. 1, No. 2, Autumn 2005, pp. 89-114. While the effects of loyalty programs are generally viewed as being pro-competitive, we note that their effects can be ambiguous in certain cases. Therefore, the merits should be analyzed on a case-by-case basis to avoid chilling procompetitive conduct which would occur if an overall ban on loyalty programs were enacted.

[27] SFC Working Group Report, p. 15.

lawsuits and adverse rulings under the proposed SFC provisions. One consequence would be the chilling of incentives to offer such programs even though they are popular with consumers, lower their prices, and are generally pro-competitive.

Common Distribution Practices Could Become Unlawful

SFC cases often involve product or service distribution practices, such as exclusive dealing and the use of most-favored nations clauses. As with commonly used pricing practices, these commonly used distribution practices may run afoul of the proposed SFC provisions even though these distribution practices are not likely to have anticompetitive effects.

Exclusive Dealing:

It is common for manufacturers to enter into exclusive dealing contracts with distributors or retailers. These contracts limit the distributors' or retailers' ability to carry products from rival manufacturers. Exclusive dealing contracts are generally thought of as being pro-competitive and efficiency-enhancing because they allow a manufacturer to locate distributors and retailers who are willing to heavily promote the manufacturer's products and to train staff on the benefits of these products, which usually enhances competition among brands.[28] It is well established in the economics and antitrust literature that exclusive dealing is one way to address the free riding of one manufacturer on the efforts of another by essentially giving the other manufacturer a property right in its promotional expenses.[29] For example, one manufacturer may spend heavily to promote a product or to train distributor staff in offering services to customers or prospects, while a rival manufacturer may not. When customers seek to make purchases, they may find the product from the rival manufacturer to be more attractive because it has a lower price due to its lower cost structure resulting from its more limited promotional and training expenses. The rival essentially free rides on the other manufacturer's market development and promotional efforts, reducing the manufacturer's incentive to engage in these efforts. That is, exclusive dealing prevents free-riding on a manufacturer's demand-increasing promotions where such promotions would be underprovided in the absence of the exclusive dealing contract. Exclusive dealing in this context is pro-competitive because it addresses this free-riding problem and thereby facilitates the manufacturer's investments in product and market development.[30]

Even though it is generally pro-competitive, exclusive dealing inhibits a rival manufacturer's freedom to trade with distributors that are "locked up" under an exclusive contract with another manufacturer. It also inhibits the locked-up distributor's freedom to trade with other manufacturers. As a result, exclusive dealing contracts could be challenged as possibly violating Option Two. It could also

[28] See, for example, Cooper, James C., Luke M. Froeb, Dan O'Brien, and Michael G. Vita, "Vertical Antitrust Policy as a Problem of Inference," *International Journal of Industrial Organization*, No. 23, 2005, p. 639; Wright, Joshua D., "An Evidence-Based Approach to Exclusive Dealing and Loyalty Discounts," *Global Competition Policy*, July 2009; Heide, Jan B., Shantanu Dutta, and Mark Bergen, "Exclusive Dealing and Business Efficiency: Evidence from Industry Practice," *Journal of Law and Economics*, Vol. XLI, October 1998, p. 387; Abbott, Alden F. and Joshua D. Wright, "Antitrust Analysis of Tying Arrangements and Exclusive Dealing," *Encyclopedia of Law and Economics*, Gerrit De Geest (Ed.), 2008, pp. 200-201.

[29] The seminal paper in this area is Marvel, Howard, "Exclusive Dealing," *Journal of Law and Economics*, vol. XXV, April 1982, 1-25. See also Ornstein, S.I., "Exclusive Dealing and Antitrust," *The Antitrust Bulletin*, Spring 1989, 65-98.

[30] Heide, Jan B., Shantanu Dutta, and Mark Bergen, "Exclusive Dealing and Business Efficiency: Evidence from Industry Practice," *Journal of Law and Economics*, Vol. XLI, October 1998, p. 387.

be a violation of Option Three if a manufacturer does not have access to its preferred distributor, making it a less-effective a competitor.

Exclusive dealing may also violate Option One if it is adopted with the Untethering Text. Under federal law, exclusive dealing contracts can only harm competition among manufacturers if they "lock up" a significant share of the market, thereby making entry or expansion by rivals more difficult. If a market is local and has several available distributors or retailers, for example, and one only serves 10% of a local market, then a manufacturer that enters into an exclusive dealing contract with that distributor or retailer – and no others in the local area – cannot use that contract to block entry or expansion by rival manufacturers. The distributor's share of the local market is simply too small for its exclusive dealing contract with a manufacturer to raise concerns regarding the creation of barriers to entry into the market for a new manufacturer. The Untethering Text, however, states that a defendant would not be required to meet or achieve any specific market share or threshold of market power to establish a claim. Without a market share threshold requirement, it does not matter what standard is used to define the relevant market because the market definition itself does not otherwise matter. Furthermore, without defining a market using an accepted standard of analysis and having some guidelines as to what constitutes a "troubling" market share, a court cannot determine the extent to which exclusive dealing contracts "cover" that market. Thus, exclusive dealing may be found to violate even Option One, especially if it is coupled with the Untethering Text's abandonment of market power or market share thresholds to find liability. That is, there can be a difference in outcomes under Option One and the Sherman Act – even though Option One closely tracks the Sherman Act – because there would be no principled manner to assess the extent of the market limited by exclusive dealing contracts under an untethered Option One.

Most-favored Nation Clauses:

A most-favored nation ("MFN") clause is a contractual commitment to a buyer that the buyer is paying the lowest price charged by the seller.[31] The SFC Working Group Report notes that MFN clauses can be concerns "especially if such clauses are widely used by the defendant."[32]

MFN clauses restrict a seller's freedom to trade with other buyers or to compete for the business of other buyers by lowering prices (possibly violating Option Two) and weaken the competitive constraint provided by rivals to the buyer (possibly violating Option Three). As with exclusive dealing contracts, the Untethering Text inhibits the analysis of whether MFN clauses are widely used by the defendant for the product at issue or a comparison of their pro- versus anti-competitive features, subjecting them to possible liability under Option One.

But MFNs can have pro-competitive effects, such as reducing uncertainty and transactions costs, decreasing search costs, limiting free-riding, and encouraging efficient investment. These clauses are

---

[31] A 'simple' or 'traditional' MFN guarantees the protected buyer that it will be charged the lowest price offered by the seller to its other buyers. A contractual restriction by one platform that restrict sellers from charging lower prices for their products or services on other platforms including the sellers' own website is known as a "broad" or "wide" platform MFN. For a review of the economics literature pertaining to MFNs, *see*, for example, Chipty, Tasneem, "Platform MFNs: Can Asking for the Lowest Price Discourage Competition?" *The Price Point*, ABA Antitrust Law Section, January 2024; and, Long, Sarah, "Retail MFNs and Online Platforms Under EU Competition Law: A Practical Primer," *Antitrust Chronicle*, Competition Policy International, September 2019.

[32] SFC Working Group Report, p. 15.

commonly used in hotel booking and in on-line retail marketplaces.[33] A platform that promotes hotel room bookings may not be sustainable, for example, if after finding a hotel room on the website an individual can book the room for less at the hotel operator's own website or some other third-party website. The same concerns may arise for any on-line retail sales. A firm is less likely to invest in developing a business around a product or service if others can free ride on that investment and acquire or offer the product or service at a lower price through other means.[34] MFNs, therefore, encourage the development of on-line hotel booking services and other on-line offerings, which benefits competition and consumers. Eliminating MFNs throughout the California economy without allowing a weighing of any pro- versus anti-competitive effects for specific MFNs, or considering whether an MFN is "wide" or "narrow,"[35] would harm competition in parts of that economy.

Loyalty Rebates:

A loyalty rebate provided by a manufacturer to a wholesaler is a discount on the price charged for a product based on the volume of that product purchased. If a certain volume target is met, for example, the buyer's unit price may fall, possibly for all units purchased. A buyer may have multiple volume targets or thresholds in its pricing schedule. Targets may be buyer-specific and can be based on metrics such as market share instead of purchase volumes. Based on the magnitude of the discounts provided, loyalty rebates can provide distributors or retailers with very strong incentives to sell the products of a specific manufacturer, and a sufficiently large discount can provide incentives for the wholesaler not to carry products from competing manufacturers. If the discount provided to the customer is significant enough to discourage the customer from purchasing from rival suppliers, the discount may be thought of as payment for exclusivity or near exclusivity on the part of the buyer. Rebates of this magnitude can have effects similar to those from exclusive dealing, and therefore can violate Options One, Two, and Three. Even so, loyalty rebates can also promote increased sales with the proper choice of volume thresholds while allowing for efficient production planning and reduced uncertainty.[36]

Courts have analyzed whether loyalty rebates are anticompetitive via an analysis that includes elements of predatory pricing (pricing below cost, recoupment periods) and exclusive dealing (the fraction of the market covered). The questions considered include whether the discounts lead to below-

---

[33] See, for example, Sean Ennis, Marc Ivaldi and Vicente Lagos, "Price Parity Clauses for Hotel Room Booking: Empirical Evidence from Regulatory Change," Toulouse School of Economics Working Paper No. 1106, November 11, 2022.

[34] See, for example, Vandenborre, Ingrid and Michal J. Frese, "Most Favoured Nation Clauses Revisited," *European Competition Law Review*, No. 12, 2014, pp. 588-593 (citing Salop, Steven C. and Fiona Scott Morton, "Developing an Administrable MFN Enforcement Policy" *Antitrust*, Vol. 27, No. 2, 2012, pp. 15-19); Wang, Chengsi and Julian Wright, "Search Platforms: Showrooming and Price Parity Clauses," *The RAND Journal of Economics*, 51(1), 2020, pp. 32-58. Wu, Jason J. and John P. Bigelow, "Competition and the Most Favoured Nation Clause," *CPI Antitrust Chronicle*, July 2013, No. 2, p. 5; and Van der Veer, Jan Peter, "Antitrust Scrutiny of Most-Favoured-Customer Clauses: An Economic Analysis," *Journal of European Competition Law & Practice*, Vol. 4, No. 6, 2013, p. 502.

[35] A contractual restriction by one platform that restrict sellers from charging lower prices for their products or services on other platforms including the sellers' own website is known as a "broad" or "wide" platform MFN. In contrast, platform MFNs are considered "narrow" if they only prevent a third-party seller from setting a lower price on its own website (or other direct sales channel) than that quoted on the platform imposing the MFN.

[36] For a discussion of how loyalty rebates allow manufacturers to increase output and sales, see Zenger, Hans, "Loyalty Rebates and the Competitive Process," *Journal of Competition Law & Economics*, Vol. 8, No. 4, 2012, pp. 717-768 ("[A loyalty rebate] allows firms to increase output, as incremental quantities are sold at a lower (discounted) price.").

cost pricing; if so, is there a reasonable prospect for recoupment of any losses; and if the contracts are exclusive or near exclusive, to what extent do they cover the market? For the reasons addressed in our discussions of predatory pricing and exclusive dealing, loyalty rebates may be ensnared by all three Options in the Staff Memo, and the analysis of whether specific loyalty rebates would harm competition would be significantly handicapped by the Untethering Text, even though they are commonly-used business strategies that can be efficiency-enhancing and need not harm competition.

Conclusion

Distinguishing legitimate forms of competition from conduct that harms competition and significantly enhances market power is challenging. This is acknowledged by the SFC Working Group Report, which states, "We know from more than a century of experience under the Sherman Act that courts find it very difficult to distinguish single-firm conduct that harms competition from single-firm conduct that constitutes legitimate competition on the merits."[37] This difficulty arises because the questions themselves are complex, not because the language in the Sherman Act is too brief or simplistic. If there were simple solutions that enabled analysts and courts to distinguish single-firm conduct that harms competition from single-firm conduct that constitutes legitimate competition on the merits, courts would have found them during previous decades.

The Options provided in the Staff Memo do not provide an easy means to make this distinction accurately. Rather, the Options, along with the proposed Untethering Text, would inhibit courts from making informed decisions on how to target enforcement at competitively harmful conduct while permitting competitively beneficial conduct. Given this, the Options in the Staff Memo are likely to have substantial adverse effects on California residents, workers and businesses, including by making it more expensive, riskier and less desirable to conduct business in the State and ultimately chilling pro-competitive and pro-consumer conduct.

Worse, the Options provided in the Staff Memo are not based on a demonstrated need, but rather on anecdotal and personal beliefs that competition in California could be more robust. Furthermore, the proposals being considered are not supported by a detailed and thorough cost-benefit study that carefully considers the implications – both positive and negative – of the proposed legislative text. Analyzing the costs and benefits of proposals like those in the Staff Memo is particularly important because the proposed SFC Options and the Untethering Text are not likely to assist courts in distinguishing legitimate forms of competition from conduct that harms competition and significantly enhances market power.

Sincerely,

Eric P. Enson

Eric P. Enson

[37] SFC Working Group Report, p. 1.

Updating California's Antitrust Law to Promote a Vibrant, Inclusive, and Competitive State Economy

Economic Security CA

with

American Economic Liberties Project
California Nurses Association
democracy policy network
End Poverty in California
ILSR
Liberation in a Generation
EX 26
Rise Economy — Resist. Reinvest. Rebuild.
TechEquity Action
UFCW — a VOICE for working America — Western States Council

Updating California’s Antitrust Law to Promote a Vibrant, Inclusive, and Competitive State Economy

Acknowledgements

This report is the result of a collective effort. We extend our deepest gratitude to Becky Chao and Kelli Smith at the Economic Security Project for leading the drafting and editing, with primary authors credited in each chapter.

We are also grateful to Carmen Comsti at the California Nurses Association, Ron Knox at the Institute for Local Self-Reliance, Michael Swerdlow during his time at the Democracy Policy Network, Lee Hepner at the American Economic Liberties Project, and Doni Tadesse at Rise Economy, whose research, drafting, and editorial contributions were invaluable.

This work also benefited greatly from Teri Olle’s vision and thoughtful review, Mona Masri’s project management, Michael Conti’s design expertise, Tesbih Habbal’s copy editing, and Taylor Jo Isenberg’s review. We deeply appreciate the collaboration, insight, and commitment of all who contributed to bringing this report to life.

Table of Contents

EX 27

I. Introduction

By Becky Chao, Kelli Smith, and Teri Olle

We’re in a moment of realignment: Political leaders, scholars, and advocates with diverse ideological leanings are exploring different ways of utilizing antitrust enforcement to shape markets and govern our economy. This renewed focus on the role of antitrust follows nearly four decades of lax enforcement and deregulation, emerging during a time of heightened concern about dysfunctional markets, concentrated power, and worsening wealth inequality — factors that have contributed to an untenable affordability crisis for most Americans.

> “60% of U.S. labor markets are highly concentrated, representing 20% of U.S. employment.”

Evidence of a revitalized approach to antitrust policy can be seen at the federal level and in the states, supported by a growing body of deeply researched scholarship. Under the first Trump administration, the U.S. Department of Justice (DOJ) brought a landmark monopolization case against Google — the first such high-profile lawsuit in nearly two decades. The Biden administration accelerated antitrust and competition policy by

EX 28

appointing rigorous and innovative leaders — such as Jonathan Kanter, Lina Khan, and Tim Wu — who ushered in a new era of vigorous enforcement.

State legislatures across the country have considered bills in recent years to expand and strengthen antitrust policy and enforcement — ranging from sector-specific efforts to address health care consolidation, grocery mergers and consumer rights, to broad reforms that seek to update foundational antitrust statutes for modern times.

The California Law Revision Commission

One of the most in-depth efforts is in California, where the legislature in 2022 tasked the California Law Revision Commission (the Commission or CLRC) with examining the state's antitrust laws and suggesting changes.[1] The Commission, in turn, gathered a team of experts in law and policy to advise it, which developed a series of subject matter working group reports. Over the course of more than two years, the Commission explored and analyzed a range of issues in antitrust law, from its underpinnings to its application over time, up to the modern day. The undertaking was both broad and deep, balanced in viewpoint, and unequivocally thorough. The Commission's work was conducted in public, with opportunity for stakeholder input at every stage in the process; indeed the signers of this report contributed through written comments, public testimony, and detailed responses to the working group reports. By its sheer volume and quality, the material produced and considered during this process constitutes an important and significant body of research in its own right.

The most important aspect of the Commission's expert reports is what they did not say. None of the experts consulted by the Commission have endorsed the antitrust status quo. The failure of antitrust law to prevent unprecedented concentrations of wealth and market power is irrefutable. As the Commission's expert report on competition observed:

> A 2016 report by the Council of Economic Advisers noted that the rate of firm entry in the U.S. has been in decline for almost 40 years. . . . [T]here is growing agreement that income and wealth inequality are growing problems in the U.S. A recent study shows that the "**prime driver of wage inequality is the growing gap between the most- and least-profitable companies**."[2]

Indeed, many of the widening gaps in our economy can be attributed to the failure of antitrust law and enforcement. Again, as the Commission's experts said:

> One measure of monopsony power is market concentration; the more highly concentrated a market, the less competition there is. Labor market

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

[2] California Law Revision Commission, *Report on Antitrust Law: Study B-750* "Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets," March 2024, https://clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp7.pdf.

concentration refers to the degree to which a few firms dominate hiring in the labor market. According to a leading empirical study, 60 percent of U.S. labor markets are highly concentrated, representing 20 percent of U.S. employment, relying on the DOJ and FTC's standard measure of market concentration.[3]

Background

Congress passed the federal antitrust laws during a period of great concern about unprecedented concentration of wealth and power in the hands of a few during the Gilded Age, which saw the rise of a handful of trusts across industries reign over politics and deepen widespread inequality. In response, President Theodore Roosevelt and congressional leaders of the Progressive Era introduced a package of antitrust laws — the Sherman Antitrust Act of 1890, the Federal Trade Commission Act of 1914, and the Clayton Antitrust Act of 1914 — that sought to codify strong antimonopoly values to constrain concentrated corporate power over markets, labor, and society. California's Cartwright Act, our foundational antitrust statute, was enacted during this same time era, in 1907. Today, we've once again reached historic levels of concentrated wealth and power that rival this period.

"For most of the last four decades, the under-enforcement of these laws has led to higher prices and fewer choices. Dominant corporations also leverage this economic power to exert political power, exercising outsized influence over our democracy."

In general, antitrust laws regulate markets by promoting fair competition and prohibiting companies from abusing market power. They are designed to prevent and proscribe anticompetitive conduct — like monopolization, collusion, and harmful mergers — that enable companies to accumulate, exert, and exploit their outsized power over consumers, workers, other businesses, and communities. For most of the last four decades, the under-enforcement of these laws has led to concentrated markets, resulting in higher prices and fewer choices across our economy. Dominant corporations also leverage this economic power to exert political power, exercising outsized influence over our democracy.

After Congress first passed our foundational antitrust statutes, the courts initially applied them to intervene against monopoly power, citing concerns over not just its economic threats, but also social and political concerns.[4] Indeed, as the

[3] Id. at 4.

[4] See, *e.g.*, *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

Commission's single-firm conduct report points out, the passage of federal antitrust legislation starting with the Sherman Act was motivated by the recognition that "concentrated economic power can lead to concentrated political power, which is widely seen as unhealthy in a democracy."[5] Evidence confirms that monopolies do not just limit working families' and households' purchasing power to secure everyday necessities, but also restrict opportunity and liberty by constraining workers' mobility and wielding outsized power over small, entrepreneurial, independent businesses.[6]

Over time, however, judicial precedent shifted enforcement of our antitrust laws away from their original intent. In the late 1970s, a group of so-called "Chicago School" scholars, including federal judges Richard Posner and Robert Bork, stressed "market efficiency" as the single most important goal of the antitrust laws. As the Commission's expert reports and leading academics affirm, the Chicago School spread their misreading of legislative intent through the promulgation of the consumer welfare standard, which primarily considers price effects. Under this standard, business practices, even monopolization, are generally permissible if they do not lead to higher prices for consumers, even if there may be harm to workers, small businesses, and trading partners.[7] Fellow judges began applying this standard, setting new judicial precedent divorced from the original goals of the antitrust statutes, making it increasingly difficult to bring successful antitrust enforcement actions.[8] The idea that the only conduct that should be policed is that which raises prices is also entrenched and pervasive in the policymaking arena.

Urgency of the moment

Over the last several years, we have seen a bipartisan resurgence of an antimonopoly movement that has begun to reverse course, restoring antitrust to its original purpose through pursuit of enforcement of existing laws, as well as advancing proposals to expand and strengthen the legal framework.

However, how and whether the current federal administration continues this trend is uncertain.[9] This instability reinforces the critical importance of California taking action to

---

[5] California Law Revision Commission, *Report on Antitrust Law: Study B-750,* "Single-Firm Conduct Working Group," January 2024, http://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp1.pdf.

[6] See, e.g., Denise Hearn, "Harms from Concentrated Industries: A Primer," Columbia Center on Sustainable Investment (February 16, 2024), https://ccsi.columbia.edu/news/harms-concentrated-industries-primer.

[7] See, e.g., Marshall Steinbaum and Maurice E. Stucke, The Effective Competition Standard: A New Standard for Antitrust (2020), *University of Chicago Law Review*: Vol. 87, Iss. 2, Article 11, Available at https://chicagounbound.uchicago.edu/uclrev/vol87/iss2/11/.

[8] Stucke, Maurice E., Reconsidering Antitrust's Goals (2011). *Boston College Law Review*, Vol. 53, p. 551, 2012, University of Tennessee Legal Studies Research Paper No. 163, Available at SSRN: https://ssrn.com/abstract=1904686.

[9] At the time of writing this report, the Trump-Vance Administration's picks for FTC commissioner and DOJ antitrust division head have had years of expertise and experience on the issues, and FTC Chair Andrew Ferugson has stated that the FTC "will end Big Tech's vendetta against competition and free speech." Chair Ferguson has also upheld the FTC and DOJ's 2023 merger guidelines. At the same time, Trump has also illegally fired the minority commissioners at the FTC, and Chair Ferguson has also closed public comment on a request for information on retailers' use of surveillance pricing.

protect our state's economy and its global significance. California is one of several states, alongside New York, Minnesota, and Michigan, that is examining its state antitrust laws and considering new proposals to fortify our ability to uphold the original goals of antitrust in a modern world.

This work could not be more timely. Restoring the primacy of antitrust's animating goals — righting imbalances in both economic *and* political power — is essential to building an economy that works for all of us and a democracy that protects essential freedoms. The severe gap that we see today between billionaires and working families is the result of antitrust law becoming untethered from the purposes intended by those who enacted it. And with each passing year of the status quo, new record-setting numbers of billionaires amass astonishing wealth and along with it, unshakable power. We are all worse off because of it.

In this context the Commission initiated its effort to evaluate current antitrust law to determine whether it is meeting its original goals and can be relied upon to do so into the future. The process is ongoing. As of this writing, the Commission has considered frameworks for proposals on expanding the Cartwright Act to reach single firm conduct, and has directed staff to develop detailed proposals for its review in the coming months. These proposals likely will serve as the foundations for future legislation, though the precise path is very much untrod.

Meanwhile, a coalition of stakeholders has mobilized behind a set of principles that recognize the critical role of a robust antitrust framework in undergirding an economy marked by fairness and a democracy grounded in freedom. While we generally align with the direction the Commission seems to be headed, we see value in setting forth our own independent analysis and recommendations stemming from this large body of work. Armed with the expert reports coming out of the Commission's process, the resulting policy recommendations, and considerable public comments, we present this report to articulate a shared vision for a set of antitrust tools and policies that we hope to see enacted into California law. In these pages we highlight key findings and conclusions from the working group reports and add to them recommendations from our analysis that, taken together, put forth a vision for how modern antitrust law and policy could spur a new era of economic prosperity based on the bedrock American principles of fairness, competition, entrepreneurship, and ingenuity. We seek to build the economy we deserve.

Our recommendations include:

- ➔ Strengthening state antitrust law to take on monopoly power;
- ➔ Enacting state-level merger protections that take into account California's unique economy;
- ➔ Equipping antitrust enforcers with better and stronger tools to combat harmful collusion;

- ➔ Addressing the unique challenges of anticompetitive conduct in the digital economy and among tech platforms;
- ➔ Protecting workers from the harmful anticompetitive effects of labor monopsony among employers; and
- ➔ Strengthening enforcement mechanisms to ensure enforcers can carry out the law as intended and designed.

Corporate concentration in California

California has the fifth largest economy in the world and represents 14 percent of the national gross domestic product.[10] What we do here matters a great deal to both our national and global economies, as well as to the 39 million people who live here and comprise our local communities. As the Commission's *Concentration and Competition in California* report points out, California is home to some of the most concentrated — and globally influential — markets in the world, namely:[11]

- ➔ **The labor market**, in which, as the Commission's experts point out, "market concentration allows employers to use their market power to pay workers less, and employers are doing exactly that."[12] The experts cite non-compete clauses (both among different employers and between employers and their employees), arbitration clauses, mergers, and worker misclassification as tools employers use to distort labor markets.[13]
- ➔ **Food and agriculture industries,** in which consolidation along the entire supply chain has increased prices for California consumers, and the prices of common foods like chicken and beef no longer bear any relationship to the cost of production. As the experts note, four large companies dominate the meat processing industry — controlling 55 percent to 85 percent of the market for pork, beef, and poultry. The Commission's experts note that grocery store mergers have also raised prices and reduced consumer choice and quality.[14]
- ➔ **Healthcare and pharmaceutical industries.** California's healthcare industry is inextricably bound with our state economy. One-third of the state budget is spent on healthcare; the healthcare industry contributes hundreds of billions of dollars to the state economy and employs 1.7 million people. For that reason, it's not hyperbole to say that increasing consolidation (that companies have pursued largely through

---

[10] Jenny Duan and Sarah Bohn, "California's Economy," October 2024, Public Policy Institute of California, https://www.ppic.org/publication/californias-economy/.

[11] California Law Revision Commission, *Report on Antitrust Law: Study B-750,* "Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets," March 26, 2024, https://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp7.pdf.

[12] *Id.*

[13] *Id.*

[14] *Id.*

serial acquisition) among hospitals, drug manufacturers, pharmacy benefit management companies (PBMs), and pharmacies poses an economic and health threat to the entire state. In California, three health insurers control 80 percent of the health insurance market, three PBMs control 75 percent of the PBM market, and eight hospital systems control 40 percent of the state's hospital beds. This concentration has resulted in hospital prices increasing by 600 percent in 35 years and prescription prices growing even faster.[15]

"Concentration has resulted in hospital prices increasing by 600% in 35 years and prescription prices growing even faster."

➔ **The entertainment industry** is also controlled by just a handful of large companies. Decades of deregulation and antitrust underenforcement have allowed for waves of vertical and horizontal consolidation. As one example, just a few companies now dominate the market for streaming video. These gatekeepers have used their increased market power and vertical control of content production and distribution to disadvantage their competitors, raise prices for consumers, limit creative innovation, and push down wages for creative workers — and more consolidation is on the horizon.[16]

The challenge we face

As dominant firms exercise their market power,[17] competition becomes increasingly distorted. The result is an uneven playing field where consumers, workers and non-dominant businesses have little power up against the dominant firms. High prices, limited employment options, and fewer choices about where and how to buy goods and services become commonplace. The harmful effects can be seen in:

➔ **Increased costs to consumers.** Compared to the rest of the world, the average U.S. family pays $5,000 more annually as a result of monopolies.[18] Prices for the top 12 best-selling prescription drugs in the U.S. increased by 68 percent between 2012 and 2018.[19] Home

---

[15] *Id.*

[16] Writers Guild of America West, "The New Gatekeepers: How Disney, Amazon, and Netflix Will Take Over Media," (Aug. 2023), https://www.wga.org/the-guild/advocacy/politics-public-policy-pac/the-new-gatekeepers-how-disney-amazon-and-netflix-will-take-over-media

[17] Jan De Loecker, Jan Eeckhout, and Gabriel Unger, "The Rise of Market Power and the Macroeconomic Implications," November 2019, http://www.janeeckhout.com/wp-content/uploads/RMP.pdf.

[18] David Leonhardt, "Big Business is Overcharging You $5,000 a Year," *The New York Times*, Nov. 10, 2019, https://www.nytimes.com/2019/11/10/opinion/big-business-consumer-prices.html.

[19] "Overpatented, Overpriced: How Excessive Pharmaceutical Patenting is Extending Monopolies and Driving up Drug Prices," I-MAK, August 2018, http://www.i-mak.org/wp-content/uploads/2018/08/I-MAK-Overpatented-Overpriced-Report.pdf.

internet costs are double what they are in France, Germany, Mexico, and Japan.[20] Some economists argue that this problem is uniquely American — the result of higher corporate concentration because of weakened antitrust enforcement and the lax regulatory environment.[21]

"The average U.S. family pays $5,000 more annually as a result of monopolies."

- ➔ **Less innovation and entrepreneurship.** In nearly every major industry, from agriculture to finance, the number and share of new companies is falling, attributable to increased market concentration that crowds out new entrants and reduces entrepreneurship.[22] For example, instead of competing *in* the market, dominant firms in the digital economy are competing *for* the market, using strategies that reinforce network effects to gain more customers and lock them in with high switching costs.[23] Start-ups are orienting more around the goal of being acquired as a metric for success,[24] and dominant players like Meta pursue acquisition strategies to buy out nascent competitors before they can become a real threat.[25]

- ➔ **Decreased bargaining power for workers.** Wages are the price employers pay for labor, and a limited number of employers (or "buyers" of labor) leads to monopsony power in the labor market, resulting in higher unemployment and lower wages.[26]

---

[20] David Leonhardt, "Big Business is Overcharging you $5,000 a Year," *New York Times*, November 10, 2019, https://www.nytimes.com/2019/11/10/opinion/big-business-consumer-prices.html and Becky Chao and Claire Park, "The Cost of Connectivity 2020," New America's Open Technology Institute, July 2020, https://www.newamerica.org/oti/reports/cost-connectivity-2020/.
[21] Thomas Philippon, *The Great Reversal: How America Gave Up on Free Markets* (2020).
[22] Jay Shambaugh, Ryan Nunn, Audrey Breitwieser, and Patrick Liu, "The state of competition and dynamism: Facts about concentration, start-ups, and related policies," Brookings Institute, June 2018, https://www.brookings.edu/research/the-state-of-competition-and-dynamism-facts-about-concentration-start-ups-and-related-policies/.
[23] *See, e.g.,* Fiona Scott Morton, "Reforming U.S. antitrust enforcement and competition policy," Washington Center for Equitable Growth, February 2020, https://equitablegrowth.org/reforming-u-s-antitrust-enforcement-and-competition-policy/; Fiona Scott Morton, "Antitrust Enforcement in High-Technology Industries: Protecting Innovation and Competition," December 2012, https://www.justice.gov/atr/file/518956/download ("Platforms can also feature 'tipping,' where an entire market may go to a single player or platform once a certain threshold is reached. With tipping, exclusionary practices that deny access to established standards can be particularly effective."); and Carl Shapiro and Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy* (1999), Chapter 7: Networks and Positive Feedback.
[24] Eric Markowitz, "Forget IPO. The New Goal? Get Acquired," *Inc.*, September 12, 2012, https://www.inc.com/eric-markowitz/forget-ipo-the-new-goal-get-acqouired.html.
[25] Casey Newton and Nilay Patel, "'Instagram Can Hurt Us': Mark Zuckerberg Emails Outline Plan to Neutralize Competitors," *The Verge*, July 29, 2020, https://www.theverge.com/2020/7/29/21345723/facebook-instagram-documents-emails-mark-zuckerberg-kevin-systrom-hearing.
[26] Suresh Naidu, Eric A. Posner, and E. Glen Weyl, "Antitrust Remedies for Labor Market Power," *Harvard Law Review*, February 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3129221.

Wages are also stagnant, with inflation-adjusted wages for the average worker having risen by a mere 3 percent since the 1970s, and the bottom fifth of workers having experienced a *decline* in wages.[27] Nurses are a good example since their wages fall after hospitals merge as a result of reduced competition.[28] Economic modeling suggests that a competitive wage for nurses should be between $90,000 and $200,000, but the median is only $68,000.[29] While California has banned non-compete clauses in employment contracts, employers also exercise monopsony power over workers from the fast-food industry to tech through non-compete agreements and no-poach agreements in the rest of the U.S.[30]

"Black and Native American workers consistently face higher unemployment rates than white workers, and non-compete clauses in employment contracts trapping employees in low-wage jobs with hostile working conditions disproportionately harm women and people of color."

➔ **Increased corporate influence over our politics.** Economic power translates to political power. Studies have shown that policymakers are much more responsive to the wishes — and demands — of the wealthy and their interest groups, and less so to ordinary people.[31] Dominant firms and the wealthy corporate leaders who run them leverage their outsized influence to benefit themselves. The resources of dominant firms often outstrip those of the government regulators and officials who could check their power and hold them accountable for abuse and fraud. Equipped with more lawyers than the U.S. antitrust enforcement agencies and enough money to capture regulators and influence elected officials, these firms use their economic power to secure and maintain political power through campaign donations, lobbying, political appointments, regulatory capture, and more.

---

[27] Jay Shambaugh, Ryan Nunn, Patrick Liu, and Greg Nantz, "Thirteen facts about wage growth," *Brookings Institute*, September 25, 2017, https://www.brookings.edu/research/thirteen-facts-about-wage-growth/.
[28] Suresh Naidu, Eric Posner, and Glen Weyl, "More and more companies have monopoly power over workers' wages. That's killing the economy." *Vox,* April 6, 2018, https://www.vox.com/the-big-idea/2018/4/6/17204808/wages-employers-workers-monopsony-growth-stagnation-inequality.
[29] *Id.*
[30] "U.S. agency considering rule reining in non-compete agreements for workers," *Reuters*, January 9, 2020, https://www.reuters.com/article/us-usa-antitrust-noncompete/u-s-agency-considering-rule-reining-in-non-compete-agreements-for-workers-idUSKBN1Z82P9.
[31] Martin GIlens, *Affluence and Influence: Economic Inequality and Political Power in America*, Princeton University Press: 2012 and Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age*, Princeton University Press: 2017.

EX 36

➔ **Increased racial disparities in economic outcomes.** In a racialized society like the U.S., inadequate and underenforced antitrust laws have empowered corporations to continue a long tradition of exploiting people of color. For example, corporate concentration's success in weakening worker power hits communities of color the hardest: Black and Native American workers consistently face higher unemployment rates than white workers,[32] and non-compete clauses in employment contracts trapping employees in low-wage jobs with hostile working conditions disproportionately harm women and people of color.[33] Across industries, many dominant firms rely on the explicit exploitation of Black and brown people, whether as end users, consumers, workers, citizens, or community members.[34] Finally, as dominant firms consolidate wealth and power, the benefits flow to corporate leaders and shareholders — who remain mostly white — and thereby compound enduring wage and wealth gaps.[35] These connections have been recognized by leadership at federal antitrust enforcement agencies, who have called for antitrust enforcement to consider racial impact.[36] While antitrust enforcement will not end racial disparities on its own, it is an important tool that helps dictate how our markets are constructed and governed, as well as who has power, whether it is bargaining power, market power, or political power.

How corporate concentration harms competition

Firms can distort competition in the marketplace in several forms, and antitrust law must be robust enough to address all of them. Here we detail just some examples of anticompetitive harms: this list is by no means comprehensive. Some conduct — classic collusion, for example — involves two or more firms working together to harm competition by agreeing to

---

32 Economic Policy Institute, "Racial and ethnic disparities in the United States," June 2022, https://www.epi.org/publication/disparities-chartbook/, last updated Nov. 2024.
33 Jessica Guynn, "How noncompete agreements harm women and people of color: 'Consequences can be devastating,'" *USA Today*, January 19, 2023, https://www.usatoday.com/story/money/2023/01/19/noncompete-agreements-harm-women-people-color/11046736002/.
34 Jade Magnus Ogunnaike, "Corporate Monopolies are a Racial Justice Issue. We Need Federal Regulation Now," *The Root*, January 29, 2021, https://www.theroot.com/corporate-monopolies-are-a-racial-justice-issue-we-nee-1846155644.
35 See, e.g., Susan Holmberg, "Power Play: How Monopolies Leverage Systemic Racism to Dominate Markets," Institute for Local Self-Reliance, June 20, 2024, https://ilsr.org/articles/powerplay/; Jeremie Greer and Solana Rice, "Anti-Monopoly Activism: Reclaiming power through Racial Justice," Liberation in a Generation, March 2021, https://www.liberationinageneration.org/wp-content/uploads/2021/03/Anti-Monopoly-Activism_032021.pdf.
36 *See, e.g.,* Lauren Feiner, "How FTC Commissioner Slaughter wants to make antitrust enforcement antiract," *CNBC,* September 26, 2020, https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html; "Centering Anti-racism in the Antimonopoly Fight," Economic Security Project, April 7, 2021, https://economicsecurityproject.org/resource/centering-anti-racism-in-the-anti-monopoly-fight/; and Khushita Vasant, "US FTC's Mark says antitrust enforcers should ensure decisions consider sustainability, racial inequality," *MLex*, October 16, 2023, https://mlexmarketinsight.com/news/insight/us-ftc-s-mark-says-antitrust-enforcers-should-ensure-decisions-consider-sustainability-racial-inequality.

set market terms to manipulate price or output and enrich themselves, *e.g.*, two competitor firms at the same level of the supply chain agreeing to set prices for a product they both sell (horizontal price-fixing) or two firms at different levels of the supply chain, like manufacturers and retailers, agreeing to set prices (vertical price-fixing). Horizontal price-fixing harms competition because it can in practice reduce the number of competitors in the market, and simultaneously degrade quality and raise prices by reducing the power of consumer preference and demand. Vertical price-fixing hurts competition because it discourages or eliminates price competition among retailers, again usually resulting in higher costs for consumers.

Firms can also suppress competition through mergers or acquisitions that lead to anticompetitive effects — when two competitor firms join together to form a larger firm that now controls so much of the market that the remaining firms cannot compete on the merits. While the joining of two firms is not *per se* harmful or illegal, anticompetitive mergers and acquisitions harm competition by increasing or entrenching market dominance, limiting the number of products or services available to consumers, increasing prices, and reducing innovation.

In other cases, anticompetitive conduct can take the form of harmful monopolist conduct — just one dominant firm that holds so much market power that it can harm competition by acting unilaterally, *e.g.*, a seller conditioning the purchase of one product on the purchase of another (tying), or an employer with so much concentrated power in the labor market (monopsony) that it allows them to underpay workers. Our recommendations follow.

II. Strengthen state antitrust law to take on single-firm conduct

By Michael Swerdlow, Kelli Smith, and Becky Chao

Monopoly power is one of the biggest threats to a thriving, fair economy. Intuitively, people understand that monopolies across the economy limit their choices of where they work or what they spend their money on. Our federal antitrust laws don't treat monopolies as *de facto* illegal; instead they prevent monopolization that isn't a result of competition on the merits. This framework is intended to ensure that businesses are vying for customers and workers by offering superior products, services, prices, wages, and benefits. This competitive drive not only permits innovation to prevail, but also ensures that consumers benefit from better choices and value. Even if a single company rises to

"Monopoly power is one of the biggest threats to a thriving, fair economy."

EX 38

dominate a market, our federal antitrust laws protect competition on the merits to prevent that company from illegally acquiring or maintaining that monopoly. In other words, there are certain forms of competition that our federal antitrust laws allow and others that the laws prohibit to protect fair, competitive markets.[37] Harmful 'single-firm conduct' — behavior or actions by a single company that may harm competition or consumers and workers — is one of the unfair forms of competition that our federal antitrust laws prohibits.

California should join a majority of other states and the federal government by adopting a statute that makes it unlawful for a single firm acting alone to engage in anticompetitive conduct.

"The absence of a prohibition on monopolizing conduct is a "fundamental shortcoming" in California's antitrust law."

The Commission's single-firm conduct experts describe "the nearly universal view that the public is harmed when a single firm has such tight control over the supply of some product or service that customers have few if any good alternatives to that firm's offerings."[38] Both Congress and the state legislature have recognized that competitive markets generate benefits to the economy and society writ large, including "more equal distribution of income and wealth and expanded opportunities for small businesses and entrepreneurs."[39] Monopolies can abuse their power both to negate those benefits and cause a variety of additional harms, including high prices, restricted choice, worker impoverishment, and "dulled incentives to innovate."[40]

Federal antitrust law, under the Sherman Act, prohibits anticompetitive single-firm conduct to protect consumers and workers and promote fair competition — specifically by barring a single firm from maintaining market power through means other than outcompeting rivals on quality and price.[41] Unlike federal law and the laws in a majority of other states, California law contains no prohibition against a single monopolist abusing its market power to the provable detriment of consumers, workers, communities, competition, or innovation, leaving us overly reliant on federal laws, federal interpretation of those laws, and

[37] See, e.g., Sandeep Vaheesan, "The Morality of Monopolization Law," *63 William & Mary Law Review Online 119,* May 9, 2022, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3929159.
[38] California Law Revision Commission, *Report on Antitrust Law: Study B-750,* "Single-Firm Conduct Working Group," January 2024, https://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp1.pdf.
[39] *Id.*
[40] *Id.*
[41] Section 2 of the Sherman Act, 15 U.S.C.A. § 2; see also *United States v. Grinnell Corp.*, 384 U.S. 563, 570 — 71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.")

federally-informed enforcement to tackle single-firm anticompetitive practices that directly affect our state.[42]

As the Commission's single-firm conduct experts note, the absence of a prohibition on monopolizing conduct is a "fundamental shortcoming" in California's antitrust law and the Cartwright Act's "most glaring deficiency."[43] Any modernization of California's antitrust law must rectify this deficiency by including a single-firm conduct standard. To truly safeguard the competitive process, simply importing federal law into California is insufficient for promoting a vibrant, competitive economy in our state. Instead, California should develop a holistic approach that addresses the broad array of harms that single-firm conduct can cause.

A. Recommendation: Adopt a single-firm conduct standard that prohibits illegal monopolization, misuse of market power, and unfair competition.

We agree with the Commission staff's initial recommendations that California should enact its own single-firm conduct standard, and that standard should "integrat[e] elements of an AOD [abuse of dominance] standard that guard against the misuse of market power."[44]

Further, we recommend that California look to the Clayton and FTC Acts as models for this reform. These statutes were designed to create clear standards for harmful business practices and empower an expert agency to address novel unfair methods of competition — including the misuse of market power. These laws can serve as a basis for California to adopt a comprehensive single-firm conduct framework without exposing the Golden State to "a new, untested antitrust framework could be risky and invite uncertainty."[45]

A misuse of market power standard should prohibit single-firm conduct that exploits consumers, workers, and other trading partners. Importantly, this more robust standard should not be limited to exclusionary conduct: it should include certain conduct that harms competition, workers, and consumers — even without proof that the conduct excludes a competitor. Such a standard would provide California antitrust enforcers with the same tools that the FTC has to proactively respond to novel forms of harmful business conduct. This update would not only close critical gaps in California's antitrust framework but also reduce the overreliance on federal enforcement, ensuring that local issues are addressed

[42] California's Unfair Competition Law (UCL) and Unfair Practices Act (UPA) proscribe some types of unfair, fraudulent, or deceptive acts or practices, but California's Cartwright Act does not itself reach unilateral conduct.
[43] California Law Revision Commission, *Report on Antitrust Law: Study B-750*, "Single-Firm Conduct Working Group," January 2024, http://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp1.pdf
[44] California Law Revision Commission, *Report on Antitrust Law: Study B-750*, "Memorandum 2025–11, Antitrust Law: Initial Recommendations for ACR 95 Questions," January 13, 2025, http://clrc.ca.gov/pub/2025/MM25-11.pdf.
[45] *Id.*

swiftly and effectively in state courts. Adopting this approach would strengthen California's position as a leader in fostering fair and innovative markets.

B. Recommendation: Give California antitrust enforcers rulemaking authority

California's Attorney General currently lacks the authority to independently update and refine antitrust enforcement tools through an administrative rulemaking process, leaving critical updates to the law to one-off enforcement precedents and the whims of generalist judges. This constraint hampers timely and effective responses to evolving market dynamics and novel challenges, leaving the state's economy, consumers, and workers vulnerable to harmful anticompetitive practices in the meantime.

Like the FTC, the state Attorney General should be granted rulemaking authority to enumerate unlawful conduct through a formal notice and comment process, subject to overarching statutory authority categories of illegal conduct, which may include unfair methods of competition, unfair and deceptive acts or practices, restraints of trade, illegal monopolization, or misuse (or abuse) of market power. That rulemaking authority should therefore include the Attorney General's ability to issue rules pursuant to California's Unfair Competition Law and Unfair Practices Act.

Enumerating in the law or regulation specific types of conduct that would be prohibited by clear standards is beneficial to the extent it provides notice to market participants of the meaning of otherwise unclear terms in the statute. The more clarity the statute itself provides, the less risk is created by leaving broad discretion to courts to interpret its terms in inconsistent ways. Nonetheless, evolving markets will demand further clarity, and for that reason, the Office of the Attorney General should have rulemaking authority to elaborate on the statutory language.

Under this structure, the Office of the Attorney General (or another expert administrative body) would be permitted to study business conduct, determine its competitive effects, and promulgate rules that provide clarity where it is lacking, in service of increased compliance with state antitrust laws. In doing so, the Attorney General should receive public comment, consider the major harms and potential benefits of certain conduct addressed by the rulemaking, and clarify its enforcement priorities. Doing so will enhance compliance, deter non-compliance, and limit unpredictable and costly delegation of discretion to generalist judges — all while making antitrust enforcement more responsive to California's dynamic economic environment.

Without rulemaking authority, generalist judges alone must design the antitrust rules of the road. These judges typically lack formal economics or antitrust training. Recent years have seen renewed efforts to encourage judicial appointments from a broader range of professional backgrounds, but even so, only a small number of nominees have labor or economics backgrounds.[46] Prior to her appointment as FTC Chair under the Biden Administration, Lina Khan wrote, "antitrust adjudication has become highly reliant on technical evidence and complex economic analysis, but generalist judges often lack the expertise to independently assess the arguments before them.

Courts have sought to compensate for this institutional deficiency by relying on *amicus* briefs and third-party experts for the economic reasoning justifying antitrust rules, partially mirroring how administrative agencies solicit and review comments on proposed rulemaking."[47] But *amicus* practice is also vulnerable to improper influence, including when parties to the litigation indirectly fund supportive briefs,[48] and recognition of this ethical deficiency is the subject of pending updates to the Federal Rules of Appellate Practice.[49]

Under the Sherman Act, a single judge, who likely lacks formal economics or antitrust training, is expected to surmise whether specific business practices in isolation will raise prices and decide how competition in major industries should be restructured. Individual judges must do this without the benefit of public hearings, neutral experts, or independent investigative tools. This extraordinary delegation has resulted in an unpredictable and problematic federal antitrust common law. By comparison, rulemaking would delegate analysis to an expert body that is accountable through the electoral process, while providing judges with clear adjudicatory frameworks.

"Rulemaking can provide pathways for small businesses to address monopolizing or unfair conduct, workers to report conduct, and consumers to redress harms."

Rulemaking can also mitigate barriers to both public and private enforcement of California antitrust and unfair competition laws. It can provide pathways for small businesses to address monopolizing or unfair conduct without requiring them or their lawyers to raise millions of dollars for a protracted court battle; workers to report conduct without taking a publicly oppositional stand against their employer;

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

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

[48] Mike Scarcella, "Google's ties to outside backers questioned in Epic Games appeal," Reuters, January 9, 2025 https://www.reuters.com/legal/government/googles-ties-outside-backers-questioned-epic-games-appeal-2025-01-09/ (last visited Mar 11, 2025)

[49] "Preliminary Draft:: Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure, and the Federal Rules of Evidence," Committee on Rules of Practice and Procedure, Judicial Conference of the United States, August 2024, https://www.uscourts.gov/sites/default/files/2025-02/preliminary_draft_of_proposed_amendments_2024.pdf

and consumers to redress harms that have a large collective impact but too small of an individual impact to rationally warrant legal action.

C. Recommendation: Develop a more comprehensive and modern approach that avoids the pitfalls of the Sherman Act

California's antitrust law must address the particular contours of California's economy and go beyond the federal judiciary's diluted Sherman Act jurisprudence that has debilitated vigorous enforcement. It makes little sense to amend California law to prohibit anticompetitive conduct by a single firm, yet wholly adopt the flawed standards for enforcing that law that have prompted bipartisan pleas for reform. To do so would likewise signal a retreat from current California law, which, as the Commission's experts point out, is not bound to federal precedent.[50] As the Commission's single-firm conduct experts note, while the Sherman Act is a starting point, merely parroting the language of Section 2 would "rob California law of the power it needs to protect competition." And "without further elucidation," doing so could bring with it the "potentially severe disadvantage" of California courts misinterpreting the Commission's report as suggesting they should reverse all precedent and mechanically import 130 years of federal jurisprudence — which has detrimentally narrowed the scope and enforceability of antitrust law — into California law.[51]

> "A modernized antitrust law should address single-firm conduct both more specifically and more holistically to combat harmful conduct, drawing from the "unfairness" standard in Section 5 of the FTC Act."

Even at the federal level in recent years, there has been an emerging consensus to expand the scope of conduct prohibited by federal antitrust laws, including the consideration of bipartisan federal legislation prohibiting self-preferencing,[52] price gouging,[53] and the use of pricing algorithms to tacitly collude.[54] In November 2022, the FTC issued a revised policy statement regarding the scope of Section 5 of the FTC Act, which broadly prohibits "unfair methods of competition in or affecting commerce."[55] These updates and proposals, if passed, provide more clarity

---

[50] *Id., and see Knevelbaard Dairies, Inc. v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000).
[51] *Id.*
[52] S.2992 - American Innovation and Choice Online Act, 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/senate-bill/2992/text.
[53] S.4214 - Price Gouging Prevention Act, 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/senate-bill/4214/all-info.
[54] S.3686 - Preventing Algorithmic Collusion Act, 118th Congress (2023-2024) https://www.congress.gov/bill/118th-congress/senate-bill/3686/text.
[55] Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the FTC Act, FTC, File No. P221202, November 10, 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

for how our federal antitrust laws should be enforced when it comes to anticompetitive single-firm conduct. Courts need not focus on the proportionality of the harms relative to the benefits of the conduct at hand, or the trade-offs between efficiency and harms to the defendant's rivals, to determine whether conduct is exclusionary or anticompetitive. These questions distract from the central issue at the crux of our antitrust laws: that anticompetitive harms to workers, consumers, and businesses merit intervention from enforcers to halt the abuse and restore competition to the market.

"In revising its antitrust law, California has the opportunity to make clear its intentions in statute — rather than leaving the questions up to interpretation by a non-expert judiciary."

In revising its antitrust law, California has the opportunity to make clear its intentions in statute — rather than leaving the questions up to interpretation by a non-expert judiciary. A modernized antitrust law should address single-firm conduct both more specifically and more holistically to combat harmful conduct, drawing from the "unfairness" standard in Section 5 of the FTC Act, including a misuse of market power standard, which is both deeply rooted in U.S. federal antitrust law and jurisprudence and widespread across developed countries including in the European Union, as well as the U.K., Canada, and Australia.

In the U.S., states like New York and Minnesota are considering an alternative abuse of dominance approach. Key provisions of New York's S933A (2021) establishing an abuse of dominance standard include:

- ➔ Defining dominance as significant market power (*e.g.*, high market share, influence over market conditions, or labor market control);
- ➔ Allowing for proof of dominance through both indirect evidence of market share, or direct evidence of specific conduct indicative of a dominant market position;
- ➔ Prohibiting dominant firms from engaging in abusive practices like predatory pricing, self-preferencing, or exclusionary contracts, and granting the state attorney general authority to issue rules defining abusive practices; and
- ➔ Establishing express protections for labor markets.

Minnesota's SF 1744 (2023-2024) likewise sought to establish an abuse of dominance standard, and similarly to the New York bill, it would have recognized firms as dominant either if they controlled a significant market share or were able to unilaterally influence market conditions. It would target practices like leveraging dominance to suppress competition in other markets, refusal to deal, or imposing restrictive employment terms like no-poach agreements.

Just as the federal Sherman Act does not prohibit the accumulation of monopoly through competition on the merits, neither the New York nor Minnesota abuse of dominance proposals seek to prohibit firms from achieving a dominant position. Rather, a carefully crafted abuse of dominance standard prohibits specifically enumerated conduct constituting an abuse of that position, while providing the State Attorney General with rulemaking authority to provide ongoing clarity.

> "A misuse of market power standard... takes into consideration how powerful corporations harm not just consumers, but small businesses and labor, too."

A misuse of market power standard would revitalize a foundational theory of antitrust harm–one that considers how powerful corporations harm not only consumers, but also small businesses and labor. Moreover, prohibiting exploitative business practices in this way would better protect California's long-term economic welfare by arresting exploitative conduct of monopolists before rivals have already been harmed.[56] Importantly, it should not be viewed as merely an expansion of current law, but instead as a means of giving credence to a robust interpretation of antitrust law by re-codifying historical and foregone theories of harm.

Examples of harmful single-firm conduct

Firms can undermine competition in ways that do not directly or immediately harm what are seen as classic "rivals" in the same market. Such conduct still harms the competitive process and takes advantage of consumers, workers, and other businesses who have little choice but to accede to the dominant firm's terms. In addition to the non-exhaustive list that

[56] See, *e.g.*, Rebecca Haw Allensworth, "Long-Term Consumer Welfare," Vanderbilt Law Research Paper (February 3, 2025), available at SSRN: https://ssrn.com/abstract=5133539

the Commission's experts lay out as potentially harmful to competition,[57] California's single-firm conduct standard should address:

Conduct that acquires or exploits monopsony power by suppressing wages:

➔ **Exploitative contract terms,** like forced arbitration or training repayment clauses that increase market power by reducing workers' capacity to bargain or seek legal redress. Enforcers and private plaintiffs may not be able to demonstrate that these clauses harm rivals, but they nonetheless increase a firm's market power as well as its control over workers and degrade their ability to push for better wages and working conditions.[58]

➔ **Worker misclassification,** wherein firms gain market power by improperly classifying workers as contractors to increase their control over worker's wages and conditions of employment.[59]

➔ **Supply chain wage suppression,** in which firms use their dominant position in a buyer market to push down wages in an adjacent market.[60] This may not have a demonstrable effect on the dominant firm's rivals, but it will structurally lower wages in an upstream market and transfer that surplus to the dominant firm.

---

[57] California Law Revision Commission, *Report on Antitrust Law: Study B-750*, "Single-Firm Conduct Working Group," January 2024, http://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp1.pdf, ("Loyalty Rebates, which penalize a customer that conducts more business with the defendant's rivals, as opposed to volume discounts, which are generally procompetitive; Exclusive Dealing Provisions, which disrupt the ability of counterparties to deal with the defendant's rivals, especially if such provisions are widely used by the defendant; Most-Favored Nation Clauses, which prohibit counterparties from dealing with the defendant's rivals on more favorable terms and conditions than those on which they deal with the defendant, especially if such clauses are widely used by the defendant; 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; Agreements to Limit Competition, such as settlements of patent infringement cases brought by pharmaceutical firms against alleged generic entrants in which the patent holder provides valuable consideration to the potential generic entrant and that party agrees to restrictions on its ability to compete against the patent holder; Predatory Pricing, including targeted discriminatory pricing aimed at particular rivals to weaken them or drive them from the market, recognizing that the "recoupment" requirement for a predatory pricing claim under federal antitrust law is not a requirement under California law.")

[58] J. J. Prescott et al., *First Evidence on the Use of Training Repayment Agreements in the US Labor Force*, ProMarket (Mar. 27, 2024), http://www.promarket.org/2024/03/27/first-evidence-on-the-use-of-training-repayment-agreements-in-the-us-labor-force/.

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

[60] Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Af ect U.S. Workers' Wages*, 1978 to 2014, 83 AM. SOC. REV. 213, 216 (2018) ("dependence on large buyers decreases suppliers' wages and accounts for 10% of the decline in wage growth in nonfinancial firms since the 1970s"); Eamon Coburn, *Supply Chain Wage Theft as Unfair Method of Competition*, YALE LAW JOURNAL (FORTHCOMING) (2024), https://papers.ssrn.com/abstract=4716531 (last visited Apr 16, 2024).

➔ **Union busting,** which enables firms to maintain dominance over labor markets by suppressing workers' ability to collectively bargain.[61]

Conduct that acquires or exploits market power by harming consumers:

➔ **Price gouging,** in which dominant firms exploit emergencies or other unusual market disruptions to raise prices on essential goods. When firms in concentrated markets are allowed to price gouge, it provides rivals an opportunity to tacitly collude and raise their prices along with the dominant firm. This increase in control over prices by the dominant firm can benefit rivals while exploiting consumers. We continue to see repeated instances of this behavior, driving and exacerbating inflation.[62]

➔ **Deploying exploitative pricing algorithms,** such as Amazon's Project Nessie which "induced other online stores to raise their prices and allowed Amazon to extract additional profits from shoppers," per the FTC's recent complaint,[63] or RealPage, which facilitated collusion among corporate landlords in the rental housing market to raise rents and artificially restrict housing supply.[64] Deploying algorithms like this impairs rivals' ability to fairly compete while hiking prices across the economy.

Conduct that acquires or exploits market power by manipulating non-rival businesses:

➔ **Imposing vertical restraints,** such as anti-steering provisions or resale price maintenance, which reduce a trading partner's ability to recommend customers use cheaper or higher-quality services.

➔ **Engaging in price discrimination,** wherein firms use their buyer power to force suppliers to sell them the same volume and type of product at a lower price than smaller rivals.

---

[61] See Antitrust Complaint Against UPMC, Strategic Organizing Center, 43, http://thesoc.org/what-we-do/upmc-action/ ("UPMC's conduct not only violates federal labor law, but also may help maintain and extend UPMC's possible monopsony power"). Ioana Marinescu & Eric Posner, *A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony*, 14, Roosevelt Institute, https://rooseveltinstitute.org/publications/a-proposal-to-enhance-antitrust-protection-against-labor-market-monopsony/.

[62] Josh Bivens, *Corporate Profits Have Contributed Disproportionately to Inflation. How Should Policymakers Respond?*, Economic Policy Institute, https://www.epi.org/blog/corporate-profits-have-contributed-disproportionately-to-inflation-how-should-policymakers-respond/ ; Isabella Weber & Evan Wasner, *Sellers' Inflation, Profits and Conflict: Why Can Large Firms Hike Prices in an Emergency?*, Economics Department Working Paper Series (2023), https://scholarworks.umass.edu/econ_workingpaper/343.

[63] Dana Mattioli, *Amazon Used Secret 'Project Nessie' Algorithm to Raise Prices*, WSJ, https://www.wsj.com/business/retail/amazon-used-secret-project-nessie-algorithm-to-raise-prices-6c593706 (last visited Apr 14, 2024).

[64] U.S. Department of Justice, *Justice Department Sues RealPage for Algorithmic Pricing Scheme that Harms Millions of American Renters*, (Aug. 23, 2024), https://www.justice.gov/opa/pr/justice-department-sues-realpage-algorithmic-pricing-scheme-harms-millions-american-renters.

- ➔ **Imposing extractive fees,** such as when a platform charges an independent business an excessive fee for access to its services. Today, certain platforms can charge independent businesses as much as half of the value of their transactions, or levy fees that are over a hundred times the true cost of providing their services.[65]

"FTC Commissioner Bedoya recently called misclassification 'a pervasive and national scandal,' depriving working people of "billions" every year."

Consider worker misclassification — the act of depriving workers of various legal benefits and worker protections by treating them as independent contractors instead of employees — which is a form of single-firm conduct that clearly harms workers, but may not have the ancillary effect of weakening or excluding competitors. That is particularly true when misclassification by one firm has the knock-on effect of causing competitors to engage in misclassification, even if there is no explicit agreement between the firms to do so. FTC Commissioner Bedoya recently called misclassification "a pervasive and national scandal," depriving working people of "billions" every year, arguing that the practice could constitute an illegal vertical restraint on trade on the employer's part.[66] Under a misuse of market power or unfairness standard, the negative impact on workers and the labor market would be considered as part of the analysis of whether such conduct should be allowed as a matter of antitrust law.

D. Recommendation: Avoid unpredictable outcomes by codifying *per se* standards of illegality and restricting consideration of out-of-market "procompetitive" benefits in rule of reason cases.

As the Commission's experts note, and as the California Supreme Court has clarified, the Cartwright Act is "broader in scope and deeper in reach" than the Sherman Act, and federal antitrust interpretations are only instructive in Cartwright Act cases.[67] Despite this, some courts continue to mistakenly apply federal antitrust principles in the absence of state law, creating legal uncertainty.[68]

Moreover, the influence of the Chicago School's agenda to narrow antitrust to focus on "efficiency" has led to the current federal antitrust standards' porous borders, allowing firms to justify harmful single-firm conduct by pointing to supposed, speculated

---

[65] See, e.g., Stacy Mitchell, Amazon's Monopoly Tollbooth in 2023, Inst. for Loc. Self-Reliance (Sep. 21, 2023), https://ilsr.org/articles/amazonmonopolytollbooth-2023/.
[66] Supra, note 57.https://www.ftc.gov/system/files/ftc_gov/pdf/Overawed-Speech-02-02-2024.pdf
[67] *In re Cipro Cases I & II,* 61 Cal.4th 116, 160-61 (2015).
[68] California Law Revision Commission, *Report on Antitrust Law: Study B-750*, "Enforcement and Immunities Working Group Report" 2024, https://clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp6.pdf.

procompetitive benefits in unrelated markets. This approach, which is applied in California in the absence of a state antitrust law, enables dominant firms to rationalize exclusionary or exploitative practices by asserting benefits that do not directly serve the harmed market.

The analysis that determines antitrust liability under federal law by weighing the harmful (anticompetitive) and beneficial (procompetitive) effects of conduct is referred to as the "rule of reason." It has come to dominate antitrust law since the Supreme Court opened the door over a century ago, but what counts as harmful or beneficial — and how courts weigh those effects against each other — has led to costly legal disputes and inconsistent outcomes.

Prohibit consideration of "out-of-market" efficiencies to offset harms occurring within a defined relevant market

A simple way to limit costly expert disputes and constrain unpredictable judicial discretion is to restrict consideration of "procompetitive" benefits to those benefits within the defined relevant market in any given case. In other words, single-firm conduct that undermines competitors or stifles innovation in one line of commerce should not be excused simply because the firm claims it drives efficiencies in another undefined market. For instance, credit card companies should not be able to justify destroying competition for lower merchant fees with assertions that doing so allows them to provide other cardholders with higher rewards.[69]

"Single-firm conduct that undermines competitors or stifles innovation in one line of commerce should not be excused simply because the firm claims it drives efficiencies in another undefined market."

In recent years, California antitrust defendants have sought to take advantage of a broad interpretation of procompetitive effects under the rule of reason (and thereby avoid liability for otherwise anticompetitive conduct) by arguing that:

- ➔ Restraints of trade allowed them to "compete more effectively" in the market for motion-picture awards by restricting access to professional associations,[70]
- ➔ Restricting entry of generic alternatives allowed them to increase drug innovation,[71]
- ➔ Denying wrapping services — *i.e.*, creating a more comprehensive benefits package by combining different elements together, such as primary health benefits,

[69] *Ohio v. American Express Co.*, 585 U.S. 529 (2018).
[70] *Id.*, at 691.
[71] *In re Cipro Cases I & II*, 61 Cal. 4th 116, 155 (2015)

supplement benefits, and administrative services — to some customers allowed them to "increase utilization" of certain other health plans,[72] and

➔ Blocking rival smartphone app distributors allowed them to enhance consumer convenience and overall security.[73]

In each instance, the respective courts found that the federal rule of reason applies equally to California's Cartwright Act before engaging in an imprecise balancing of anticompetitive and procompetitive effects.

Codify single-firm conduct that has historically been deemed illegal *per se*, or irrebuttable by any business justification

Antitrust laws have been interpreted over time to distinguish between conduct that is *per se* illegal, or irrebuttable by any procompetitive justification, and conduct that may warrant consideration of benefits to competition as a justification.

> "A modernized antitrust law in California should codify clear standards of *per se* illegality for forms of anticompetitive conduct for which pro-competitive business justifications have historically not offset harms."

Over time, courts interpreting federal antitrust laws have drifted away from bright-line standards of illegality. In some instances, conduct that was once thought to be squarely anticompetitive — including non-price vertical restraints (rules or agreements set by a company, usually a manufacturer, that limit how businesses in its supply chain, like distributors or retailers, can deal with rival manufacturers)[74] and resale price maintenance (when a manufacturer requires or pressures a retailer to sell a product at a specific price)[75] — has become subject to judicial discretion. Indeed, California courts have also recognized a

[72] *Ben-E-Lect v. Anthem Blue Cross Life & Health Ins. Co.*, 51 Cal. App. 5th 867, 877 (2020)
[73] *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)
[74] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)
[75] *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)

EX 50

recent trend toward applying the rule of reason even in those more extreme cases.[76]

A modernized antitrust law in California should codify clear standards of *per se* illegality for forms of anticompetitive conduct for which procompetitive business justifications have historically not offset harms. At a minimum, doing so would create more certainty and predictability in the law.[77] Some conduct, like worker misclassification or price fixing, should be expressly declared illegal *per se*. Other conduct might be prohibited based on determinate criteria. For instance, exclusive dealing and tying arrangements have historically been deemed illegal when they foreclose competition in a significant share of a relevant market.[78] This substantial foreclosure test is not a new innovation, but has been used in federal and state adjudication for decades.

At a fundamental level, the law should be sufficiently specific that firms know what conduct is allowed and what isn't, and its enforcement should be predictable and fair. The current framework for federal analysis falls short of that basic principle and should not be replicated here in California. Strengthening *per se* and other clear standards while limiting analysis of any procompetitive benefits to in-market impacts would be a starting point to develop a more consistent doctrine and to avoid replicating here in our state the confusion and unpredictability that the rule of reason has created at the federal level.

For other types of conduct where business justifications may warrant a particular restraint of trade — *i.e.*, conduct that has offsetting procompetitive benefits even when engaged in by a firm with substantial market power — the analysis should consider only those procompetitive justifications that directly affect the market in which the conduct takes place.[79]

---

[76] *Sidibe v. Sutter Health,* No. 12-CV-04854-LB, 2022 WL 767087, at *2 (N.D. Cal. Mar. 11, 2022) ("Nonetheless, the main California Supreme Court cases suggest a modern trend toward less categorical rules and appear to recognize that some consideration of business justifications is possible even in *per se* tying cases.") (citing In re Cipro Cases I & II, 61 Cal. 4th 116, 147-148 (2015))
[77] In its recommendation prohibiting "loyalty rebates," the CLRC Single-Firm Conduct Working Group Report distinguishes "volume discounts" as "generally procompetitive." We disagree with this presumption. Volume discounts have a tendency to favor larger firms with greater purchase power and may result in secondary-line price discrimination against smaller purchasers.
[78] *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 200 Cal. App. 3d 687, 690, 248 Cal. Rptr. 189 (Ct. App. 1988).
[79] This is not an unprecedented approach. In fact, the New York 21st Century Antitrust Act, as originally introduced in 2021 and again in subsequent sessions and which was the impetus for California to undertake its study of antitrust law in 2024, sought to completely bar evidence of procompetitive effects from being introduced as a defense to cure competitive harm. NY S933C (2021-2022) ("Twenty-First Century Anti-Trust Act"), at §340(2)(b)(iii) ("Evidence of procompetitive effects shall not be a defense to abuse of dominance and shall not offset or cure competitive harm.")

III. Enact state-level merger protections to account for California's local economic conditions

By Ron Knox, Kelli Smith, and Becky Chao with Doni Tadesse

"The historical lack of federal vigor, combined with the federal government's inability to monitor and, when needed, litigate every problematic merger, particularly at the local level, underscore the need for states to enact their own merger and acquisitions laws that empower attorneys general to block harmful deals at home."

At the federal level, the Clayton Act with its crucial 1950 amendment is intended to prevent mergers that "may . . . substantially lessen competition" or that "tend to create a monopoly" — language that Congress intended to stop the formation of monopolies in their incipiency.[80] However, enforcement of this statute has been uneven, especially over the past 40 years, under the predominance of the Chicago School economic philosophy and the Consumer Welfare Standard as antitrust enforcement's guiding principle. While federal antitrust enforcers from the Trump-Pence and Biden-Harris Administrations have started to reinvigorate merger enforcement, the historical lack of federal vigor, combined with the federal government's inability to monitor and, when needed, litigate every problematic merger, particularly at the local level, underscore the need for states to enact their own merger and acquisitions laws that empower attorneys general to block harmful deals at home.

State merger laws can give enforcers important powers to monitor and challenge mergers that impact local economies. Several policies, embedded in legislation, would help ensure the California Attorney General can prevent additional undue concentration of corporate power and thereby support workers, small businesses, and competition in the state.

[80] See, for example, "The Merger Incipiency Doctrine and the Importance of 'Redundant' Competitors," Peter C. Carstensen and Robert Lande, Wisconsin Law Review, April 2019

EX 52

A. Recommendation: Create a state premerger notification system based on the FTC-DOJ proposed improvements to the premerger reporting form

To prevent anticompetitive mergers, state attorneys general, like the FTC, must be aware of them before they occur and have time to prevent them if need be. While states have the legal right to review and challenge potentially anticompetitive mergers under both federal and state law, they do not have a right to, nor can they easily access, premerger notification filings submitted to the federal antitrust agencies.[81] Moreover, unless their own state laws have created a premerger notification regime for certain transactions, state attorneys general are typically not made aware of mergers within their states.

Currently, except in a few industries, California's Attorney General lacks broad authority or a mechanism to monitor or receive notice of proposed mergers directly, meaning that by the time public filings are available at the federal level, the state is already at a disadvantage. This delay hinders the ability to proactively investigate and challenge mergers that could adversely affect California workers, shoppers, small businesses, and the economy overall.

When implementing a premerger notification regime, California lawmakers should look to the FTC rule on premerger notification reporting and waiting period requirements.[82] Additionally, creating parallel state-level premerger notification systems — in which companies would be required to submit the requisite premerger notification documentation to state law enforcers when they notify mergers to the federal antitrust authorities — would greatly benefit California's ability to identify and prevent anticompetitive mergers.[83]

> "A California-specific merger control system should rely on simple, clear measurements of market structure and concentration."

[81] "Antitrust Premerger Notification Act," Uniform Law Commission (as submitted to the CLRC), draft discussion paper, May 17, 2024, https://drive.google.com/drive/folders/1KQ5unh3kESQyxUO7KupH1Aqy7P9RM-rM?usp=drive_link

[82] Federal Trade Commission, "FTC Finalizes Changes to Premerger Notification Form," October 10, 2024, https://www.ftc.gov/news-events/news/press-releases/2024/10/ftc-finalizes-changes-premerger-notification-form

[83] In fact, the Uniform Law Commission has proposed such a system. See *Id.* While laudable in its goal to provide parallel notification to state enforcement authorities, the ULC's proposed state legislation would undermine federal efforts and recently-passed California laws designed to protect workers and ensure equitable access to food and healthcare.

However, any such system must be designed to avoid undermining current federal efforts and recently-passed California laws that have adopted more rigorous reporting requirements for specific industries.[84]

For example, recognizing that grocery mergers pose a particular risk to Californians by reducing competition in critical areas like food pricing, accessibility, and quality, leading to food deserts, higher consumer costs, and decreased choice for shoppers, all of which have a direct impact on public health and economic stability, the California legislature in 2023 passed AB 853, which serves as a good model for a robust industry-specific premerger notification system. It requires certain grocery and pharmacy chains to notify the California Attorney General about proposed mergers and provide information about their effects on consumer choice, pricing, and worker conditions, including wages and benefits.[85]

Although it is unrealistic to ask the Attorney General to review all, or even most, corporate mergers proposed in or affecting the California market, the legislature should work to identify appropriate thresholds to ensure the Attorney General is informed of and allowed to review the mergers most likely to impact competition, including mergers in key industries where concentration levels are already high or they are particularly important to workers, independent businesses, and the state's economy.

In addition to mergers and acquisitions, the Commission should consider empowering California state enforcers with the ability to review other types of financial transactions and governance structures, such as common ownership, that influence firm conduct as a result of common shareholding.[86]

B. Recommendation: Create commonsense merger thresholds based on concentration levels and bright-line rules

Currently, California lacks a state-specific merger control law that provides a clear framework for challenging them. The lack of a premerger notification system, combined with the resulting required reliance on federal agencies for necessary information, and limited investigative resources, creates considerable uncertainty for the Attorney General when considering enforcement. This lack of predictability makes it difficult to confidently challenge mergers, as these cases are costly in both time and resources. As a result, the Attorney General may hold back from intervening even in potentially harmful mergers.

---

[84] *See* California Law Review Commission, First Supplement to Memorandum 2023-49, December 18, 2023, https://clrc.ca.gov/pub/2023/MM23-49s1.pdf.
[85] Cal. Assemb. B. 853, 2023-2024 Reg. Sess. (Cal. 2023)
[86] See, e.g., Einer Elhauge, The Casual Mechanisms of Horizontal Shareholding, Ohio State Law Journal, https://moritzlaw.osu.edu/sites/default/files/2021-06/08.Elhauge2.pdf and Einer Elhauge, How Horizontal Shareholding Harms Our Economy–and Why Antitrust Law can Fix It, https://corpgov.law.harvard.edu/wp-content/uploads/2019/11/Einer-Elhauge.pdf.

A California-specific merger control system should adopt the 2023 Merger Guidelines' approach,[87] instructing the Attorney General to rely on simple, clear measurements of market structure and concentration to challenge potentially anticompetitive mergers.[88] By instructing enforcers to challenge mergers above a certain threshold of market concentration, California lawmakers would be following the clear Supreme Court precedent set out in *Philadelphia National Bank* and its progeny.[89] Such standards in the law would also create assurances and clarity for the legal and business communities when considering a transaction in California.

The California Attorney General should consider other bright-line market concentration thresholds beyond simple horizontal mergers. The approach of the 2023 Merger Guidelines is particularly instructive as dominant, incumbent firms move into adjacent markets, including through vertical mergers. When antitrust enforcers define product markets, they should look across the entire industry ecosystem, including these adjacent markets. For example, Apple operates in both smartphone and phone operating system markets, while cloud infrastructure providers, such as Microsoft's Azure product, offer both cloud hosting and software products, leveraging dominance in one market to distort competition in another. Of particular concern should be mergers that consolidate control over essential inputs like data, expertise, and infrastructure.

C. Recommendation: Require additional merger reporting for specific California industries that are highly concentrated or pose substantial risk of harm

Companies in highly concentrated markets are already at higher risk of engaging in harmful monopolistic behavior than firms in fair and competitive markets, which becomes further exacerbated by mergers in those markets. Requiring additional merger reporting for high-risk industries where highly concentrated markets prevail in California is crucial to protect consumers and safeguard local economies that may not rise to the level of FTC attention, but that nonetheless be devastated if applying locally-oriented standards. Enhanced scrutiny could ensure that mergers don't lead to higher prices, reduced innovation, or job losses. This process helps regulators assess potential harms and maintain a fair, competitive market.

---

[87] U.S. Dep't of Justice & Fed. Trade Comm'n, 2023 Merger Guidelines (2023), https://www.justice.gov/atr/2023-merger-guidelines.

[88] *Id* ("the Agencies may use evidence about market shares and market concentration as part of their analysis. These structural measures can provide insight into the market power of firms as well as into the extent to which they compete.")

[89] *United States v. Phila. Natl. Bank*, 374 U.S. 321 (1963) (Ruling that, "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market[,] is so inherently likely to lessen competition substantially that it must be enjoined in the absence of [rebuttal] evidence.")

Healthcare industry. Healthcare consolidation is dangerous because it can lead to reduced competition, higher prices, and lower quality of care, especially in essential services like hospitals and pharmaceuticals, where consumers have limited alternatives and often face a reduction or elimination of healthcare options. Several states have implemented healthcare-related merger control laws intended to serve a variety of competition and public policy goals.[90] Such industry-specific merger laws serve as a helpful example for California lawmakers considering whether and how to review mergers in other industries deemed crucial to California workers, new businesses, and the economy overall. California has premerger notification requirements for nonprofit hospital sales and for some material change transactions, but regulators have limited authority to intervene in such transactions.

"An FTC study of Big Tech acquisitions showed that the five Big Tech titans — Meta, Apple, Alphabet, Amazon, and Microsoft — collectively acquired 819 smaller companies without submitting those acquisitions to antitrust authorities for review."

Though vetoed by the Governor, AB 3129 (2024) would have required premerger notification in the healthcare industry, enhancing California's ability to monitor mergers and acquisitions in the state's healthcare provider industry and limit the incursion of often-damaging private equity ownership in healthcare.[91]

Technology industry. California's economy is heavily composed of and impacted by the technology industry. In the technology sector, anticompetitive mergers and acquisitions can stifle innovation, consolidate control over critical infrastructure, and harm consumer choice, particularly in industries like digital platforms and software where dominant players can use their market power to suppress competitors. Nine of the largest companies in California by revenue are tech companies, including Big Tech titans Meta, Apple, and Alphabet.[92] Those companies, along with Amazon and Microsoft, have accumulated their significant market power through a series of acquisitions that eliminated nascent rivals. The anticompetitive nature of these acquisitions has hollowed out the entrepreneurial tech ecosystem. In the 1980s, around 90 percent of venture capital-backed startups went public, while around 10 percent were acquired by another company. By 2019, those numbers had entirely reversed, with around 90 percent of all venture capital-backed startups being acquired by a larger company.[93] Although the reasons for this transformation in tech startup entrepreneurship

---

[90] For a comprehensive list of state healthcare merger laws, see "State Healthcare Transaction Review Laws: A New Landscape," Ari Jonathan Markenson, Gregory W Packer Jr, and Pamela Polevoy, American Bar Association, Jun. 25, 2024, https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-june/state-healthcare-transaction-review-laws-a-new-landscape/

[91] *Assembly Bill No. 3129*, 2023-2024 Sess. (Cal. 2024)

[92] "53 CA Companies Make Fortune 500 List For 2023," Lucas Combos and Beth Dalbey, Patch.com, June 6, 2023, https://patch.com/california/across-ca/53-ca-companies-make-fortune-500-list-2023

[93] "The Great Startup Sellout and the Rise of Oligopoly," Florian Ederer and Bruno Pellegrino, AEA Papers and Proceedings, May 2023, https://www.aeaweb.org/articles?id=10.1257/pandp.20231024

are varied, the incumbent tech giants have become further insulated from competition, due in part to their aggressive acquisition strategy over the past decade. An FTC study of Big Tech acquisitions showed that the five Big Tech titans — Meta, Apple, Alphabet, Amazon, and Microsoft — collectively acquired 819 smaller companies without submitting those acquisitions to antitrust authorities for review.[94] The elimination of nascent rivals, whether through acquisition or otherwise, harms innovation that would otherwise threaten those incumbent tech firms.[95] Effects on innovation and nascent competition can be incorporated into a standard competition-based merger review. However, as the FTC has found, many such transactions were never reported to the antitrust agencies because they fall below reportable thresholds. California could help protect its tech innovation economy by both requiring that all transactions involving tech firms above a certain size be reported to the Attorney General, and by promulgating merger review rules that safeguard nascent competition, innovation, and entrepreneurship, given their critical role in the state's economic health and sustainability.

In addition to these sectors, lawmakers should consider other industries crucial to the well-being of Californians and the state's economy for which more significant review standards on proposed transactions would be appropriate. Doing so will help ensure the Attorney General can properly review and, when needed, challenge transactions that threaten competition, consumers, and workers in key industries within the state.

D. Recommendation: Explicitly include labor and community impacts in the merger review process to ensure California workers, jobs, and communities are considered

As the Commission's experts describe in detail, concentration in the labor market is high, even though "[h]ealthy competition for workers is critical to addressing income inequality, stagnant wages, and broad-based economic growth."[96]

Both federal and California antitrust enforcement agencies are increasingly recognizing labor market impacts in merger reviews:

> The DOJ and FTC have concluded that the effects of monopsony power in labor markets are just as pernicious as the effects of monopoly in project markets. Leading scholars put it this way: a "lack of competition in the labor market enables employers

---

[94] Federal Trade Commission, "Non-HSR Reported Acquisitions by Select Technology Platforms, 2010 — 2019: An FTC Study," Sep. 2021, https://www.ftc.gov/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study

[95] See, for example, "Nascent Competitors," C. Scott Hemphill and Tim Wu, University of Pennsylvania Law Review, 2020

[96] California Law Revision Commission, *Report on Antitrust Law: Study B-750,* "Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets," March 26, 2024, https://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp7.pdf.

to suppress the wages of their workers." That, in turn, harms the economy: "[T]he low wages force workers out of the workforce" and "suppress[] economic growth" by restricting the pool of available workers from which potentially new competitors can draw. Wage suppression also enhances societal income inequality by separating those who work in concentrated markets from those who work in competitive labor markets. Workers that already have low incomes are affected the most because they lack bargaining power and alternatives. The empirical research has borne this out.[97]

For the first time, the FTC and DOJ have issued revised merger guidelines explicitly considering labor effects[98] and have partnered with the Department of Labor and National Labor Relations Board to enhance enforcement.[99] And while the Cartwright Act lacks explicit merger review provisions, the recent FTC-backed challenge to the Kroger-Albertsons merger signals a shift toward including labor considerations, as do various case studies the Commission's experts describe which involve California companies and their proposed mergers' negative impacts on the labor market.[100]

To clearly affirm the intent to prioritize community and labor impacts in merger reviews, policymakers should specify that mergers be reviewed for their labor market impacts on workers as well as their impact on the communities in which they occur.

Impacts on labor. Because of the size of the state and its economy, many national mergers will have significant labor market impacts within California. For example, the United Food and Commercial Workers International Union, including California's UFCW 8, opposed the now-failed megamerger between Kroger and Albertsons because of its potential to reduce the union's bargaining power, threatening workers' wages and benefits.[101] While the FTC's lawsuit successfully blocking the merger addressed potential harms to labor because of lost competition, the merger could have also cost the state union jobs due to store closures. Through a labor-focused review of corporate mergers, and by including affected unions in the merger review process, California policymakers can protect competition from concentration among companies both as employers, where monopsony power threatens jobs and the strength of labor unions, and as retailers, where concentration hurts

[97] California Law Revision Commission, *Report on Antitrust Law: Study B-750,* "Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets," March 26, 2024, https://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp7.pdf.
[98] Federal Trade Commission & Department of Justice, 2023 Merger Guidelines (Dec. 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.
[99] Federal Trade Commission & Department of Justice, "FTC, DOJ Partner with Labor Agencies to Enhance Antitrust Review of Labor Issues in Merger Investigations," (Aug. 28, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/08/ftc-doj-partner-labor-agencies-enhance-antitrust-review-labor-issues-merger-investigations.
[100] California Law Revision Commission, *Report on Antitrust Law: Study B-750,* "Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets," March 26, 2024, https://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp7.pdf.
[101] "UFCW 8-Golden State Opposes Kroger-Albertsons Mega Merger," UFCW 8 Golden State, Sept. 2023, https://www.ufcw8.org/news/ufcw-8-golden-state-opposes-kroger-albertsons-mega-merger/

accessibility and quality and raises prices. In fact, California has recently passed legislation specific to the grocery and pharmacy industry that can serve as a good model for a robust premerger notification system across other industries — requiring certain grocery and pharmacy chains to notify the California Attorney General about proposed mergers and provide information about their effects on consumers *and* workers.[102]

Impacts on community. Mergers and acquisitions pose significant risks to California's economy and communities, particularly communities of color, which should be considered in the merger review process. As Solana Rice at Liberation in a Generation testified before the Commission, California should include a race equity impact analysis in its merger review, with an eye toward particular or disproportionate harms or risks to communities of color, including workers, small businesses, and consumers of color.

In the banking and fintech sectors, for example, without sufficient oversight, these transactions often result in branch closures, job losses, reduced reinvestment in local communities, and higher fees for consumers. As fintech companies continue to grow their market share, they increasingly act like traditional banks but without being subject to the same regulatory obligations, further exacerbating risks to consumers and communities. A State Reinvestment Act, for example, would require premerger review processes that account for community needs, invite public participation, and implement a public benefit standard for merger approval, ensuring that no merger is approved unless it demonstrably benefits local communities through improved access to financial services, job preservation, and local reinvestment.

IV. Empower state antitrust enforcers with more and better tools to combat harmful concerted action

By Michael Swerdlow, Becky Chao, and Kelli Smith

Concerted action refers to a situation where two or more firms collaborate in a way that benefits them individually but harms competition in the marketplace. This typically results in unlawful practices commonly referred to as "collusion," where firms agree or collectively act to limit competition, set prices, divide markets, or engage in other anticompetitive behaviors that undermine fair market conditions. Concerted action harms competition when it restricts choice, raises prices, or stifles innovation. Some of the most common types of concerted action are price fixing, agreements to divide markets, bid rigging, output restraints that produce artificial scarcity, and exclusive dealing.

California law, while somewhat broader than the Sherman Act when it comes to concerted action, still fails to effectively protect groups that are most vulnerable to monopolistic behavior, such as workers, consumers, farmers, and small businesses. Antitrust laws were

[102] Cal. Assemb. B. 853, 2023-2024 Reg. Sess. (Cal. 2023)

"California law, while somewhat broader than the Sherman Act when it comes to concerted action, still fails to effectively protect groups that are most vulnerable to monopolistic behavior, such as workers, consumers, farmers, and small businesses."

designed to prevent collusion and monopolistic behaviors. Perversely, these same laws have been used to prevent *subordinated groups* (like small businesses, gig workers, or independent contractors) from organizing or coordinating actions outside of specific exemptions like labor unions. When these groups attempt to join forces to challenge monopolistic practices, they risk being accused of violating antitrust laws. This antithetical use of the law is an unintended consequence that has strengthened the position of large monopolies, rather than curbing their influence and allowing smaller players to thrive.

A. Recommendation: Authorize subordinated groups to countervail the power of monopolies

To comply with federal antitrust law, California must clearly authorize, and actively supervise, many forms of coordinated action that countervail monopoly power.[103] To allow more subordinated groups to effectively engage in countervailing monopoly power, California should create or entrust an administrative body with plenary power to create collective bargaining systems for subordinated groups to countervail dominant firms.[104] For example, these boards could authorize:

- ➔ Gig workers that are independent contractors to bargain with tech platforms
- ➔ Family farmers to bargain with Big Ag
- ➔ Local franchisees to bargain with national franchisors
- ➔ Internet customers to bargain with broadband monopolists
- ➔ Underbanked Californians to bargain with financial institutions

Under this scheme, dominant firms could also be required to bargain in good faith with groups that represent their smaller trading partners. Subjects of bargaining could differ by industry, with guidance from the IWC. For instance, broadband customers could be empowered to negotiate maximum prices for basic internet plans and processors could be required to bargain over the terms of agricultural contracts.

[103] See *Parker v. Brown*, 317 U.S. 341 (1943), *Cal. Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)
[104] Alternatively, the legislature could approve systems of countervailing power on a case-by-case basis.

B. Recommendation: Shift the burden of proof in price-fixing cases to large corporations

A common reason firms engage in collusive conduct is to fix prices, allowing them to manipulate the market in their favor. For example, two competing companies might secretly agree to set prices at a certain level, reducing competition and ultimately harming consumers.

However, current antitrust law places a high burden on plaintiffs to prove such conduct. The Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*[105] requires plaintiffs to plead detailed facts about coordination even before they are able to compel evidence. This creates a significant barrier, as those harmed by the price-fixing — such as consumers or smaller competitors — are often unable to access or otherwise detect the critical evidence needed to demonstrate collusion. Since much of the coordination behind price-setting occurs behind closed doors — or manifests in inaccessible or opaque software code — the collusion is largely invisible to those who are affected. This makes it extremely difficult to hold firms accountable under the existing legal framework. Moreover, the heightened pleading standard for price fixing cases often results in effective pre-litigation of claims, contributing to significant enforcement delays.

> "Price-fixing has been significantly enhanced by the use of technology, allowing firms to engage in anticompetitive behavior much more efficiently — and covertly — than in the past."

To remedy this imbalance, California should shift the burden of proof to large corporations to prove that an illegal price fixing agreement has not occurred, including through any of the following means:[106]

- **Presumption of price collusion**: Create a presumption that illegal price fixing has occurred, based on parallel pricing and other indicators suggestive that price fixing was the result of an agreement among dominant corporations.
- **Easier access to court**: Laws should allow price-fixing cases to survive motions to dismiss or motions for summary judgment when plaintiffs present circumstantial evidence of collusion and communication, even if the behavior is consistent with

[105] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)

[106] American Economic Liberties Project, "Tools for Reforming Antitrust Policy: Crack Down on Illegal Price Fixing with Pleading Standards that Place the Burden of Proof on Large Corporations," Sept. 13, 2022, https://www.economicliberties.us/our-work/antitrust-toolkit-pt2/#.

"conscious parallelism" — *i.e.,* when businesses in the same industry adopt similar practices like pricing or product offerings without explicit agreement.

- ➔ **Preliminary injunctive relief:** The Office of the Attorney General should be empowered to intervene in price-fixing matters and request preliminary injunctive relief with a lower evidentiary threshold.
- ➔ **Industry bans for offenders**: Courts should have the power to bar individuals who violate price-fixing laws from returning to the industries in which they committed these illegal acts.
- ➔ **Whistleblower protections**: A whistleblower bounty program should be established, offering protection and incentives for individuals who expose price-fixing, safeguarding them from retaliation by employers, buyers, or sellers.

C. Recommendation: Curb algorithmic collusion

Price-fixing has been significantly enhanced by the use of technology, allowing firms to engage in anticompetitive behavior much more efficiently — and covertly — than in the past. The DOJ has recently cautioned that price fixing algorithms are capable of facilitating collusion in markets once thought of as too decentralized to enforce price fixing schemes.[107]

Take rental pricing, for example: historically, apartment seekers and landlords relied on listings in newspapers and later, online classifieds. However, today, algorithms can scrape vast amounts of rental data from multiple sources in real time, consolidating it into a product that landlords can subscribe to. These algorithms not only gather and organize information from numerous websites, but also leverage AI to analyze trends, adjust pricing, and provide recommendations for optimal rent prices. As a result, landlords can now coordinate pricing strategies in ways that would have previously required far more time and human effort, enabling a form of digital algorithmic collusion that is harder to detect and regulate.

Pricing algorithms have the potential to allow businesses to coordinate pricing without directly exchanging information with each other, like digital trade associations but without safeguards to prevent intentional or indirect collusion. Even in less concentrated industries, more businesses could soon begin deploying pricing algorithms in ways that will result in a situation indistinguishable from cartel pricing: all players in the industry will adopt pricing algorithms that punish competitors for lowering prices and reward them for raising or maintaining prices.

To hedge against this situation, California should:

- ➔ **Create reporting requirements for all pricing algorithms to the California Department of Justice.** Firms that deploy pricing algorithms that affect more than a

[107] "DOJ lays out *per se* theory of liability for price fixing using algorithms," JD Supra, November 21, 2023 https://www.jdsupra.com/legalnews/doj-lays-out-per-se-theory-of-liability-7680256/

de minimis volume of commerce should be required to report monthly on their data sources, methodology, results, and clients. This data requirement will dramatically lower the resources required by enforcers to bring cases. Fabrication of these reports or significant omissions should be grounds for an injunction to halt the algorithm and/or civil damages.

➔ **Codify a low threshold for preliminary injunctions of pricing algorithms.** As we've seen in housing, agriculture, and oil, pricing algorithms are inflationary. If the government or another plaintiff can show they're likely to succeed per traditional preliminary injunction criteria, they should be able to enjoin the algorithms' usage before the trial is complete. Had this policy been in place at the time, it would have stopped Agri Stats[108] and Realpage[109] years ago.

➔ **Ban tacit collusion.** As a result of increasing consolidation in an industry, companies no longer need to engage in overt communication to collude. Instead, they can do so tacitly without an explicit agreement to do so through a combination of announcements, investments, and algorithms that facilitate "conscious parallelism."[110] To prevent tacit collusion, a ban would prevent a firm from raising prices solely because a competitor has done so.[111]

D. Recommendation: Ban price gouging, price copying, and collective foreclosure

Current legal standards for proving price-fixing under statute and case law make it exceedingly difficult to demonstrate improper collusive conduct, even when the outcome — higher prices — is both obvious and indisputable. Investigations often rely on insider information, like private communications or internal documents, which are rarely accessible to plaintiffs or regulators without significant discovery efforts. Such investigations often take years to prosecute and fail to address tacit collusion. As a result, there is a clear disconnect between the visible harm to consumers and the hidden conduct that drives it.

---

[108] U.S. Department of Justice, "Justice Department Sues Agri Stats for Operating Extensive Information Exchanges Among Meat Processors," Sept. 28, 2023, https://www.justice.gov/opa/pr/justice-department-sues-agri-stats-operating-extensive-information-exchanges-among-meat.

[109] U.S. Department of Justice, "Justice Department Sues RealPage for Algorithmic Pricing Scheme that Harms Millions of American Renters," Aug. 23, 2024, https://www.justice.gov/opa/pr/justice-department-sues-realpage-algorithmic-pricing-scheme-harms-millions-american-renters.

[110] Brandon Ballou, "The 'No Collusion' Rule," *32 Stanford Law & Policy Review 213* (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793881

[111] *Id.* Other potential innovative solutions to the problem of algorithmic coordination include: 1) using consumer algorithms to counteract some of the negative effects, 2) changing merger review to limit mergers likely to increase algorithmic coordination, 3) introducing a disruptive algorithm to create noise on the supply side, and 4) freezing the price of one competitor.

In response to this gap, recent efforts have focused on directly targeting firms that expand their profit margins in ways that are unmoored from market forces or competitive pressure. Recent proposals[112] by U.S. Senator Elizabeth Warren aim to hold companies accountable for unjustified price increases and introduce new mechanisms for regulators to address profiteering disguised as ordinary business practice. These efforts seek to rebalance the scales and provide more effective tools to prevent and punish anticompetitive price-fixing behavior.

California should likewise take a direct approach and codify that price gouging under any circumstances is an unfair and deceptive practice under California law. The law should:

- ➔ **Prohibit sellers from charging a grossly excessive price,** regardless of where the price gouging occurs in the supply chain or distribution network. If the state Attorney General suspects a business is raising prices far above its costs without a legitimate business justification, they should be empowered to investigate that conduct, acquire a preliminary injunction to lower prices, and, after an administrative procedure, obtain disgorgement and treble damages for repeat offenders.
- ➔ **Include an affirmative defense for small businesses acting in good faith.** Small and local businesses sometimes must raise prices in response to crisis-driven increases in their costs because they have little negotiating power with their price-gouging suppliers. This affirmative defense protects small businesses from unjustified litigation if they show legitimate cost increases.
- ➔ **Target dominant companies that exploit emergencies (such as the recent pandemic and wildfires) to boost profits,** creating a rebuttable presumption of price gouging against firms that exercise undue market power.
- ➔ **Require public companies to clearly disclose costs and pricing strategies.** During periods of exceptional market shock, the law would require California companies to disclose and explain changes in their cost of goods sold, gross margins, and pricing strategies in their quarterly filings. This requirement could be superseded by federal disclosure requirements.

To further address tacit collusion in concentrated markets, California should prohibit price-copying, banning companies from raising prices solely because their competitors have done so. Similar to Ballou's recommendation to leverage Section 5 of the FTC Act, which allows the FTC to combat "unfair methods of competition" without the need to prove an explicit agreement,[113] California could codify that such price copying is likewise prohibited as an unfair business practice. This would give regulators more power to act in cases where companies may be relying on competitors' pricing decisions rather than market demand.

---

[112] *Price Gouging Prevention Act of 2024*, S. 3803, 118th Cong. (2024).
[113] Brandon Ballou, "The 'No Collusion' Rule," *32 Stanford Law & Policy Review 213* (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793881

Even when firms lack the exclusionary power of a monopolist, they can still engage in parallel actions that collectively foreclose competition. For instance, eight suppliers could each lock 10% of a given market into long-term exclusive contracts. In this situation each individual contract would likely affect too small a share of the market to raise antitrust concerns, yet these contracts collectively block new entrants from competing in 80% of the market. The manufacturers would not need a formal agreement to maintain this market structure; still, they would be able to effectively divide up much of the market just the same. To close antitrust law's tacit collusion loophole, California should clarify that common business strategies that collectively foreclose markets can violate the antitrust laws, even when they don't stem from an agreement between competitors.[114]

V. Complement general antitrust reform with tech-specific policies to promote competition in the tech platforms and AI sectors

By Becky Chao

> "Platforms have taken advantage of the lack of antitrust oversight to secure and cement their dominant market positions."

Even if the Commission decides not to pursue tech-specific policies at this juncture, a range of competition issues specific to the tech industry — self-preferencing, network effects, and conflicts of interest from multi-sided platforms with multiple business lines — merits continued scrutiny under existing antitrust laws and consideration for integration in complementary laws and regulations. Historical precedent in California and at the federal level demonstrates how general antitrust law and sector-specific regulations, such as those for banking like the California Consumer Financial Protection Law, work hand-in-hand to protect consumers, workers, small businesses, and communities; foster innovation; and safeguard the public interest.

The rise of a few dominant tech platforms has reshaped not just competition across the economy, but our society, transforming how people engage in daily work, school, commerce, and even our democracy. These tech platforms sometimes go beyond offering a single product or service, often building out many business lines that are vertically integrated on

[114] For examples of collective foreclosure cases, See Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); Standard Oil Co. v. United States 337 U.S. 293 (1949).

top of one another — meaning that a single company controls more than one stage of the supply chain.[115]

> "Without antimonopoly guardrails to promote competition, the tech platforms will continue to distort competition, pick winners and losers, and rig the digital economy in their favor."

Platforms have taken advantage of the lack of antitrust oversight to secure and cement their dominant market positions: they threaten the economic viability of traditional brick and mortar stores, alongside other trading partners, including small, independent businesses reliant on their services. By leveraging economies of scale and network effects to lock in entire ecosystems and distort competition, a handful of tech platforms have cornered their markets with unprecedented scale and speed, outpacing traditional brick-and-mortar stores.[116] These platforms relentlessly aggregate data to double down on their power over society, reinforcing their control over vertical and horizontal business lines to cement their dominance.[117] These same trends are emerging in the AI space, as new AI products and services are built on this existing, concentrated ecosystem of digital infrastructure.[118]

This rise in concentrated power in other sectors, like rail, telecom, and banking, has all led to the passage of new legislation, regulation, and new government agencies to protect consumers, small businesses, and workers. California has led the nation in passing the California Consumer Privacy Act, the first comprehensive state law to protect consumers' privacy. California can build on this leadership by enacting new legislation that tackles the anticompetitive issues arising from concentration in the tech sector.

Without antimonopoly guardrails to promote competition, the tech platforms will continue to distort competition, pick winners and losers, and rig the digital economy in their favor.

---

[115] See, e.g., Harold Feld, "Platform Regulation Part II: Defining 'Digital Platform,'" Public Knowledge, July 18, 2018, https://publicknowledge.org/platform-regulation-part-ii-defining-digital-platform/.
[116] *Id.*
[117] See, e.g., Becky Chao and Ross Schulman, "Promoting Platform Interoperability," New America's Open Technology Institute, May 13, 2020, https://www.newamerica.org/oti/reports/promoting-platform-interoperability/online-platform-competition-is-hard-to-address.
[118] See. e.g., Amba Kak and Sarah Myers West, "2023 Landscape: Confronting Tech Power," AI Now Institute, April 11, 2023, https://ainowinstitute.org/2023-landscape and Barry Lynn, Max von Thun, Karina Montoya, "AI in the Public Interest: Confronting the Monopoly Threat," Open Markets Institute, November 2023, https://www.openmarketsinstitute.org/publications/report-ai-in-the-public-interest-confronting-the-monopoly-threat.

EX 66

California can lead the way by showing that a different world is possible by supplementing its efforts to amend existing antitrust laws with new legislation targeting the tech platforms, including their role in the development of AI.

As state leaders consider the need for general antitrust reform and tech-specific legislation, we argue that we need both to fully halt anticompetitive harms. Non-discrimination rules, data portability and interoperability, and structural separation are critical components of the antitrust toolbox that are necessary to ensure dynamic, fair markets in the tech sector. In the CLRC Technology Platforms Working Group's report, authors explore the pros and cons of some of these tools, but the evidence is overwhelmingly clear that we need a more comprehensive, broader approach to address the harms to competition that the dominant tech platforms have had on the digital ecosystem and broader economy.

Whereas antitrust enforcement generally relies on *ex post* enforcement, legislation that requires non-discrimination, data portability and interoperability, and structural separation would implement *ex ante* tools to promote competition that are more effective in that market actors would know upfront which anticompetitive practices are illegal, making it easier for companies to comply. If these tools are implemented alongside general antitrust reform, the result would be a more stable, predictable business environment for all competitors, instead of just for the dominant firms.

A. Recommendation: Adopt non-discrimination rules to ensure equal access and pricing

Non-discrimination rules prevent companies from competing unfairly against third parties in markets they control and ensure equal access and pricing. A non-discrimination standard would bar platforms from discriminating against competitors by charging them higher prices or refusing to deal with them, putting an end to any self-preferencing practices that gives platforms an anticompetitive advantage over competitors. For example, Facebook and Google's targeted advertising model favors content that is most profitable, and without these common carriage rules to prevent these platforms from exploiting their competitive positions, they can preference their own products over competitors' and manipulate sellers and buyers by providing different pricing and terms for the same services.[119]
Non-discrimination rules are important even if a platform has been structurally separated and cannot self-preference its own vertically integrated business lines, because that firm could still choose who gets access to its platform or charge different, prohibitively high prices.[120]

[119] See "Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations," House Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.
[120] Tejas Narechania & Ganesh Sitaraman, "An Antimonopoly Approach to Governing Artificial Intelligence," Vanderbilt Law Research Paper No. 24-8 (Jan. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4597080.

California should ensure that platforms offer equal access on equal terms to all actors in the ecosystem, instead of letting them retain the ability to control the playing field, distort competition, and extract tolls from companies that must use their infrastructure. Non-discrimination rules are especially critical as platforms become increasingly vertically integrated, and rely on algorithms that can discriminate on price and terms. These requirements require a vertically-integrated platform to treat all downstream business neutrally, including their own.[121]

> "Without non-discrimination rules in place, dominant platforms are free to distort innovation and pick winners and losers in the marketplace."

As the CLRC weighs criticisms of the American Innovation and Choice Online Act (AICOA), a bill introduced in the 117th Congress that would've instituted non-discrimination rules for covered platforms, it should consider the growing body of evidence showing the need for such requirements. Non-discrimination rules are necessary to foster innovation in the digital tech ecosystem, where dominant platforms like Amazon have incentives to prioritize their own products and services in search responses over the top rated or most relevant product.[122] Without non-discrimination rules in place, dominant platforms are free to distort innovation and pick winners and losers in the marketplace.

Whereas non-discrimination rules can be implemented as a remedy in monopolization cases, this piecemeal approach means that they wouldn't apply to all the platforms at once. Implementing a non-discrimination standard through new legislation would be a more comprehensive approach that ensures a level playing field for all competitors.

In their article, scholars Tejas Narechania and Ganesh Sitaraman outline several places in the AI stack — *i.e.,* the layered structure of technologies and components that enable the development, deployment, and operation of AI — where non-discrimination rules would open up competition: hardware fabricators and designers, cloud providers, open source and non-open source commercial available data warehouses and lakes, and foundation models and APIs could all be subject to non-discrimination rules to ensure free and open access.[123]

[121] *Id.*
[122] See Chiara Farronato, Andrey Fradkin, and Alexander MacKay, "Self-Preferencing at Amazon: Evidence from Search Rankings," January 2023, https://www.aeaweb.org/articles?id=10.1257/pandp.20231068.
[123] Tejas N. Narechania & Ganesh Sitaraman, *An Antimonopoly Approach to Governing Artificial Intelligence*, 43 Yale L. & Pol'y Rev. 95 (2024).

B. Recommendation: Require data portability and interoperability to reduce barriers to entry and encourage innovation

Data portability and interoperability reduce barriers to entry and encourage innovation by allowing users across different platforms to authorize their disparate systems to interact and exchange data, much like how users using one cell phone carrier can call and talk to users on another cell phone carrier. Data portability and interoperability unlock the network effects that come from each provider's customer base so that platforms don't leverage their individual networks to effectively corner the market. Because of data portability, cell phone users can bring their number to other networks, saving them the trouble of notifying all their contacts about a new phone number. Because of interoperability, customers don't have to sign up for each provider to communicate with customers on other networks and can still tap into a network that covers the entire market, versus just individual carriers. Regulators and antitrust enforcers have imposed interoperability requirements for AT&T and Microsoft, enabling competition in instant messaging,[124] long-distance calling, and internet browsers.[125]

> "Data portability and interoperability unlock the network effects that come from each provider's customer base so that platforms don't leverage their individual networks to effectively corner the market."

Together, data portability and interoperability would lower switching costs for users and address the network effects barrier for new companies to compete with incumbents like Facebook, enabling new entrants to tap into the existing social graphs to quickly build up their own customer base. Facebook used to offer third-party apps the ability to allow users to find and add their Facebook friends on their apps through an application programming interface (API). This function was instrumental to new competitors like Vine and MessageMe's success, but Facebook cut off access to fend off the competition.[126] Having mandated interoperability across the board would help facilitate more competition.

---

[124] "Fact Sheet: FCC's Conditioned Approval of AOL-Time Warner Merger," FCC, January 2001, https://transition.fcc.gov/Bureaus/Cable/Public_Notices/2001/fcc01011_fact.pdf.

[125] Philip J. Weiser, Regulating Interoperability: Lessons from AT&T, Microsoft, and Beyond, 76 ANTITRUST L.J. 271 (2009), available at https://scholar.law.colorado.edu/articles/454.

[126] Roberto Baldwin, "Facebook Gets Passive-Aggressive About Blocking Vine," Wired, January 25, 2013, https://www.wired.com/2013/01/facebook-vine-policy/ and Kim-Mai Cutler, "Facebook Brings Down The Hammer Again: Cuts Off MessageMe's Access To Its Social Graph," TechCrunch, March 16, 2013, https://techcrunch.com/2013/03/15/facebook-messageme/.

Data portability and interoperability can be implemented as a remedy on a case-by-case basis in antitrust enforcement, but mandating data portability and interoperability through new legislation would be a more comprehensive approach that would hold all companies accountable to the same standard.

In the AI context, interoperability could be applied by mandating data sharing through federated learning, to ensure that multiple applications or users train a shared foundation model through an interoperable standard, so that no single application gains an advantage from continuous or reinforcement learning because that application is vertically integrated with the underlying model.[127] Interoperability rules could also be applied to cloud platforms to lower switching costs between cloud providers.[128]

C. Recommendation: Enforce structural separation to eliminate conflicts of interest

> "Structural separation has been historically embraced as a key antitrust remedy applied to railroads, bank holding companies, television networks, and telecom carriers."

Alongside non-discrimination, data portability, and interoperability requirements, California should also consider new legislation like structural separation that opens up competition at the market structure level.

Platforms exploit their bottleneck and gatekeeper power to constrain competitors, extract rents from suppliers and competitors, and expand into new markets with a built-in advantage. Amazon offers a prime example: it forces its third-party sellers to use its warehouse and shipping services so that they are featured more prominently in search results by Amazon's algorithm.[129] Structural separation presents a robust way to circumvent this bottleneck and gatekeeping power.

The digital economy has transformed the pace of business, surpassing traditional brick and mortar businesses by making it possible for tech platforms to achieve economies of scale and network effects much faster through vertical integration and data consolidation. When

---

[127] Tejas N. Narechania & Ganesh Sitaraman, *An Antimonopoly Approach to Governing Artificial Intelligence*, 43 Yale L. & Pol'y Rev. 95 (2024).
[128] *Id.*
[129] Renee Dudley, "The Amazon Lockdown: How an Unforgiving Algorithm Drives Suppliers to Favor the E-Commerce Giant Over Other Retailers," *ProPublica*, April 26, 2020, https://www.propublica.org/article/the-amazon-lockdown-how-an-unforgiving-algorithm-drives-suppliers-to-favor-the-e-commerce-giant-over-other-retailers.

companies integrate across business lines and use their power in one market to gain an unfair advantage in another, we can build on a strong legal tradition of structural separation: splitting up dominant companies along business lines and preventing them from dealing in business lines that compete against companies that depend on their very own platforms.

Structural separation can be implemented across ownership separation — also known as "break up" — or functional separation.[130] The former requires dominant, integrated firms to divest certain business lines that pose a conflict of interest, separating out these businesses so that different owners control each function. The latter allows a single company to maintain its ownership over multiple business lines, but requires a particular organizational structure to avoid these conflicts.

Structural separation has been historically embraced as a key antitrust remedy applied to railroads, bank holding companies, television networks, and telecom carriers, in large part because they can be more administrable than antitrust remedies that police conduct on a case-by-case basis. Whereas conduct remedies require enforcers to monitor specific firms, structural separation sets clear rules for the underlying structure of the market. As Narechania and Sitaraman put it, "Regulators have to monitor or audit specific business practices and identify violations of pricing or treatment — or, at a minimum, respond to complaints from businesses who might fear reporting the platforms upon which they depend to regulators. Structural separations, by contrast, are a prophylactic rule: they prevent any commingling of business lines, and thus are easily administered."[131]

Our federal antitrust agencies are pursuing structural separation as an efficient remedy in multiple Section 2 monopolization cases against the tech platforms. Simultaneously, legislators can explore California-specific legislation modeled after the bipartisan bill Rep. Pramila Jayapal introduced in the 117th Congress, the Ending Platform Monopolies Act (H.R. 3825). The bill was designed to prevent monopolistic practices by Big Tech, protecting small businesses by putting a stop to anticompetitive behavior and fostering innovation. Legislation would more quickly and clearly clarify the need for structural separation to ensure a level playing field for the entrepreneurs and small businesses that drive California's thriving start-up economy.

Structural separation is an important tool for tackling AI competition as well. As Narechania and Sitaraman argue, structural separation applied here can also help prevent the downstream competition harms like self-preferencing and facilitate innovation:

> "Structurally separating the cloud layer from higher layers in the stack …would treat cloud computing platforms as utility providers of a commodity product (namely,

---

[130] "Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations," House Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.
[131] Tejas N. Narechania & Ganesh Sitaraman, *An Antimonopoly Approach to Governing Artificial Intelligence*, 43 Yale L. & Pol'y Rev. 95 (2024).

computational capacity) that is open for all kinds of uses — like electricity — and ensure that those providers cannot prioritize their own downstream business lines over their competitors'. Separation would likely also spur cloud providers to innovate on their cloud offerings, rather than on innovation that comes from vertical integration. This would, in turn, also facilitate innovation in the downstream markets where cloud users could develop a range of products and services, rather than being pushed into the cloud company's system."[132]

In a recent paper, Open Markets Institute and Mozilla outline a few places in the AI stack where structural separation becomes a critical intervention: 1) between cloud computing and AI services to prevent firms from preferencing their own AI solutions over competitors'; 2) between AI foundational models and operating systems to prevent a single company from integrating its AI solutions more seamlessly and offering exclusive features or preferential access within downstream products; and 3) between semiconductors and cloud computing services to eliminate firms' incentives to optimize their hardware to work best with their own cloud and AI solutions.[133]

VI. Protect workers from the harmful anticompetitive effects of monopsony power

By Carmen Comsti

While antitrust case law has recognized labor market theories of harms, it is particularly alarming that California's antitrust law has no expressly codified standards or enforcement mechanisms to address anticompetitive behavior by employers and the harms to workers from employer monopsony in labor markets.[134] Unions and workers have long engaged with federal and state antitrust review processes and other legal tools to respond to employer consolidation and anticompetitive practices that harm workers and the labor market. But the impact of labor market concentration and employer monopsony on workers and anticompetitive single-firm conduct of employers historically have been ignored in enforcement efforts by federal and state antitrust regulators.

---

[132] *Id.*
[133] Max Von Thun and Daniel A. Hanley, "Stopping Big Tech from Becoming Big AI: A Roadmap for Using Competition Policy to Keep Artificial Intelligence Open for All, Open Markets Institute and Mozilla," October 2024, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/67100da0fb1ffa695a7ad75b/1729105313006/Stopping+Big+Tech+from+Becoming+Big+AI.pdf.
[134] See, e.g., *NCAA v. Alston*, 141 S. Ct. 2141 (2021) (applying the Sherman Act to protect workers from an employer-side agreement to limit compensation); See, e.g., *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948) ("The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."); see *FTC v. Kroger Co.,* No 3:24-CV-003470-AN, 2024 WL 5053016 (D. Or. Dec. 10, 2024).

Employer monopsony power occurs when a single employer, or a small number of employers, has significant control over the labor market for a particular type of job or geographic area. Employer monopsony power in a labor market diminishes workers' ability to bargain for and secure fairer wages and safer working conditions with their employer. This power allows the employer to suppress wages, reduce benefits, or impose unfavorable working conditions because workers have limited or no alternative employment options. Anticompetitive behavior in labor markets and the lack of competition among employers increase market power of employers over workers and can result in depressed wages and unsafe or unfair working conditions,[135] such as no-poach agreements that restrict workers' ability to get higher pay or better treatment at a competitor employer or neighboring franchise.

"Labor market concentration depresses wages by 20%."

A 2022 U.S. Treasury analysis of labor market competition found that labor market concentration depresses wages by 20 percent relative to a fully competitive benchmark, with significant impacts both within the labor market and well beyond it.[136] Monopsony power can reduce workers' bargaining power against an employer that has dominance over a labor market, resulting in lower wage growth,[137] reduced safe staffing levels,[138] restraints on worker mobility,[139] and diminishing job quality.[140]

Corporate concentration among employers in one sector of the labor market can also lead to fewer employment options in other sectors: for example, when an Amazon fulfillment

---

[135] *See* Hafiz H and Marinescu I (2023), "Labor Market Regulation and Worker Power," *University of Chicago Law Review*, Vol. 90(2): 469-509, https://chicagounbound.uchicago.edu/uclrev/vol90/iss2/6/.
[136] U.S. Department of the Treasury, "The State of Labor Market Competition," March 7, 2022, https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf.
[137] *See, e.g.,* Prager E, Schmitt M (Feb. 2021), "Employer Consolidation and Wages: Evidence from Hospitals," *American Economic* Review, 111: 397-427, https://www.jstor.org/stable/27027692.
[138] Marinescu I et al, "Wages, Hires, and Labor Market Concentration," *J Econ Behav & Org.* (2021), 184(C), 506-605. *See also* Wasser D, "Literature Review: Monopsony, Employer Consolidation, and Health Care Labor Markets." *Cent for Econ and Pol'y Res* (Jan. 2022). https://www.cepr.net/report/literature-review-monopsony-employer-consolidation-and-health-care-labor-markets/.
[139] *See* Naidu S and Carr M (Jul. 2022), "If You Don't Like Your Job, Can You Always Quit?" Economic Policy Institute, https://www.epi.org/unequalpower/publications/pervasive-monopsony-power-and-freedom-in-the-labor-market/.
[140] *See* Hafiz H and Marinescu I (2023), "Labor Market Regulation and Worker Power," *University of Chicago Law Review*, Vol. 90(2): 469-509, https://chicagounbound.uchicago.edu/uclrev/vol90/iss2/6/.

center opens, warehousing employment increases, but non-warehouse jobs, such as local retail positions, decline, likely displaced by the new center.[141]

Threats to good jobs are particularly prevalent among workers of color, and particularly women of color, "who, due to historic and ongoing racism and sexism, not only face higher unemployment rates, racial and gender wage gaps, lower rates of educational attainment, and substantially less access to generational wealth, but are also overrepresented in lower-paid occupations vulnerable to corporate concentration abuses."[142]

Current antitrust case law affirms labor market theories of harm due to employer monopsony but, without express statutory standards, these theories are rarely pursued by antitrust enforcement agencies. At the federal level, the U.S. Supreme Court has long confirmed that federal antitrust law applies to anticompetitive behavior by buyers in a market and the harmful effects of monopsony, but theories of monopsony harm have rarely involved an analysis of labor market competition and harm to workers.[143] Likewise, under today's California antitrust statute, there is no express recognition of any legal standard or enforcement mechanism to address anticompetitive behavior or concentration in labor markets that harm workers. However, while California law explicitly prohibits price-fixing by buyers,[144] which applies to employers as buyers in a labor market, it does not expressly prohibit wage-fixing in the statute.

In recent years, federal antitrust and consumer protection regulators, including the FTC and U.S. DOJ, have begun to concertedly develop regulation and guidance that would explicitly apply and prioritize antitrust law enforcement to review labor market concentration and curbing its negative impacts on workers. In 2021, President Biden's Executive Order 14036 instructed federal antitrust agencies, among other things, to pursue antitrust enforcement to address the harmful effects of monopsony and the abuses of market power in labor

---

[141] Janelle Jones and Ben Zipperer, Economic Policy Institute, "Unfulfilled Promises: Amazon fulfillment centers do not generate broad-based employment growth," Feb. 1, 2018. https://www.epi.org/publication/unfulfilled-promises-amazon-warehouses-do-not-generate-broad-based-employment-growth/

[142] Letter from Solana Rice, Liberation in a Generation, to CLRC chair, submitted to CLRC on May 2, 2024.

[143] See *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lunder Co.*, 549 U.S. 312, 317-18 (2007) (holding that "general theoretical similarities of monopoly and monopsony combined with the theoretical and practical similarities of predatory pricing and predatory bidding convince us that our two-pronged [Sherman Act test] should apply to predatory-bidding claims"); see FTC v. Kroger Co., No 3:24-CV-003470-AN, 2024 WL 5053016, at *31 (D. Or. Dec. 10, 2024) (describing federal case law recognizing labor markets as cognizable markets under the Sherman Act).

[144] Cal. Bus. & Prof. Code § 16720; see Knevelbaard Dairies v. Kraft Foods, Inc., 232 F. 3d 979, 987-88 (9th Cir. 2000) (applying California's statutory *per se* rule prohibiting price-fixing to buyer conspiracies).

markets.[145] Prior to that Executive Order, the FTC and DOJ had never blocked or challenged a merger on the basis of its monopsonist labor market effects.

California can look to these recent efforts by federal antitrust regulators to establish enforcement standards under federal antitrust to expressly allow state law to address employer abuses against workers that result from labor market concentration and anticompetitive monopsonist behavior.

A. Recommendation: Adopt an express state labor market impact standard in statute

California can codify a standard to review the impact and potential harm to workers of employer monopsony over a labor market as distinct from a consumer market concentration analysis. A labor market impact standard, similar to federal antitrust regulators' 2023 Merger Guidelines, should be incorporated into any premerger review or premerger filing requirements established under California law, as well as any single-firm conduct standard adopted under the Cartwright Act. Importantly, antitrust regulators should be able to take enforcement action against a firm or to block or place conditions on a merger solely on the basis of labor market harm.

> "Antitrust regulators should be able to take enforcement action against a firm or to block or place conditions on a merger solely on the basis of labor market harm."

In federal Merger Guideline 10, the FTC and U.S. DOJ articulate a labor market impact standard in antitrust enforcement and explicitly provide a framework for analyzing whether a merger of competing buyers, including employers, will substantially lessen competition for workers, which would warrant enforcement action.[146] Importantly, Merger Guideline 10 recognizes that the negative impact of labor market monopsony power may go beyond the impact on labor market prices — *i.e.*, wages — and that concentration of employer power through market consolidation and anticompetitive behavior can result both in employer abuse or exploitation of workers and in employer power to violate labor and employment law. The agencies describe in Merger Guideline

[145] Executive Order 14036, "Executive Order on Promoting Competition in the American Economy," The White House (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[146] Department of Justice and Federal Trade Commission, 2023 Merger Guidelines, December 18, 2023, https://www.justice.gov/atr/2023-merger-guidelines

10 that substantially lessening competition for workers "may lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality."[147] The agencies further explain what will be considered in their analysis of lessening competition for workers' labor and the potential for labor market harm or reduced job quality as a result of a merger:

> A decrease in wages is understood as relative to what would have occurred in the absence of the transaction; in many cases, a transaction will not reduce wage levels, but rather slow wage growth. Wages encompass all aspects of pecuniary compensation, including benefits. Job quality encompasses non-pecuniary aspects that workers value, such as working conditions and terms of employment.[148]

The FTC's first enforcement action using labor market theories of harm since their adoption of Merger Guideline 10, *In the Matter of Kroger Company/Albertsons Companies, Inc. (Kroger/Albertsons)*, provides a useful example of how a labor market impact standard could be applied in California. The FTC's lawsuit and complaint alleged that the merger would substantially lessen competition not only for grocery markets, negatively impacting consumers and raising grocery prices, but also that labor market competition would be eliminated, diminishing Kroger and Albertsons workers' ability to collectively bargain for stronger union contracts with improved wages, benefits, and working conditions.[149] The FTC argued that consolidating Kroger and Albertsons would have enabled the new combined employer to gain increased bargaining leverage over workers and their unions to the workers' detriment, resulting in subpar terms of employment, slower wage growth, weaker benefits, and potentially degraded working conditions.[150] The FTC, in its complaint, additionally analyzed the potential negative effect the merger would have on union workers' ability to credibly leverage the threat of a strike or boycott to negotiate better contract terms.[151] While the judge did not weigh in on this labor dimension in its ruling siding with the FTC, this example provides a solid framework for enforcers to follow in future investigations.

If California establishes a premerger review process, labor market information should be required in premerger filings to evaluate the labor market impact of proposed mergers. California can look to the FTC's proposed updates to Hart-Scott-Rodino Act merger filings, which would require companies to provide information about their employees "to aid the agencies' evaluation of the impact of proposed transactions on competition for workers in

---

[147] *Id.* at 26-27.
[148] *Id.* at 27, note 51.
[149] Complaint ¶¶ 7, 57-82, *The Kroger Company and Albertsons Companies, Inc.* (*Kroger/Albertsons*), FTC No. D-9428 (Feb. 26, 2024); Complaint for Temporary Restraining Order and Injunctive Relief, *FTC et al. v. Kroger et al.,* No. 3:24-cv-00347, at ¶¶ 7, 101 (D. Or. Feb. 26, 2024).
[150] Complaint, *Kroger/Albertsons,* at ¶¶ 69-82; Complaint, *FTC et al. v. Kroger et al.*, at ¶¶ 88-101.
[151] Complaint, *Kroger/Albertsons,* at ¶¶ 73-77; Complaint, *FTC et al. v. Kroger et al.*, at ¶¶ 92-96.

labor markets."[152] The proposed Hart-Scott-Rodino Act merger filings would require merger companies to detail employee job classifications, post-merger geographical information about workers, and worker and worker safety information, including a firm's history of labor law violations during a five-year period before the filing. Past labor law violations would include penalties or findings filed by the U.S. Department of Labor, the National Labor Relations Board, and the Occupational Health and Safety Administration.

B. Recommendation: Establish a "joint employer rule" to address parent corporation dominance over labor markets

Labor market monopsony can arise either from a single employer acquiring dominance over workers through horizontal mergers and acquisitions of competing employers within a labor market, or from a company using vertical acquisitions or contractual restraints to become a dominant franchisor in a labor market. As parent companies or franchisors, large conglomerate corporations are increasingly using anticompetitive restrictive covenants — like no-poach agreements,[153] noncompete provisions,[154] and stay-or-pay contracts[155] — both to limit worker mobility in a labor market and to control terms and conditions of employment for workers with whom they have only indirect or reserved control.[156] To address this indirect anticompetitive behavior of labor market monopsonists, California antitrust law can establish a legal standard that allows antitrust enforcement against a "joint employer" of workers within a labor market.

---

[152] FTC, "Notice of Proposed Rule, Premerger Notification; Reporting and Waiting Period Requirements," Federal Register, 88 Fed. Reg. 42,178-218 (Aug. 29, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-parts-801-803-premerger-notification-reporting-waiting-period-requirements.

[153] Michael Iadevaia (2020), "Poach-No-More: Antitrust Considerations of Intra-franchise No-Poach Agreements," *ABA Journal of Labor and Employment Law, Vol. 35(1):* 151-82, https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v35/number-1/poach-no-more.pdf.

[154] American Economic Liberties Project, "Better wages and working conditions: How states should tackle noncompete agreements, "TRAPs," and other restraints on worker mobility., American Economic Liberties Project, https://www.economicliberties.us/wp-content/uploads/2024/06/AELP-states-noncompetes.pdf.

[155] *Id.*

[156] Callaci B et al (Mar 2023), "Vertical Restraints and Labor Markets in Franchised Industries," Mimeo, https://marshallsteinbaum.org/assets/callaci-pinto-steinbaum-walsh-2023-vertical-restraints-franchise-labor-markets-3-10-23-.pdf. Callaci B (Nov. 2021), "What Do Franchisees Do? Vertical Restraints as Workplace Fissuring and Labor Discipline Devices," Law and Political Economy Project, https://lpeproject.org/blog/what-do-franchisees-do-vertical-restraints-as-workplace-fissuring-and-labor-discipline-devices/. Polden D (Spring 2023), "Restrictions on worker mobility and the need for stronger policies on anticompetitive employment contract provisions," *Competition*, California Lawyers Association, Vol 33(1), https://calawyers.org/publications/antitrust-unfari-competition-law/competition-spring-2023-vol-33-no-1-restrictions-on-worker-mobility-and-the-need-for-stronger-policies-on-anticompetitive-employment-contract-provisions/.

Recently, FTC Commissioner Alvaro Bedoya has spoken on the need for antitrust law to address the anticompetitive effects of worker misclassification as independent contractors and the lack of joint employer liability under antitrust and other worker protection law.[157] By misclassifying workers as independent contractors without facing liability, employers can control labor markets without responsibility for anticompetitive behavior.[158] Joint employer liability under California antitrust law would help ensure that parent companies or franchisors cannot skirt antitrust liability for anticompetitive behavior restraining trade in labor markets.

VII. Strengthen antitrust enforcement mechanisms

> "Effective enforcement requires not only robust agency action but also clear, bright-line rules that courts can apply consistently."

Effective enforcement requires not only robust agency action but also clear, bright-line rules that courts can apply consistently. The current ambiguity in legal standards allows dominant firms to exploit loopholes, making it hard for enforcers to intervene, delaying justice, and creating inconsistency by relying on a non-expert judiciary to make decisions. By delineating bright-line rules, the Commission can create clear, objective criteria for California's courts to identify anticompetitive conduct. This will reduce reliance on judicial discretion, limit unnecessary litigation, and enable faster, more consistent decisions while providing businesses with the certainty they need to understand the boundaries of lawful conduct, thereby reducing compliance costs and encouraging fair competition.

Resource and empower antitrust enforcement agencies. The California Attorney General's office must have the resources to investigate and prosecute anticompetitive behavior. Adequate resources ensure that enforcement agencies can bring timely and effective actions against monopolistic behavior. More capacity to investigate matters increases the likelihood of successful prosecutions, deters anticompetitive conduct, and ensures justice for affected workers, consumers, and small businesses. To this end, adequate funding for expert staff, data analysis tools, and modern investigative technology is essential. The Attorney General's office should also have the ability to seek injunctive relief and impose civil penalties for violations of state antitrust laws, without being entirely reliant on federal

[157] Remarks of U.S. FTC Commissioner Alvaro Bedoya (Feb 2, 2024), ""Overawed": Worker Misclassification as a Potential Unfair Method of Competition," Global Competition Review: Law Leaders Global Summit, Miami, FL, https://www.ftc.gov/system/files/ftc_gov/pdf/Overawed-Speech-02-02-2024.pdf.
[158] Padin L (sept. 23, 2024), "How Antitrust Law Supports Workers' Rights," National Employment Law Project, https://www.nelp.org/how-antitrust-law-supports-workers-rights/.

enforcement action. To facilitate information sharing, reduce redundancy, and accelerate investigations, California should also effectively coordinate with the FTC and DOJ.

Address the evidentiary problems created by business use of end-to-end encryption. Utilizing end-to-end encryption combined with automatic self-deleting chats effectively immunizes any conspiracy in restraint of trade. Without access to competitor communications or a cooperator, conspiracies are virtually impossible for enforcers to prosecute. There are several solutions to tackle this problem. First, California must develop a framework to target tacit collusion, as detailed in the Concerted Action section of this report. California could then establish a duty to document business communications, requiring corporations to maintain such records even when using end-to-end encrypted platforms. Failure to document communications would serve as grounds for injunctive relief or civil damages. This approach would balance privacy concerns with the need for accountability in corporate communications.

VIII. Conclusion

"By acting decisively, California can ensure that its economy remains inclusive, competitive, and fair."

California stands at a pivotal moment in the effort to reclaim antitrust as a force for economic justice and fair competition. Just as the Gilded Age spurred the original antitrust laws, today's era of extreme corporate concentration demands a modern, more robust response. By strengthening state antitrust law, adopting sector-specific protections, and providing enforcers with the tools they need to hold dominant firms accountable, California has the opportunity to lead the nation in setting a higher standard for competition policy.

The policy recommendations in this report — from stronger merger review processes to safeguards against employer monopsony power — offer a clear pathway to restore fair competition. Addressing the unique challenges posed by the digital economy and platform dominance is especially critical, as the rapid pace of technological change threatens to outstrip the enforcement capabilities of existing antitrust tools. By acting decisively, California can ensure that its economy remains inclusive, competitive, and fair.

These commonsense antitrust reforms will complement other areas of law to combat the pervasive influence of concentrated corporate power. State community reinvestment acts, for instance, can ensure financial institutions are held accountable to the communities they serve, promoting equitable development and combating the adverse effects of banking consolidation. Strengthened consumer protection laws can shield households from exploitative practices like predatory fees and deceptive pricing. Comprehensive labor laws are essential to protect workers from monopsony power and ensure fair wages and working conditions. Tax policy reform can level the playing field by preventing mega-corporations from using loopholes to outmaneuver small businesses. Together, these policies form a comprehensive framework for economic justice and shared prosperity.

As the world's fifth-largest economy, California's leadership in this endeavor is not just significant for its residents but also for the broader national and global economy. By addressing concentrated power and promoting a competitive, inclusive economy, California can serve as a model for other states and countries to follow. The work ahead is challenging, but the potential for a more equitable future is within reach. With bold action, California can restore the promise of fair competition and ensure that its economy works for everyone — not just the most powerful among us.

International
Center for
Law & Economics

Comments of the International Center for Law & Economics on Memorandum 2025-21on the Draft Language for Single-Firm Conduct Provision

California Law Revision Commission Study of Antitrust Law, Study B-750

May 23, 2025

Authored by:

Geoffrey A. Manne (President and Founder, International Center for Law & Economics)

Dirk Auer (Director of Competition Policy, International Center for Law & Economics)

Brian Albrecht (Chief Economist, International Center for Law & Economics)

Lazar Radic (Senior Scholar, International Center for Law & Economics)

laweconcenter.org | icle@laweconcenter.org
1104 NW 15th Ave. Ste 300 Portland, OR 97209

@laweconcenter
503.770.0076

Introduction

We are grateful for the opportunity to respond to the California Law Revision Commission's study of antitrust law with these comments on Memorandum 2025-21 on proposed policy options to address single-firm conduct ("the Memorandum").[1] The International Center for Law & Economics (ICLE) is a nonprofit, nonpartisan global research and policy center based in Portland, Oregon. ICLE was founded with the goal of building the intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law & economics methodologies to inform public-policy debates, and has longstanding expertise in the evaluation of competition law and policy. ICLE's interest is to ensure that competition law remains grounded in clear rules, established precedents, a record of evidence, and sound economic analysis.

We appreciate the Commission's efforts to modernize California's antitrust laws (the Cartwright Act) and its openness to public input during this process. Our comments address three critical issues raised by the Memorandum's options for a new single-firm-conduct (SFC) provision, and we urge the Commission to proceed with caution and economic clarity.

As background, the Memorandum outlines three options for a Cartwright Act amendment targeting single-firm monopolistic conduct.

- Option One would mirror the traditional language of Section 2 of the federal Sherman Antitrust Act (prohibiting monopolization and attempts to monopolize) with an added reference to monopsony issues. It would also add interpretive guidance to "untether" California law from restrictive federal precedents.
- Option Two would expand the basic provision by incorporating a broader range of potential harms, and possibly a departure from the conventional rule-of-reason framework.
- Option Three, labeled an "Exclusionary Conduct" provision, represents the most dramatic break from U.S. antitrust norms: it uses novel terminology and defines unlawful single-firm conduct in terms of harm to a firm's "trading partners" (customers or suppliers), rather than focusing primarily on harm to competition or consumers.

Each option is accompanied by proposed legislative findings and declarations that emphasize the Commission's intent to distance California law from federal antitrust jurisprudence. Unfortunately, this change of course—particularly the sharp divergence from well-established U.S. antitrust principles—would be counterproductive.

There are important reasons to believe that it would be unwise to untether California antitrust law from U.S. antitrust law's error-cost framework, effects-based analysis, and consumer welfare standard. Abandoning these principles in favor of a more interventionist (or European-inspired) approach would likely chill innovation and harm consumers in the long run, as we explained in our prior

---

[1] Staff Memorandum, *2025-21 Draft Language for Single Firm Conduct Provision*, CALIF. LAW REVIS. COMM. (Mar. 24, 2025), *available at* https://clrc.ca.gov/pub/2025/MM25-21.pdf [*hereinafter* "Memorandum"].

comments to the Commission.[2] These comments further caution against expanding antitrust enforcement to protect "trading partners" (such as suppliers or workers) as a distinct objective. Using antitrust law to shield an idiosyncratic selection of rivals and other trading partners, rather than focusing on protecting competition and consumers, would risk politicizing enforcement and undermining economic efficiency.

Finally, we caution against incorporating monopsony (buyer-power) or novel "dominant buyer" considerations into a single-firm conduct rule, absent a sound empirical and legal framework. There is currently a lack of consensus on such fundamental issues as market definition, competitive effects, and how to balance harms to workers versus consumers.[3] It would therefore be premature to enact sweeping new prohibitions aimed at employer market power or other monopsonistic conduct before these complex economic and policy questions are resolved.

In the sections that follow, we elaborate on each of these points. First, we explain why California should retain alignment with the consumer-welfare-centric, effects-based approach of U.S. antitrust law, rather than adopt a "precautionary" European-styled regime that presumes harm from large firms. Second, we address the issues surrounding monopsony power in labor markets, arguing that regulators should not rush to impose broad new liabilities on single-firm conduct involving labor or other input markets without robust evidence and clear standards. Third, we discuss the dangers of shifting antitrust focus from consumers to "trading partners," highlighting the potential for politicized enforcement and reduced efficiency. We conclude by urging the Commission to carefully calibrate any reforms so that California's antitrust law remains a force for consumer welfare and innovation.

I. The Risks of Untethering California Antitrust Law from Established US Antitrust Principles

The Memorandum indicates that California wishes to "free" itself from decades of restrictive jurisprudence by the U.S. federal courts. It would do so by nullifying rulings of the U.S. Supreme Court that limit its ability to find antirust liability[4] and by disavowing the error-cost framework's preference for false negatives over false positives in antitrust analysis.[5] This is misguided, as there are important reasons why the overenforcement of antitrust laws is likely more harmful than their underenforcement.

---

[2] Geoffrey Manne & Dirk Auer, *Against the 'Europeanization' of California's Antitrust Law* (Comments of the International Center for Law & Economics on the Single-Firm Conduct Expert Report California Law Revision Commission Study of Antitrust Law, Study B-750, May 7, 2024), *available at* https://laweconcenter.org/resources/against-the-europeanization-of-californias-antitrust-law.

[3] Geoffrey A. Manne, Brian C. Albrecht, & Dirk Auer, *Labor Monopsony and Antitrust Enforcement: A Distorting Mirror*, 74 DEPAUL L. REV. 1119 (2025).

[4] Memorandum, at 12-13.

[5] *Id.*, at 11.

Of course, no one believes that markets are perfect, or that antitrust enforcement can never be appropriate. The question is, instead, marginal and comparative: Given the realities of politics, economics, the limits of knowledge, and the errors to which they can lead, which imperfect response is preferable at the margin? Or, phrased slightly differently, should we give California antitrust enforcers and private plaintiffs more room to operate, or should we continue to cabin their operation in careful, economically grounded ways that are aimed squarely at optimizing (not minimizing) the extent of antitrust enforcement?

This may be a question about changes at the margin, but it is far from marginal. It goes to the heart of the market's role in the modern economy.

While there are many views on this subject, arguments that markets have failed us in ways that more extensive antitrust enforcement would correct are poorly supported.[6] We should certainly continue to look for conditions where market failures of one kind or another may justify intervention, but we should not make policy on the basis of mere speculation. And we should certainly not do so without considering the likelihood and costs of regulatory failure, as well. In order to reliably adopt a sound antitrust policy that might improve upon the status quo (which has evolved over a century of judicial decisions, generally alongside the field's copious advances in economic understanding), we would need much better information about the functioning of markets and the consequences of regulatory changes than is currently available.

To achieve this, antitrust law and enforcement policy should, above all, continue to adhere to the error-cost framework, which informs antitrust decisionmaking by comparing the relative costs of mistaken intervention with mistaken nonintervention.[7] Specific cases should be addressed as they arise, with an implicit understanding that, particularly in digital markets, precious few generalizable presumptions can be inferred from a prior case. The overall stance should be one of restraint, reflecting the state of our knowledge.[8] We may well be able to identify anticompetitive harms in certain

---

[6] Among other things, the expert report leading up to the current memorandum argued that antitrust should be used to address alleged policy concerns broader than protecting competition, and should accept reductions in competition to do so. *See Antitrust Law – Study B-750*, CALIF. LAW REVIS. COMM. at 2, *available at* http://www.clrc.ca.gov/B750.html (*last revised* Apr. 26, 2024) ("Nonetheless, these important values ['broader social and political goals'] 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."). But as one of the authors of the expert report has noted elsewhere: "while antitrust enforcement has a vital role to play in keeping markets competitive, antitrust law and antitrust institutions are ill suited to directly address concerns associated with the political power of large corporations or other public policy goals such as income inequality or job creation." Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 714 (2018).

[7] Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMP. L. & ECON. 153 (2010).

[8] *See* Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSP. 3, 4 (2003) ("[T]he economics profession should conclude that until it can provide some hard evidence that identifies where the antitrust authorities are significantly improving consumer welfare and can explain why some enforcement actions and remedies are helpful and others are not, those authorities would be well advised to prosecute only the most egregious anticompetitive violations.").

cases, and when we do, we should enforce the current laws. But we should not overestimate our ability to fine-tune market outcomes without causing more harm than benefit.

Allegations that the modern antitrust regime is insufficient take as a given that there is something wrong with antitrust doctrine or its enforcement, and cast about for policy "corrections." The common flaw with these arguments is that they are not grounded in robust empirical or theoretical support. Indeed, as one of the influential papers that (ironically) is sometimes cited to support claims for more antitrust puts it:

> An alternative perspective on the rise of [large firms and increased concentration] is that they reflect a diminution of competition, due to weaker U.S. antitrust enforcement. *Our findings on the similarity of trends in the United States and Europe, where antitrust authorities have acted more aggressively on large firms, combined with the fact that the concentrating sectors appear to be growing more productive and innovative, suggests that this is unlikely to be the primary explanation*, although it may be important in some industries.[9]

Rather, such claims are little more than hunches that something must be wrong, conscripted to serve a presumptively interventionist agenda. Because they are merely hypotheses about things that could go wrong, they do not determine—and rarely even ask—if heightened antitrust scrutiny and increased antitrust enforcement are actually called for in the first place.

Implicitly shunning the evidence demonstrating that markets have become more, not less, competitive,[10] the Memorandum proposes that California adopt a firm stance in favor of false positives over false negatives—in other words, that it tolerate erroneously condemning procompetitive behavior in exchange for avoiding the risk of erroneously accepting anticompetitive conduct:

> The Commission can nullify these principles by asserting in that it favors overdeterrence and need not follow federal law.
>
> The Legislature hereby finds and declares all of the following:

---

[9] David Autor, David Dorn, Lawrence F. Katz, Christina Patterson, & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q.J. ECON. 645, 651 (2020) (citations omitted) (emphasis added).

[10] *See e.g.*, Sharat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity*, 13 AM. ECON. J. MICRO. 309, 323-24 (2021). ("[C]oncentration increases do not correlate to price hikes and correspond to increased output. This implies that oligopolies are related to an offsetting and positive force—these oligopolies are likely due to technical innovation or scale economies. My data suggest that increases in market concentration are strongly correlated with innovations in productivity"); Chang-Tai Hsieh & Esteban Rossi-Hansberg, *The Industrial Revolution in Services*, 1 J. POL. ECON. MACRO. 3 (2023). ("Market concentration at the local level has decreased in all US cities, particularly in cities that were initially small. These facts are consistent with the availability of new fixed-cost-intensive technologies that yield lower marginal costs in service sectors. The entry of top service firms into new local markets has led to substantial unmeasured productivity growth, particularly in small markets"); David Berger, Kyle Herkenhoff, & Simon Mongey, *Labor Market Power*, 112 AM. ECON. REV. 1147, 1148-49 (2022), (finding that most labor markets are more competitive today than they were in the 1970s).

> (a) Courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors the risk of over-enforcement of antitrust laws over the risk of under-enforcement.[11]

This presupposes that the risk of antitrust underenforcement is greater than the risk of overenforcement. Of course, it is possible that, in some markets, there are harms that are missed for which enforcers should have been better equipped. But advocates of reform have yet to adequately explain much of what we would need to know to make such determinations, let alone to craft the right approach if we did. Antitrust law should be refined based on an empirical demonstration of harms, as well as a careful weighing of those harms against the losses to social welfare that would arise if procompetitive conduct were deterred alongside anticompetitive conduct.

Dramatic new statutes to undo decades of antitrust jurisprudence or reallocate burdens of proof with the stroke of a pen are unjustified. Suggesting that antitrust law should uniformly err on the side of enforcement, when the effect of the conduct at issue on competition is uncertain, would be an unsupported statement of a political preference, not one rooted in sound economics or evidence.

The primary evidence adduced to support the claim that underenforcement (and thus, the risk of Type II errors) is more significant than overenforcement (and thus, the risk of Type I errors) is that there are not enough cases brought and won. But even if this is superficially true, such a conclusion is just as consistent with a belief that the current regime is functioning well as it is with a belief that it is functioning poorly.

At the same time, some critics (including the Memorandum's authors) contend that a heightened concern for Type I errors stems from a faulty concern that Type 2 errors are not really problematic, as the market itself will correct the situation, which they view as naïve.[12]

But Judge Frank Easterbrook's famous argument for enforcement restraint is not based on the assertion that markets are perfectly self-correcting. Rather, his claim is that the (undeniable) incentive of new entrants to compete for excess profits in monopolized markets operates to limit the social costs of Type II errors more effectively than the legal system's ability to correct or ameliorate the costs of Type I errors. The logic is quite simple, and not dependent on the strawman notion of market perfection:

> If the court errs by condemning a beneficial practice, the benefits may be lost for good. Any other firm that uses the condemned practice faces sanctions in the name of stare decisis, no matter the benefits. If the court errs by permitting a deleterious practice, though, the welfare loss decreases over time. Monopoly is self-destructive. Monopoly prices eventually attract entry. True, this long run may be a long time coming, with loss to society in the interim. The central purpose of antitrust is to speed up the arrival of the

[11] Memorandum, at 11.

[12] *Id.*

> long run. But this should not obscure the point: judicial errors that tolerate baleful practices are self-correcting while erroneous condemnations are not.[13]

Moreover, anticompetitive conduct that is erroneously excused may be subsequently corrected, either by another enforcer, a private litigant, or another jurisdiction. Ongoing anticompetitive behavior will tend to arouse someone's ire, whether it be competitors, potential competitors, customers, or input suppliers. That means such behavior will be noticed and potentially brought to the attention of enforcers. And for the same reason—identifiable harm—it may also be actionable.

By contrast, procompetitive conduct that does not occur because it is prohibited or deterred by legal action has no constituency and no visible evidence on which to base a case for revision. Nor does a firm improperly deterred from procompetitive conduct have any standing to sue the government for erroneous antitrust enforcement, or the courts for adopting an improper standard. Of course, overenforcement can sometimes be corrected, but the institutional impediments to doing so are formidable.

The claim that concern for Type I errors is overblown further rests on the assertion that "more up-to-date economic analysis" has undermined that position.[14] But that learning is, for the most part, entirely theoretical—constrained to "possibility theorems" divorced from realistic complications and the real institutional settings of decisionmaking. Indeed, the proliferation of such theories may actually increase—rather than decrease—uncertainty by further complicating the analysis, and asking generalist judges to choose from among competing theories without any realistic means to do so.[15]

Unsurprisingly, "[f]or over thirty years, the economics profession has produced numerous models of rational predation. Despite these models and some case evidence consistent with episodes of predation, little of this Post-Chicago School learning has been incorporated into antitrust law."[16] Nor is it likely that the courts are making an erroneous calculation in the abstract. Evidence of Type I errors is hard to come by. But for a wide swath of conduct called into question by the "post-Chicago School" and other theories, the evidence of systematic problems is virtually nonexistent.[17]

Moreover, contrary to the Memorandum's implications, U.S. antitrust law has not ignored potentially anticompetitive harm, and courts certainly aren't blindly deferential to conduct undertaken by

---

[13] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3 (1984).

[14] Herbert J. Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PENN. L. REV. 1843, 1849 (2020).

[15] *See* Geoffrey A. Manne, *Error Costs in Digital Markets*, in GLOBAL ANTITRUST REPORT IN THE DIGITAL ECONOMY (Joshua D. Wright & Douglas H. Ginsburg eds., 2020), *available at* https://gaidigitalreport.com/wpcontent/uploads/2020/11/Manne-Error-Costs-in-Digital-Markets.pdf.

[16] Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 147, 166 (2012).

[17] *Id.* at 166 ("[T]here is very little empirical evidence based on in-depth industry studies that RRC is a significant antitrust problem."); *id.* at 148 ("Because of [the Post-Chicago School] literature's focus on theoretical possibility theorems, little evidence exists regarding the empirical relevance of these theories.").

large firms. It is impossible to infer from the general "state of the world" or from perceived "wrong" judicial decisions that the current antitrust regime has failed, or that California, in particular, would benefit from a wholesale shift of its antitrust error-cost presumptions.

The Memorandum seeks to overturn these presumptions by nullifying three pillars of U.S. antitrust law: the U.S. Supreme Court's decisions in *Trinko*, *Amex*, and *Brooke Group*.[18] As we explain in the following subsections, this approach is misguided on both legal and economic grounds.

A. *Trinko* Prevents Inefficient Free Riding that Risks Chilling Innovation

In dispensing with *Trinko*, the Memorandum brings the Cartwright Act closer to the EU's approach to "refusals to deal." U.S. and EU antitrust laws differ greatly when it comes to refusals to deal, however, and for good reason. While the United States has imposed strenuous limits on enforcement authorities or rivals seeking to bring such cases, EU competition law sets a far lower threshold for liability, thereby facilitating free riding by self-interested parties.

The U.S. approach is firmly rooted in the error-cost framework and, in particular, the conclusion that avoiding Type I (false-positive) errors is more important than avoiding Type II (false-negative) errors. As the Supreme Court held in *Trinko*:

> [Enforced sharing] may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also 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.[19]

In that case, the Supreme Court was unwilling to extend the reach of Section 2, cabining it to a very narrow set of circumstances:

> *Aspen Skiing* is at or near the outer boundary of §2 liability. The Court there found significance in the defendant's decision to cease participation in a cooperative venture. The unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end.[20]

This highlights two key features of U.S. antitrust law concerning refusals to deal. To start, U.S. antitrust law generally does not apply the "essential facilities" doctrine—indeed, as the Court held in *Trinko*, "we have never recognized such a doctrine."[21] Accordingly, in the absence of exceptional

---

[18] Memorandum, at 4, 12.

[19] *Verizon Comm. v. Law Offices of Trinko*, 540 U.S. 398, 408 (2004)

[20] *Trinko*, 540 U.S. at 409.

[21] *Trinko*, 540 U.S. at 411. *See also* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989).

facts, upstream monopolists are rarely required to supply their product to downstream rivals, even if that supply is "essential" for effective competition in the downstream market.

As in most areas of antitrust policy, EU competition law is much more interventionist. Refusals to deal are a central theme of EU enforcement efforts, and there is a relatively low threshold for liability.[22] In theory, for a refusal to deal to infringe EU competition law, it must meet a set of fairly stringent conditions: the input must be indispensable, the refusal must eliminate all competition in the downstream market, and there must not be objective reasons that justify the refusal.[23] In practice, however, all of these conditions have been significantly relaxed by EU courts and the Commission's decisional practice.[24] This is best evidenced by the lower court's *Microsoft* ruling. As John Vickers notes:

> [T]he Court found easily in favor of the Commission on the *IMS Health* criteria, which it interpreted surprisingly elastically, and without relying on the special factors emphasized by the Commission. For example, to meet the "new product" condition it was unnecessary to identify a particular new product… thwarted by the refusal to supply but sufficient merely to show limitation of technical development in terms of less incentive for competitors to innovate.[25]

The "coup de grace" to the limiting principles laid down in *Bronner* was arguably the European Court of Justice's ruling in *Android Auto*, in which the court refused to apply *Bronner* in the context of digital platforms. The court discarded the indispensability criterion and found that mere convenience was sufficient to create an access obligation on the part of the dominant undertaking.[26] In general, but especially after the *Android Auto* ruling, it is apparent that EU competition law is far less concerned about the potential chilling effect on firms' investments than is U.S. antitrust law.

The Memorandum's additional proposal that liability should not turn on whether a defendant treated particular parties differently in exercising exclusionary conduct (including refusal to deal)[27] is a further move away from effects-based analysis and toward the European model. As Einer Elhauge has noted, there is an important distinction between unconditional and discriminatory exclusionary conduct:

> Efforts to simply improve a firm's own efficiency and win sales by selling a better or cheaper product at above-cost prices should enjoy per se legality without any general requirement to share that greater efficiency with rivals. But exclusionary conditions that

[22] *See* Joined Cases 6/73 & 7/73, *Instituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Comm'n*, 1974 E.C.R. 223, [1974] 1 C.M.L.R. 309.

[23] *See* Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs*, EU:C:1998:569, §41.

[24] Niamh Dunne, *Dispensing with Indispensability*, 16 J. C. L. E. 74 (2020).

[25] John Vickers, *Competition Policy and Property Rights*, 120 ECON. J. 390 (2010).

[26] Case C-233/23 *Alphabet Inc. and Others v Autorità Garante della Concorrenza e del Mercato (Android Auto)* ECLI:EU:C:2025:110, §40, 52.

[27] Memorandum, at 13.

> discriminate on the basis of rivalry by selectively denying property or products to rivals (or buyers who deal with rivals) are not necessary to further ex ante incentives to enhance the monopolist's efficiency, and should be illegal when they create a marketwide foreclosure that impairs rival efficiency.[28]

By seeking to impose liability, regardless of whether conduct is exercised in a discriminatory fashion, the Memorandum would remove the general protection under U.S. antitrust law for unconditional refusals to deal, and would instead apply the conditional standard to all exclusionary conduct.

B. *Amex* Correctly Updates Antitrust Law for Two-Sided Markets

In the face of evolving facts, procedural consistency and substantive accuracy require that legal doctrines change. Two-sided markets present novel business arrangements, the competitive dynamics and implications of which are incompletely captured by existing antitrust doctrines. In this context, the Supreme Court's decision in *Amex* is uniquely important for the antitrust analysis of firms in the modern platform economy.[29] In a nutshell, *Amex* held that, in cases involving two-sided markets, plaintiffs must show harm on both sides of the market.

The Memorandum attempts to reverse the Supreme Court's holding on platform vertical restraints in *Amex* by positing instead that showing harm on only one side of a multi-sided market suffices to prove antitrust liability.[30] As Greg Werden notes, however, "[a]lleging the relevant market in an antitrust case does not merely identify the portion of the economy most directly affected by the challenged conduct; it identifies the competitive process alleged to be harmed."[31]

Particularly where novel conduct or novel markets are involved—and the relevant economic relationships are therefore poorly understood—market definition is crucial to determine "what the nature of [the relevant] products is, how they are priced and on what terms they are sold, what levers [a firm] can use to increase its profits, and what competitive constraints affect its ability to do so."[32] This is the approach the Supreme Court employed in *Amex*.

The Memorandum's proposal to overrule *Amex* in California is deeply misguided. The economics of two-sided markets are such that "there is no meaningful economic relationship between benefits and costs on each side of the market considered alone.... [A]ny analysis of social welfare must account for the pricing level, the pricing structure, and the feasible alternatives for getting all sides on board."[33] Assessing anticompetitive harm with respect to only one side of a two-sided market will

---

[28] Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 343 (2003).

[29] *Ohio v. American Express* ("Amex"), 138 S. Ct. 2274 (2018).

[30] Memorandum, at 13.

[31] Gregory J. Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 ANTITRUST L.J. 729, 741 (2013).

[32] Geoffrey A. Manne, *In Defence of the Supreme Court's 'Single Market' Definition in Ohio v. American Express*, 7 J. ANTITRUST ENFORCEMENT 104, 106 (2019).

[33] David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. REG. 325, 355-56 (2003). *See also* JeanCharles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990, 1018 (2003).

arbitrarily include and exclude various sets of users and transactions, and incorrectly assess the extent and consequences of market power.[34]

Indeed, evidence of a price effect on only one side of a two-sided platform can be consistent with either neutral, anticompetitive, or procompetitive conduct.[35] Only when output is defined to incorporate the two-sidedness of the product, and where price and quality are assessed on both sides of a sufficiently interrelated two-sided platform, is it even possible to distinguish between procompetitive and anticompetitive effects. In fact, "[s]eparating the two markets allows legitimate competitive activities in the market for general purposes to be penalized no matter how output-enhancing such activities may be."[36]

Notably, while some scholars have opposed the *Amex* holding that both sides of a two-sided market must be included in the relevant market in order to assess anticompetitive harm, some of these critics appear to note that the problem is not that both sides should not be taken into account at all, but only that they should not be included in the same relevant market (thus, permitting a plaintiff to make out a *prima-facie* case by showing harm to just one side).[37] The language proposed in the Memorandum, however, would go even further, seemingly permitting a finding of liability based solely on harm to one side of a multi-sided market, regardless of countervailing effects on the other side:

> In cases where a defendant's business is a multi-sided platform, that the defendant's conduct presents harm to competition on more than one side of the multi-sided platform, or that the harm to competition on one side of the multi-sided platform outweighs any benefits to competition on any other side(s) of the multi-sided platform.[38]

As in the *Amex* case itself, such an approach would confer benefits on certain platform-business users (in Amex, retailers) at the direct expense of consumers (in *Amex*, literal consumers of retail goods purchased by credit card).

---

[34] *See, e.g.*, Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Cost of Free Goods*, 80 ANTITRUST L.J. 521, 557 (2016)

[35] *See, e.g.*, *Brief of Amici Curiae Prof. David S Evans and Prof. Richard Schmalensee in Support of Respondents in Ohio et al. v. American Express Co.*, No. 16-1454 (Sup. Ct. Jan. 23, 2018), at 21, *available at* https://www.supremecourt.gov/DocketPDF/16/16-1454/28972/20180123160215215_16-1454%20State%20of%20Ohio%20v%20American%20Express%20Brief%20for%20Amici%20Curiae%20Antitrust%20Law%20in%20Support%20of%20Respondents.pdf ("The first stage of the rule of reason analysis involves determining whether the conduct is anticompetitive. The economic literature on two-sided platforms shows that there is no basis for presuming one could, as a general matter, know the answer to that question without considering both sides of the platform.").

[36] *United States et al. v. Am. Express Co. et al.*, 838 F.3d 179, 198 (2nd Cir. 2016).

[37] *See, e.g.*, Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2161 (2018) ("[I]t is essential to account for any significant feedback effects and possible changes in prices on both sides of a platform when assessing whether a particular firm has substantial market power.").

[38] Memorandum, at 13.

Adopting such an approach in California—whose economy is significantly dependent on multisided digital-platform firms, including both incumbents and startups—would imperil the state's economic prospects[39] and exacerbate the incentives for such firms to take jobs, investments, and tax dollars elsewhere.[40]

At a higher level, the Memorandum's hostility toward the *Amex* ruling appears to be a function of a more generalized rebuke of vertical integration. According to the Memorandum, federal antitrust law has been distorted by the misguided presumption that vertical arrangements and unilateral conduct are unlikely to harm competition.[41] There are, however, sound empirical reasons why U.S. antitrust law treats vertical restraints more favorably than horizontal ones.

On the one hand, ever since the Supreme Court's *Leegin* ruling, even price-related vertical restraints (such as resale price maintenance, or "RPM") are assessed under the rule of reason in the United States.[42] The previous *per-se* condemnation of vertical agreements was economically (and, thus, legally) unsustainable. As Patrick Rey and Jean Tirole (hardly the most free market of economists) saw as long ago as 1986: "Another major contribution of the earlier literature on vertical restraints is to have shown that *per se* illegality of such restraints has no economic foundations."[43]

While there is theoretical literature (rooted in so-called "possibility theorems") that suggests firms could engage in anticompetitive vertical conduct, the empirical evidence strongly suggests that, even though firms do impose vertical restraints, it is exceedingly rare that they have net anticompetitive effects. Nor is the relative absence of such evidence for a lack of looking: countless empirical papers have investigated the competitive effects of vertical integration and vertical contractual arrangements and found predominantly procompetitive benefits or, at worst, neutral effects.[44] Accordingly, neither

---

[39] *See* Joseph Politano, *California Is Losing Tech Jobs*, APRICITAS ECONOMICS (Apr. 14, 2024), https://www.apricitas.io/p/california-is-losing-tech-jobs ("[California's] GDP fell 2.1% through 2022, the second-biggest drop of any state over that period, driven by a massive deceleration across the information sector. That allowed states like Texas to overtake California in the post-pandemic GDP recovery, creating a gap that California still hasn't been able to close despite its economic rebound in 2023.").

[40] *Id.* ("[T]he Golden State has been bleeding tech jobs over the last year and a half—since August 2022, California has lost 21k jobs in computer systems design & related, 15k in streaming & social networks, 11k in software publishing, and 7k in web search & related—while gaining less than 1k in computing infrastructure & data processing. Since the beginning of COVID, California has added a sum total of only 6k jobs in the tech industry—compared to roughly 570k across the rest of the United States.").

[41] Memorandum, at 11.

[42] *Leegin Creative Leather Prods. Inc. v. PSKS*, Inc., 551 U.S. 877 (2007).

[43] Patrick Rey & Jean Tirole, *The Logic of Vertical Restraints*, 76 AM. ECON. REV. 921, 937 (1986).

[44] These papers are collected and assessed in several literature reviews, including Global Antitrust Institute, Comment Letter on Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers (George Mason Law & Econ. Research Paper No. 18-27, Sep. 6, 2018). Even the reviews of such conduct that purport to be critical are only tepidly so. *See*, *e.g.*, Marissa Beck & Fiona Scott Morton, *Evaluating the Evidence on Vertical Mergers* 59 REV. INDUS. ORG. 273 (2021) ("[M]any vertical mergers are harmless or procompetitive, but that is a far weaker statement than presuming every or even most vertical mergers benefit competition regardless of market structure.").

the change of stance toward vertical conduct nor the abandonment of *Amex* are justified on the basis of empirical evidence.

C. Forfeiting *Brooke Group* Risks Castigating Procompetitive Conduct

There is a reason why the evidentiary bar for proving predatory pricing is so high: antitrust law encourages high output and low prices. Reflecting a proper reading of the error-costs framework, U.S. antitrust law errs on the side of underenforcement due to a justified concern that castigating low prices may deter precisely the sort of conduct that antitrust law is meant to promote. As such, the standard of proof for predatory pricing—*i.e.*, claims of exclusionary conduct resulting from pricing below cost—is rightly set high. This is, in part, to dissuade self-interested plaintiffs who may look to shield themselves from a more efficient competitor.

In *Brooke Group*, the Supreme Court thus subjected allegations of predatory pricing to two strict conditions: 1) monopolists must charge prices that are below some measure of their incremental costs; and 2) there must be a realistic prospect that they will be able to recoup these first-period losses.[45] In laying out its approach to predatory pricing, the Supreme Court identified the risk of false positives and the clear cost of such errors to consumers. It therefore particularly stressed the importance of the recoupment requirement because, without recoupment, "predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced."[46]

Accordingly, in the United States, authorities must prove that there are constraints that prevent rival firms from entering the market after the predation scheme, or that the scheme itself would effectively foreclose rivals from entering in the first place.[47] Otherwise, competitors would undercut the predator as soon as it attempts to charge supracompetitive prices to recoup its losses. In such a situation—without, that is, the strong likelihood of recouping the lost revenue from underpricing—the overwhelming weight of economic learning (to say nothing of simple logic) makes clear that predatory pricing is not a rational business strategy.[48] Thus, apparent cases of predatory pricing—in the absence of the likelihood of recoupment—are most likely not, in fact, predatory. Deterring or punishing them would likely actually *harm* consumers.

Once again, the Memorandum attempts to approximate EU competition law, where the standard applied to predatory pricing is much laxer and therefore more likely to injure consumers. Authorities must prove only that a company has charged a price below its average variable cost, in which case its behavior is presumed to be predatory.[49] Even when a firm imposes prices that are between average

---

[45] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-27 (1993).

[46] *Id.*, at 224.

[47] On entry deterrence, *see* Steven C. Salop, *Strategic Entry Deterrence*, 69 AM. ECON. REV. 335 (1979).

[48] *See generally* John S. McGee, *Predatory Pricing Revisited*, 23 J. L. ECON 289 (1980).

[49] Case C-62/86, *AKZO v Comm'n*, EU:C:1991:286, ¶¶ 71-72.

variable and average total cost, it can be found guilty of predatory pricing if authorities show that its behavior was part of "a plan to eliminate competition."[50] Most significantly, in neither case is it necessary for authorities to show that the scheme would allow the monopolist to recoup its losses.[51]

By affirmatively dispensing with the limitations laid down in *Brooke Group*,[52] the Memorandum effectively recommends that California legislators shift California predatory-pricing law toward the European model. Unfortunately, such a standard has no basis in economic theory or evidence—not even in the "strategic" economic theory that arguably challenges the dominant "Chicago School" understanding of predatory pricing.[53] Indeed, strategic predatory pricing still requires some form of recoupment and the refutation of any convincing business justification offered in response.[54] As Bruce Kobayashi and Tim Muris emphasize, the introduction of new possibility theorems, particularly uncorroborated by rigorous empirical reinforcement, does not necessarily alter the implementation of the error-cost analysis:

> While the Post-Chicago School literature on predatory pricing may suggest that rational predatory pricing is theoretically possible, such theories do not show that predatory pricing is a more compelling explanation than the alternative hypothesis of competition on the merits. Because of this literature's focus on theoretical possibility theorems, *little evidence exists regarding the empirical relevance of these theories. Absent specific evidence regarding the plausibility of these theories, the courts... properly ignore such theories*.[55]

The case of predatory pricing illustrates a crucial distinction between European and American competition law. The recoupment requirement embodied in U.S. antitrust law essentially differentiates aggressive pricing behavior that improves consumer welfare by leading to overall price decreases from predatory pricing that reduces welfare due to ultimately higher prices. In other words, it is entirely focused on consumer welfare.

The European approach, by contrast, reflects structuralist considerations that are far removed from a concern for consumer welfare. Its underlying fear is that aggressive pricing by dominant companies—even to the benefit of consumers—could, by their very success, engender more concentrated market structures. It is simply presumed that these less-atomistic markets are invariably detrimental to consumers. Both the *Tetra Pak* and *France Télécom* cases (and the recent *Qualcomm* judgment) offer clear illustrations of the European Court of Justice's reasoning on this point:

---

[50] *Id.* at ¶ 72 ("[P]rices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor.").

[51] Case C-333/94 P, *Tetra Pak v Comm'n*, EU:C:1996:436, ¶ 44. See also, Case C-202/07 P, *France Télécom v Comm'n*, EU:C:2009:214, ¶ 110.

[52] Memorandum, at 13-14.

[53] *Id.* at ¶ 107.

[54] Patrick Bolton, Joseph F. Brodley, & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L. J. 2239 (2000).

[55] Kobayashi & Muris, *supra* note 16 (emphasis added).

> [I]t would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated… The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors.[56]

In short, the European approach leaves much less room for analysis of a pricing scheme's concrete effects, making it much more prone to false positives than the *Brooke Group* standard in the United States. It ignores not only the benefits that consumers may derive from lower prices, but also the chilling effect that broad predatory-pricing standards may exert on firms that attempt to attract consumers with aggressive pricing schemes. There is no basis for enshrining such an approach in California law.

II. The Broken Mirror of Monopoly and Monopsony Power

The potential amendments described in the Memorandum suggest that antitrust law has traditionally obviated monopsony power.[57] They also appear to assume that there is no reason to treat monopsony power any differently than monopoly power.[58] Indeed, in many parts of the Memorandum, "monopoly" and "monopsony" are placed on equal footing. For instance, Option One includes the following provision:

> Section 16720.1 is added to read: It is unlawful for a person to monopolize or monopsonize, to attempt to monopolize or monopsonize, to maintain a monopoly or monopsony, or to combine or conspire with another person to monopolize or monopsonize, in any part of trade or commerce.[59]

There are, however, important differences between monopoly and monopsony power that militate against their equivalent treatment under antitrust law. Indeed, despite the growing interest among economists, lawyers, and policymakers in the concept of monopsony power—particularly in labor markets—significant empirical and conceptual challenges remain in the use of antitrust law to address labor monopsony.

On the empirical front, the evidence on the extent and impact of labor monopsony is mixed.[60] While some studies have found evidence of labor-market concentration and its effects on wages, these studies often rely on indirect measures that have limited applicability to antitrust cases.[61] More direct

---

[56] *Tetra Pak*, *supra* note 51, at ¶ 44. *See also* Case T-671/19 *Qualcomm, Inc. v European Commission* ECLI:EU:T:2024:626 ¶ 441 & 594.

[57] Memorandum, fn. 7.

[58] *See, e.g.*, Memorandum, at 2.

[59] *Id*. Option Two contains similar wording.

[60] Manne, Albrecht, & Auer, *supra* note 3, at 1129-1141.

[61] *Id.* at 1136-1141.

estimates of monopsony power are rare, and often rely on stylized economic models that may not capture the complexities of real-world labor markets.[62] Moreover, the economics literature has not reached a clear consensus on the appropriate framework to assess labor-market power in antitrust contexts.[63]

Conceptual challenges also abound. Unlike monopoly (seller power), which directly affects final consumer prices, monopsony power is exerted upstream (*e.g.*, an employer paying lower wages, or a buyer paying lower input prices). This means any assessment of competitive harm must grapple with effects at multiple levels of the supply chain. For instance, if a dominant buyer (like a large employer) uses its power to push wages down, while there is direct harm to workers, downstream consumers might benefit, at least in part, from lower costs (through lower product prices). Traditional antitrust doctrine and existing enforcement tools are not (yet) well-equipped to balance these cross-market effects. In a recent law-review article about monopsony issues and antitrust, ICLE scholars explain:

> All supply chains end with final consumers, and antitrust policy must grapple with how to balance effects at different levels of the distribution chain.[64]

As a result, when applying antitrust law to monopsony situations, policymakers must consider the "pass through" of upstream cost savings to downstream prices. This complexity is not present in-run-of-the-mill monopoly cases. There is also no established consensus on how to weigh a dollar of harm to workers against a dollar of benefit to consumers, or how much pass through might be sufficient to offset a monopsony harm. This is an area of ongoing economic debate, which is one reason courts have been cautious in pure labor-monopsony cases.[65]

Defining the relevant labor or input market also poses thorny issues. Defining a labor market involves drawing boundaries around job types, skills, industries, and geographic areas, which can be highly "blurry" and fact-dependent. Is an assembly-line worker at a grocery warehouse in the same market as an assembly-line worker at a car factory? Does a tech engineer in San Francisco compete in the same labor market as one in Los Angeles or Bangalore? These questions illustrate why labor markets do not always map neatly onto product markets, and why antitrust law's conventional tools may not translate cleanly.

---

[62] *See, e.g.* Suresh Naidu, Eric A. Posner, & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018). *See also* Douglas O. Staiger, Joanne Spetz, & Ciaran S. Phibbs, *Is There Monopsony in the Labor Market? Evidence from a Natural Experiment*, 28 J. LAB. ECON. 211 (2010); Arindrajit Dube, Laura Giuliano, & Jonathan Leonard, *Fairness and Frictions: The Impact of Unequal Raises on Quit Behavior*, 109 AM. ECON. REV. 620 (2019).

[63] Manne, Albrecht, & Auer, *supra* note 3, at 1124.

[64] *Id.* at 1119.

[65] *See, e.g.*, *Kartell v. Blue Shield of Mass. Inc.*, 749 F.2d 922 (1st Cir. 1984); *see also* Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 342–43 (2010) ("However, Judge Breyer treated Blue Cross essentially as an agent for the customers it insured, rather than as an intermediary firm that purchased inputs and sold outputs as a monopolistic reseller. The court apparently assumed (perhaps wrongfully) that Blue Cross would pass on its lower input costs to its customers in the form of lower insurance premiums.").

Recent enforcement efforts tend to gloss over the unsettled state of the economics literature on these points. For example, novel market definitions, such as the Federal Trade Commission's proposed "unionized grocery workers" labor market in a recent merger case, have raised eyebrows about whether such definitions align with economic reality.[66] The fact that agencies are experimenting in this area underscores that methodologies are still in flux.

Crucially, there remains no clear legal standard for how to treat harms to workers or suppliers *vis-à-vis* consumers under the antitrust laws. Under the prevailing consumer welfare standard, antitrust plaintiffs must typically show that the challenged conduct harms consumers or overall competition, not just that it harms a subset of suppliers or workers. In practice, this has meant that cases purely alleging harm to workers (like wage-fixing or no-poach agreements) often struggle unless they can connect that harm to reduced output or quality in a consumer market.

Indeed, recent criminal cases against naked no-poach agreements have faced difficulties in court, and even civil monopsony cases run into the requirement to demonstrate downstream harm. Some advocates argue that the law should be changed to explicitly recognize harm to workers as sufficient by itself. But doing so would be a major departure from the consumer welfare principle, essentially redefining the goal of antitrust. If California were to outlaw single-firm conduct that harms workers (*e.g.*, wage suppression) without regard to consumer impact, it would need to confront how to trade off these interests. Should a practice that moderately harms workers but greatly benefits consumers be unlawful, or vice versa? There is no consensus on this normative question. The Commission's Memorandum does not provide an answer, and neither does the academic literature on the topic.

Given these uncertainties, it would be premature to explicitly incorporate monopsony considerations into a new SFC. This is not to say antitrust should ignore labor issues entirely—rather, the state of economic knowledge militates against a rush to condemn conduct based on simplistic models or incomplete evidence. While concerns about labor monopsony are real and worth studying, "they are not supported by empirical and theoretical foundations sufficient to bear the weight of these galvanized efforts" at aggressive enforcement.[67]

The academic literature on the extent of labor-market power is mixed and sometimes contradictory, with estimates of wage-setting power varying widely by industry and methodology.[68] The effects of employer concentration on wages and employment are likewise debated. Some data suggest higher concentrations depress wages but that literature is difficult to interpret. As Steven Berry, Martin Gaynor, and Fiona Scott Morton write:

---

[66] Complaint ¶ 8-9, Kroger Co./Albertsons Cos., Inc., FTC Docket No. 9428 (Feb. 26, 2024), https://www.ftc.gov/legal-library/browse/cases-proceedings/krogercompanyalbertsons-companies-inc-matter.

[67] Manne, Albrecht, & Auer, *supra* note 3, at 1123.

[68] Manne, Albrecht, & Auer, *supra* note 3, at 1132 (discussing some of the implausible implications of estimates of labor-market power).

> A main difficulty in [the monopsony power literature] is that most of the existing studies of monopsony and wages follow the structure-conduct-performance paradigm; that is, they argue that greater concentration of employers can be applied to labor markets and then proceed to estimate regressions of wages on measures of concentration. For the same reasons we discussed above, studies like this may provide some interesting descriptions of concentration and wages *but are not ultimately informative about whether monopsony power has grown and is depressing wages.*[69]

In short, the evidence base is still being developed.

Furthermore, remedies for monopsony are not straightforward. In monopoly cases, a successful suit can result in lower prices for consumers or structural changes that foster competition. In monopsony (*e.g.*, labor) cases, a remedy might involve raising wages. But regulators must ensure that such remedies don't unintentionally harm downstream consumers or induce other distortions. There's also the question of whether antitrust is the optimal tool: labor issues can often be addressed by labor-specific regulation (minimum-wage laws, collective-bargaining rights, job-mobility policies like non-compete-clause bans), which may target the problem more directly than antitrust litigation could.

All of this suggests that California should not jump ahead of the evolving research and federal enforcement efforts by embedding unproven monopsony theories into its law. At this juncture, developing better measures of labor-market power, studying specific instances of monopsony harm, refining economic models, and clarifying enforcement priorities would be more productive policy avenues. The inclusion of monopsony or "dominant buyer" language in a single-firm conduct provision should not outpace the empirical and legal consensus. California can play a constructive role in this area by fostering further study and perhaps by testing cautiously in individual cases, rather than by enacting sweeping statutory mandates before the requisite analysis is in place.

III. Protecting 'Trading Partners' Instead of Consumers

Protecting "trading partners"—defined as "parties with which the defendant deals, either as a customer or supplier"—has attracted growing interest in antitrust law in recent years.[70] While this approach may reflect legitimate concerns about power imbalances, it risks undermining the coherence, neutrality, and effectiveness of antitrust enforcement centered on the consumer welfare standard.

The consumer welfare standard, long the cornerstone of U.S. antitrust policy, focuses on such economic outcomes as lower prices, higher output, improved quality, and innovation. It offers a relatively objective and administrable framework for courts and agencies.[71] In contrast, protecting trading partners introduces a pluralistic and often conflicting set of aims. Suppliers may benefit from

---

[69] Steven Berry, Martin Gaynor, & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSPS. 44, 57 (2019), http://dx.doi.org/10.13140/RG.2.2.24964.99201 (emphasis added).

[70] Memorandum, at 6. There are also suggestions that "suppliers" include "suppliers of labor," or workers. In that case, the comments included in the previous section (on monopsony power) apply here as well.

[71] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

higher input prices, while consumers suffer; protecting business customers may enhance their profits, but at the expense of costs to consumers. These tradeoffs make it difficult to formulate a consistent enforcement standard.

One major risk is the politicization of antitrust law. Antitrust law depends on a stable and principled basis for meaningful and effective enforcement. Broadening its purpose to protect trading partners opens the door to more discretionary and potentially more politicized decisionmaking. Imbuing antitrust with open-ended objectives would risk creating a sort of "meta-legislation" that, as a result, increases the returns to influencing enforcement policy and outcomes. In turn, this raises firms' incentives to expend their resources on "destructive" rather than "productive" entrepreneurship—*i.e.*, rent seeking.[72]

Another major risk that flows from the politicization of antitrust relates to protecting inefficient firms at the expense of consumer welfare. Pursuing the welfare of firms under the rubric of "trading partner welfare" may provide a lifeline to less-efficient firms, who may be encouraged to acquire through litigation what they could not through competition.[73] But antitrust law is not meant to insulate businesses from competition simply because they are small or disadvantaged—quite the contrary. Under a trading-partner theory, enforcement actions could target practices like aggressive pricing or exclusive dealing—not because they harm competition, but because they harm specific upstream or downstream partners. This would represent a dramatic and unjustified break from established antitrust principles.

Finally, incorporating trading-partner protection into antitrust enforcement risks conflating it with other legal domains better suited to address such concerns. Contract law and regulatory policy already provide avenues to address imbalances in supplier or customer relationships. Antitrust law is "comparatively disadvantaged" to adjudicate questions in these legal domains, especially when such cases involve difficult questions that may prejudice consumer welfare.

To be clear, existing antitrust frameworks that protect consumers are often perfectly adequate to address practices that may also harm trading partners. For instance, the rule-of-reason analysis under antitrust law frequently incorporates considerations on trading partners *when consumer harm is also present*. Expanding the scope of antitrust to protect trading partners *in isolation* would dilute its doctrinal rigor and increase the risk of regulatory and judicial overreach.[74]

Reorienting antitrust law around the protection of trading partners may appear appealing when combined with (misguided) perceptions about rising corporate concentration. Besides lacking a solid empirical basis, however, such a shift would destabilize the objective foundation of antitrust enforcement, politicize regulatory discretion, and entangle antitrust with redistributive aims, rather than

---

[72] William J. Baumol, *Entrepreneurship: Productive, Unproductive, and Destructive*, 11 J. BUS. & VENTUR. 3 (1996).

[73] Ann P. Bartel & Lacy G. Thomas, *Predation through Regulation: The Wage and Profit Effects of the Occupational Safety and Health Administration and the Environmental Protection Agency*, 30 J. L. & ECON. 239 (1987).

[74] Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT. J. IND. ORG. 714 (2018).

policing inefficient conduct that harms consumers. A more prudent approach would retain the consumer welfare standard while using complementary policies—such as tax reforms or contract law—to address broader concerns.

IV. Conclusion

ICLE appreciates the opportunity to provide input on the CLRC's single-firm conduct policy options. In this comment letter, we have articulated three core recommendations:

1. Maintain California's antitrust alignment with the fundamental U.S. framework—grounded in the consumer welfare standard, effects-based analysis, and error-cost caution—and resist calls to "Europeanize" monopolization law in a way that would diminish innovation and consumer benefits.
2. Be cautious in addressing monopsony or buyer-side dominance in any new statute, acknowledging current economic uncertainties and the need for a clear framework. It is better to proceed incrementally, guided by evidence from both economics and actual cases, than to impose broad prohibitions that could overshoot or conflict with the consumer welfare goal.
3. Refrain from expanding antitrust to protect "trading partners" (suppliers, workers, or other stakeholders) as an end in itself, as this would politicize enforcement, protect less-efficient competitors, and divert antitrust from its pro-consumer mission. Competition, not competitors or contracting parties, should remain the focus of the law.

California's antitrust laws can and should evolve to address modern economic realities. That evolution must, however, be informed by rigorous analysis and respect for the lessons learned over decades of antitrust enforcement. The consumer welfare standard and error-cost framework are not antiquated relics; they are safeguards that ensure antitrust intervention helps, rather than harms, the public. Departing from them, whether by embracing presumptions of guilt for large firms or by turning antitrust into a multipurpose tool for various interest groups, would risk repeating historical mistakes.

As we have previously observed, "once antitrust is expanded beyond its economic constraints and imbued with political content, it ceases to be a uniquely valuable tool for addressing real economic harms to consumers, and becomes a tool for routing around legislative and judicial constraints,"[75] undermining its legitimacy and effectiveness. We urge the Commission to avoid that path.

[75] Geoffrey Manne, *Why US Antitrust Law Should Not Emulate European Competition Policy*, 10 (Written Statement from A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU, Hearing of the U.S. Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, Dec. 19, 2018), *available at* https://www.judiciary.senate.gov/imo/media/doc/Manne%20Testimony.pdf.

May 22, 2025

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

Re: Antitrust Law - Study B-750 - Comment On Behalf of the Motion Picture Association, Inc.

Dear Chairperson Carrion, Commissioners and Executive Director Reilly,

The Motion Picture Association, Inc. (MPA) is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. Its members are: Amazon Studios LLC, Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment, Inc.; Universal City Studios, LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment, Inc. These companies and their affiliates are producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment sectors. These companies, plus some new entrants in the market such as Apple Studios, along with other key producers and distributors including companies like Lionsgate, You Tube TV and Legendary, comprise California's world-leading motion picture and television sector (a.k.a. Hollywood).

MPA appreciates the opportunity to comment on the California Law Revision Commission's (CLRC) study on California's antitrust laws, Study B-750 and on Memo 2025-21 on Single Firm Conduct dated March 24, 2025. The CLRC has been assigned an ambitious task, and we recommend that it only seeks changes that are supported by strong objective evidence delivered through a balanced process and that are narrowly tailored to avoid unintended consequences and ensure legislative passage. We believe this should be grounded in recognition of the purpose of the antitrust laws - namely to protect competition and ultimately consumers.

I. The Process

In MPA's letter to the CLRC dated October 3, 2024, it expressed concerns about the biased process the CLRC implemented. The CLRC ratified the decision of its former executive director to choose a former prosecutor as its only consultant and its private outside working groups were almost entirely comprised of anti-business participants. After I expressed concerns about bias to the former executive director, a CLRC memo was published on March 9, 2023, requiring the work to be *objective* and for the concentration report to be *empirical*.

Unfortunately, this standard has not been met. MPA's October 3 letter details some of the failures to produce *objective* and *empirically* sound work. MPA also produced an economic study to highlight some of the many mistakes in the concentration report.

Unfortunately, the CLRC continues to rely on work that did not meet its own standards. The procedural bias and the false narrative of the concentration report has infected the current single firm conduct proposals. For example, see the purpose statement language suggesting that the legislature find that we suffer from widespread concerns of "growing consolidation" and "the accumulation of power by a few dominant corporations." Memo at page 10. The CLRC has not done the economic work to support those claims. MPA's work shows its sector is competitive and the U.S. Chamber did a study showing that concentration is not rising but falling. See: https://www.uschamber.com/antitrust/u-s-chamber-study-industrial-concentration-in-the-u-s-economy-is-declining-not-increasing

II. Response to Staff Memo on Single Firm Options

MPA is deeply concerned about the staff recommendations for three reasons. First, current monopoly law appears to be working given the results over recent years like the Google case. Both the Biden and Trump Administrations have made monopoly enforcement a top priority and our AG and private parties also vigorously enforce that law. Second, all three staff proposals reject 135 years of federal single firm precedent. This takes the business world back to 1890 with no guidance about what behavior is legal. This will force California businesses to comply with at least two potentially inconsistent laws or move work out of the state to reduce risk. Third, the proposals mistakenly blend single firm and concerted conduct. These two areas have different rules to address different problems.

Instead of these approaches we suggest that the CLRC recommend adoption of the Sherman Act § 2 as state single firm law. If there are cases that should be inapplicable in California, we can achieve that through the legislation in the exact same way as we successfully rejected the Supreme Court's Illinois Brick decision on indirect purchasers in Cal. Bus. & Prof. Code § 16750(a). Why follow a controversial new pathway that is highly likely to fail when there is a proven pathway to success?

A. Current Federal Law Is Working

Despite criticism from some, the current federal monopoly law, Sherman Act § 2, appears to be working. Antitrust lawsuits alleging monopolization have been brought by federal and state enforcers against Google, Meta, Live Nation, Apple, Amazon, RealPage and others. Two of these lawsuits have already been tried, resulting in findings of liability against Google in multiple advertising and search markets. In a third case, against Meta, a trial is currently underway.

Motions to dismiss the Live Nation and Amazon cases have been denied. Many of these cases have been launched or decided under the precedent established by the DOJ's successful monopolization case against Microsoft. See *United States v. Microsoft*, 253 F.3d 34, 50 (D.C. Cir. 2001).

B. Each Staff Proposal Abandons 135 Years of Precedent

Each staff proposal would create enormous uncertainty by creating a whole new standard and by indiscriminately rejecting all the single firm law created since 1890. This includes key tools for evaluating risk and real harm like relevant market and market share. It also includes the 135 years of guidance on what conduct is anticompetitive.

While some recent monopolization cases have been criticized by some, there is general agreement that monopolization law is intended to prevent a single firm from acquiring or maintaining monopoly power in a relevant market by anticompetitive conduct. It is focused on firms that can raise prices, reduce output and thwart innovation without the risk of losing customers due to market characteristics like high barriers to entry.

The first step in evaluating a firm's market power is to define the relevant market. This entails identifying those products or services that competitively constrain each other. If the firm's product or service has no or few reasonably interchangeable substitutes and there are significant barriers to entering the market, the relevant market may be defined to be narrow, and the firm may be found to have high market share, indicating it may have market power over the product or service. In contrast, if there are many reasonably interchangeable substitutes, a broader market definition would be defined, and it would be less likely that the firm can profitably raise its price.

The concept of relevant markets has long been critical in antitrust law. It is not a recent creation of the current conservative Supreme Court. Instead, it has been used for about 76 years and can be traced to the Supreme Court's decision in *Columbia Steel Co. v. U.S.*, 334 U.S. 495 (1948) and has been the subject of unanimous decisions by the liberal Warren Court. See, e.g., *Walker Process Equip. v. Food Mach. & Chem.*, 382 U.S. 172, 177 (1965) ("Without a definition of that market, there is no way to measure [a defendant's] ability to lessen or destroy competition.") Abandoning this core antitrust concept as the staff suggests would be a serious mistake.

The next step is to measure the firm's share of the relevant market. While there is no precise threshold, the cases typically require at least a super majority share. In the famous case of *U.S. v. Alcoa*, 148 F.2d 416, 424 (2nd Cir. 1945), Judge Learned Hand opined that while controlling 90% "is enough to constitute a monopoly; it is doubtful whether 60% or 64% would be enough; and certainly 33% is not." The Supreme Court endorsed this standard one year later in *American Tobacco Co. v. U.S.*, 328 U.S. 781, 814 (1946). The liberal Warren Court later endorsed this practice of inferring power from high market share. See *U.S. v. Grinell Corp.*, 384 U.S. 563, 571 (1966) ("[t]he existence of such [monopoly] power ordinarily may be inferred from the predominant share of the market.") Like the concept of relevant market, while market share is used by the current conservative Court, it is a longstanding and effective tool that has been applied by liberal Courts for decades.

The use of market share not only helps courts assess market power, but it also helps guide firm behavior. Firms with market power have additional obligations that don't burden smaller firms.

If your firm has a high market share, you must pay special attention to these obligations. If your firm's share is small, you don't have this additional compliance obligation and risk.

Instead of being focused on firms with monopoly power, the current proposal applies to all firms, no matter how small. All firms, even small businesses with no real ability to harm competition, would need to comply with the staff's vague new rules. If adopted, any of the proposals would cause major confusion and uncertainty in the courts and with businesses trying to comply with the law. Both liberal and conservative Supreme Court justices have cautioned against such ambiguity. Justice Breyer once noted that "antitrust rules are court-administered rules. They must be clear enough for lawyers to explain to their clients." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Circuit 1990).[1] Similarly, Chief Justice Roberts has emphasized the need for clear antitrust rules. *Pacific Bell Telephone v. Linkline Comm.*, 555 U.S. 438, 452 (2009) ("We have repeatedly emphasized the importance of clear rules in antitrust.")

The adoption of proposals that diverge from federal monopolization law would reject the hard-won learning that emerged out of the D.C. Circuit's seminal *Microsoft* decision. Distilling "a century of case law on monopolization under § 2," the court of appeals expounded on key principles "for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it." *United States v. Microsoft*, 253 F.3d 34, 58-59 (D.C. Cir. 2001). Those sound principles have guided epochal enforcement actions against alleged monopolies, including the recent successful prosecution of Google for monopolizing general search services. In that case, the D.C. Circuit's explanation in *Microsoft* of "how to evaluate claims of monopolization" provided the necessary "analytical framework" for the *Google* decision. *See United States v. Google LLC*, 747 F. Supp. 3d 1, 106-07 (D.D.C. 2024). There is no good reason to abandon that framework for untested rules.

Finally, the staff approach also discards 135 years of learning on single firm topics including exclusive dealing, tying, loyalty discounts, bundled pricing, most favored customer terms, product design and abuses of the government and standard setting processes.

C. The Staff Proposals Erroneously Blend Single Firm and Multi-Firm Rules

Erasing the distinction between unilateral (single-firm) and concerted (multi-firm) conduct by embracing a "new 'restraint of trade' violation for single firm actors," as one proposal advocates, would not advance antitrust enforcement but rather render it incoherent. Antitrust policy around the world rests on drawing a basic distinction between concerted (multi-firm) action and independent action of individual firms. The reason why the law treats "concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decision making that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly." *Copperweld Corp. v. Independence Tube Corp.*, 467 US 752, 768-69 (1984). For this reason, injecting "restraint of trade" terminology that emerged from case law regarding conspiracy and other concerted activity that is "judged more sternly than unilateral activity under

[1] Justice Breyer was nominated to the Supreme Court from the First Circuit by President Clinton in 1994.

§ 2" into a statute directed at unilateral conduct is an invitation to confusion at best and an assault on consumer interests at worst. "It is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster." *Id.* at 767-68.

D. A Better Approach with a Proven Record of Success

MPA suggests that the CLRC recommend adoption of the Sherman Act § 2 as California's single firm state law. If there are cases that should be inapplicable in California, we can achieve that through the legislation in the exact same way as we successfully rejected the Supreme Court's Illinois Brick decision on indirect purchasers in Cal. Bus. & Prof. Code § 16750(a). Why follow a controversial new pathway that is highly likely to fail when there is a proven pathway to success?

After the Supreme Court ruled that indirect purchasers could not sue under the antitrust laws in Illinois Brick, the state simply adopted an "Illinois Brick Repealer" in 1978. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and Cal. Bus. and Prof. Code Section 16750(a). This change provided that Illinois Brick did not apply to state law claims. Following this approach, the CLRC could recommend legislation addressing the perceived issues with the three cases that it appears to focus on: *Brooke Group v. Brown and Williamson Tobacco*, 509 U.S. 209 (1993)(standard for predatory pricing); *Verizon Communications v. Law Offices of Curtis Trinko*, 540 U.S. 398 (2004)(duty to deal with competitors) and *Ohio v. American Express*, 138 S. Ct. 2274 (2018)(standard for multisided platforms).

This approach follows a successful path and doesn't throw the proverbial baby out with the bathwater.

II. Potential Preemption by the Copyright Act

The use of exclusive licenses and contracts is now covered in a clear manner by federal law. There is one set of rules for multi-firm conduct and one for single firm conduct. The single firm conduct rule like in the government's victory in the Microsoft case would be wiped away by the CLRC's categorical rejection of all federal single firm law, resulting in great uncertainty. The risk to the CLRC here is amplified by the threat of preemption from other federal laws.

State antitrust laws are generally not preempted by federal antitrust law. See *California v. ARC America Corp.*, 490 U.S. 93 (1989). However, unlike federal antitrust laws, the Copyright Act contains a section that expressly preempts contrary state laws. 17 U.S.C. § 301. Accordingly, state antitrust and unfair competition laws may, as applied to copyright works, be preempted by the Copyright Act. See *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 385 (3rd. Cir. 1999) (en banc) (invalidating Pennsylvania's unfair competition law limiting exclusive theatrical licenses to 42 days and holding that a state may not regulate copyright owners' "exclusive rights" to "distribute and perform" copyrighted motion pictures).

The attached letter from the Copyright Alliance, which represents over 2 million individual creators and over 15,000 organizations that comprise the creative community from authors to songwriters to booksellers, video game companies, record labels and studios, explains this constitutional restriction on your work in greater detail. MPA urges that you closely consider it. It would be permanently harmful to the reputation of the CLRC to draft an unconstitutional law.

VII. Conclusion

Thank you for considering our concerns and comments. We hope this letter, the concentration study by the U.S. Chamber and the letter by the Copyright Alliance on preemption are helpful in your work on the antitrust study. MPA remains willing to engage constructively in your process to ensure you receive balanced input to ensure that changes to California antitrust law are based on empirical evidence, objective, fair and passable.

Sincerely,

Dan Robbins

Dan Robbins
SENIOR VICE PRESIDENT, ASSOCIATE GENERAL COUNSEL

O (818) 935-5815
E dan_robbins@motionpictures.org

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,

Keith Kupferschmid
CEO
Copyright Alliance
1331 F St., NW Suite 950
Washington, D.C. 20004

To: Sharon Reilly
Executive Director, California Law Revision Commission

From: Single-Firm Conduct Expert Working Group
Carl Shapiro (Chair), Aaron Edlin, Doug Melamed, Sam Miller, and Fiona Scott Morton

Re: Feedback on "Draft Language for Single Firm Conduct Provision"
Staff Memorandum 2025-21, Study B-750, March 24, 2025

Date: 5 June 2025

We are writing in response to your email of May 29, 2025, in which you invited us to provide feedback on the March 24, 2025, staff memo "Draft Language for Single Firm Conduct Provision."

The staff memo presents three options. We address these in turn.

Option One, "Basic SFC Provision," uses language similar to Sherman Act §2. Our January 25, 2024, report (p. 13) made this statement regarding Option One:

> "However, while adding such language would be an important starting point, without further elucidation, using language that mimics the Sherman Act would come with a potentially severe disadvantage: California state courts might then believe that they should apply 130 years of federal jurisprudence to cases brought under California state law. In recent decades, that jurisprudence has substantially narrowed the scope of the Sherman Act, as described above, so relying on it could well rob California law of the power it needs to protect competition. This drawback is accentuated if California seeks to enact stronger antitrust laws to protect its citizens than has the United States."

Using language dating back to 1890 may be easy and feel safe, but it will not be effective.

Moreover, if language were added stating that California state courts should not be bound by Sherman Act case law, Option One would be patently ambiguous and would give California state courts virtually no guidance as to how the new law should be construed.

Option Two, "Enhanced SFC Provision," expands on Option One by combining it with a prohibition on "restraints of trade." We agree with staff that this expansion "defuses the Sherman Act §2's singular focus on monopolistic behavior, with its high market thresholds and its decades of narrow interpretations and applications." However, the term "restraint of trade" is extremely broad and vague, as famously pointed out by Justice Brandeis:

> "Every agreement concerning trade, every regulation of trade restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[1]

Option Two gives the courts no useful guidance on how to distinguish restraints that promote competition from those than suppress or even destroy competition. This is a major missed opportunity. We also are concerned that the vagueness of Option Two would create harmful legal uncertainty.

---

[1] *Chicago Board of Trade v. United States*, 246 U.S. 231 at 244. This case involved Sherman Act §1.

Option Three is to adopt an "Exclusionary Conduct" provision. Our January 25, 2024, report recommended this approach and provided example statutory language. This approach has the benefit of being far less ambiguous than Options One and Two while incorporating into California Law sound, widely accepted economic and legal principles.

Under Option Three, single-firm conduct is deemed to be anticompetitive exclusionary conduct if it meets two conditions. First, it must diminish the competitive constraints imposed by the defendant's rivals. Second, it must harm trading partners, which typically but not always are the defendant's customers. Put simply, anticompetitive exclusionary conduct **weakens rivals and harms customers**.

The staff memo states: "While this new framework is attractive as a fresh alternative, the staff suggests this proposal would benefit from additional clarifications as to its operation and interpretation." We now address the specific points about Option Three made in the staff memo.

- Regarding harm to trading partners, the staff memo states that "it is unclear whose benefits are being measured and to which trading partners the harm must be negated in balancing the increased market power." This question is easy to answer: in the typical case where the plaintiff alleges that the defendant's customers are harmed, the defendant can prevail by showing that **the benefits to these same customers are large enough** that they are not in fact harmed.
- Regarding the term "trading partners," the staff memo states that "existing California antitrust law protects all participants in the trading chain whether directly or indirectly. The staff suggests clarifying the term 'trading partner' to avoid confusion." We welcome such a clarification. Logically, **basing liability on showing harm to direct customers does not rule out cases brought by indirect customers**. Indeed, when direct customers are harmed, it is reasonable to presume that indirect customers will be harmed as well.
- Regarding the burden of proof, the staff memo states: "The second prong of Option 3 requires a finding that any benefits do not *prevent* the defendant's trading partners from being harmed, leaving unclear who has the burden on this prong and whether it is intended to alter the rule of reason standard of weighing the benefits and harms." We find this remark baffling, since the staff memo then cites the following passage from our report (p. 18): "The burden is on the defendant to prove that any procompetitive justification for the challenged conduct is non-pretextual and does not weaken competitive discipline more than reasonably necessary to accomplish the procompetitive goal." Put simply, **the defendant bears the burden of establishing any benefits of its challenged conduct**. In other words, if the plaintiff establishes the first prong, the burden then shifts to the defendant for the second prong.
- Regarding how one distinguishes pro-competitive conduct from anticompetitive exclusionary conduct, the staff report notes that our report offered a number of supplemental provisions intended to guide the courts. We agree with staff that these supplemental provisions could be reexamined as part of preparing overall recommended language for the legislature. We would like to stress that **Option Three provides far more guidance to the courts about what conduct is prohibited than do Options One and Two**.

If the Commission is seriously interested in proposing something along the lines of Option Three to the legislature, we would be happy to provide "additional clarifications as to its operation and interpretation," including adjustments to the example statutory language from our report.