MEMORANDUM 2025-42

Public Comment Analysis and Draft Language Options for Mergers and Acquisitions

This Memorandum[1] presents analysis of public comments received on Memorandum 2025-31 regarding draft legislation to address mergers and acquisitions in California, as requested by the Commission at its June 26, 2025 meeting.[2] The staff also present additional merger options as a result of those comments.

Memorandum 2025-31 presented four options for merger provisions to be added to the Cartwright Act, with the advantages and disadvantages of adopting each.

The staff requests Commission feedback on the four draft options, including whether the Commission would like the staff to make revisions or conduct further analysis.

This Memorandum was compiled with the assistance of the Commission's Antitrust Study consultant, Cheryl Johnson. The staff would also like to recognize the Mergers and Acquisitions Working Group members[3] for their important and foundational work.

[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. 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 2025-34, p. 6.

[3] Profs. John Kwoka, Richard J. Gilbert, Prasad Krishnamurthy, D. Daniel Sokol, and Guofu Tan.

PUBLIC COMMENTS RECEIVED IN RESPONSE TO THE MERGER PROVISIONS

List and Organizational Descriptions of Public Comments Received

The public comments received by the Commission after its June 26, 2025, meeting are listed below and appended to this memorandum.

Exhibits	***Exhibit pages***
Coalition of Business Associations and Chambers of Commerce (7/29/25)	**1**
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American Economic Liberties Project, California Nurses Association, Consumer Federation of California, Democracy Policy Network, Economic Security California Action, End Poverty in California, Institute for Local Self Reliance, Rise Economy, Small Business Majority, TechEquity Collaborative, United Domestic Workers (UDW/AFSCME Local 3930), United Food and Commercial Workers Western States Council (UFCW) (8/27/25; email 9/3/25)	**168**
CAMEO Network (9/8/25)	**177**

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

Coalition of Business Associations and Chambers of Commerce

This comment was submitted on behalf of the following coalition of business associations and chambers of commerce: Los Angeles County Business Federation, Silicon Valley Leadership Group, La Cañada Flintridge Chamber of Commerce, Torrance Area

Chamber of Commerce, Employers Group, Los Angeles County Taxpayers Association, Multicultural Business Alliance, California African American Chamber of Commerce, San Jose Chamber of Commerce, San Mateo County Economic Development Association, Chamber San Mateo County, Central Valley Business Federation, Valley Industry & Commerce Association, Los Angeles Area Chamber of Commerce, San Diego Regional Chamber of Commerce, and Bay Area Council.

California Life Sciences

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.

Mergers and Acquisitions Working Group (Prof. John Kwoka)

The Mergers and Acquisitions Working Group was comprised of five members who submitted two separate responses, one of which is from Professor John Kwoka.

John Kwoka is the Neal F. Finnegan Distinguished Professor of Economics at Northeastern University and previously served as Chief Economist to the former chair of the Federal Trade Commission (FTC), Lina M. Khan. He also served at the Antitrust Division of the U.S. Department of Justice, the Federal Communications Commission, and worked on the 2023 Merger Guidelines jointly issued by the U.S. Department of Justice and the Federal Trade Commission.[4]

Motion Pictures Association

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.;

[4] See also EX 14.

> 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).

Profs. Robert H. Lande and John M. Newman, Commissioner Rebecca Kelly Slaughter

Professors Robert H. Lande and John M. Newman and FTC Commissioner Rebecca Kelly Slaughter are coauthors of "The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act Section 7,"[5] which was referenced in Memorandum 2025-31.[6]

Robert H. Lande is a Venable Professor of Law Emeritus at the University of Baltimore School of Law and Director of the American Antitrust Institute, a nonprofit research and advocacy organization.

John M. Newman is the Herbert Herff Chair of Excellence at the University of Memphis School of Law and previously served as the Deputy Director of the Bureau of Competition at the FTC.

Rebecca Kelly Slaughter is a former[7] Commissioner and Acting Chair for the Federal Trade Commission, having previously served as the Chief Counsel to the Office of Senator Charles Schumer.

Mergers and Acquisitions Working Group (Profs. Richard Gilbert, Prasad Krishnamurthy, D. Daniel Sokol, Guofu Tan)

The Mergers and Acquisitions Working Group was comprised of five members who submitted two separate responses, the second of which is from Professors Richard Gilbert, Prasad Krishnamurthy, D. Daniel Sokol, and Guofu Tan.

Richard Gilbert is a Distinguished Professor Emeritus of Economics at University of California Berkeley Economics and was previously a Deputy Assistant Attorney General for Economics with the U.S. Department of Justice.

Prasad Krishnamurthy is a Professor of Law at University of California Berkeley Law, where his research includes financial regulation, antitrust and competition policy, and

[5] Robert H. Lande, John M. Newman and Rebecca Kelly Slaughter, *The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act Section 7*, 103 TEX. L. REV. 711 (2025).

[6] Memorandum 2025-31, p. 3, fn.16.

[7] Rebecca Kelly Slaughter's Commissioner status is currently subject to litigation. President Trump terminated Slaughter in March 2025 and she was returned to her position by lower courts. However, on September 8, 2025, the Supreme Court temporarily blocked her reinstatement while her case continues. *Trump v. Slaughter* (Sept. 8, 2025) - S.Ct._, 2025 WL 2582814.

economic development.

D. Daniel Sokol is the Carolyn Craig Franklin Chair in Law and a Professor of Law and Business at the University of Southern California Gould School of Law and Marshall School of Business. He holds a courtesy appointment in the Department of Economics.

Goufu Tan is a Professor of Economics at the University of Southern California, and his research and practice areas include industrial organization, antitrust and competition policy, auction theory, and microeconomic theory.

California Chamber of Commerce

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."

International Brotherhood of Teamsters, Teamsters California, United Food and Commercial Workers Western States Council, California Federation of Labor Unions

This comment was submitted by Amanda Lewis of Cuneo Gilbert & LaDuca, LLP on behalf of the International Brotherhood of Teamsters, Teamsters California, United Food and Commercial Workers Western States Council, and California Federation of Labor Unions (IBT Coalition).

According to their websites:

> The Teamsters are America's largest, most diverse union. In 1903, the Teamsters started as a merger of the two leading team driver associations. These drivers were the backbone of America's robust economic growth, but they needed to organize to wrest their fair share from greedy corporations. Today, the union's task is exactly the same.
>
> The United Food and Commercial Workers Western States Council is the regional coordinating body of 11 UFCW local unions representing over 200,000 workers in California, Arizona, Nevada, and Utah. The Council is a part of the 1.2 million member strong UFCW International Union. UFCW members are standing together to improve the lives of workers, families, and communities.
>
> The California Federation of Labor Unions is dedicated to promoting and defending the interests of working people and their families for the betterment of California's communities. From legislative campaigns to grassroots organizing, our affiliates are actively engaged in every aspect of California's economy and government.

American Economic Liberties Project, *California Nurses Association*, *Consumer Federation of California*, *Democracy Policy Network*, *Economic Security California Action*, *End Poverty in California*, *Institute for Local Self Reliance*, *Rise Economy*, *Small Business Majority*, *TechEquity Collaborative*, *United Domestic Workers (UDW/AFSCME Local 3930)*, *United Food and Commercial Workers Western States Council (UFCW)*

This comment was submitted by Scott Kronland, of Altshuler Berzon, LLP on behalf Economic Security California Action, and cosigned by the entities above. According to its website:

> Economic Security Project Action advocates for ideas that build economic power for all Americans. Our team disburses grants, runs issue campaigns, develops creative interventions and research products, and convenes the field to advance our issues and turn bold ideas into reality.

CAMEO Network

This comment was submitted by Heidi Pickman on behalf of CAMEO Network. According to its website:

> CAMEO Network is made up of over 400 organizations, agencies, and individuals dedicated to furthering business development across the nation with small and micro-business financing such as loans and credit, technical assistance and business management training. We build capacity and expand resources for our members. We also educate the public on the economic impacts of micro-business through public awareness and advocacy at the local, state and federal level to support the growth of micro-business, start-ups, and entrepreneurs.

Opposition to Changing California's Antitrust Laws Generally

The Coalition of Business Associations and Chambers of Commerce (Coalition), California Life Sciences (CLS), Motion Picture Association (MPA), and California Chamber of Commerce (CalChamber) oppose the merger options presented.

Broadly, these entities assert that current law provides sufficient opportunities for the state to enforce existing federal antitrust laws, and any deviation from the current antitrust legal environment would create uncertainty, deterring investment and stunting job creation.

CLS notes that its industry relies on a predictable regulatory environment to facilitate the mergers and acquisitions that are part of its normal business processes:

> California's life sciences ecosystem depends on dynamic partnerships and requires substantial financial risk. Mergers and acquisitions (M&A) are essential mechanisms that enable new discoveries to reach patients. M&A allows smaller

> firms to access the capital, infrastructure, and regulatory expertise needed to bring innovative treatments to market more quickly, affordably, and at scale. Without access to capital markets, the entire ecosystem would be at risk, in particular small start-ups. More than 90% of California's life sciences companies have fewer than 10 employees. Most operate without turning a profit, engaging in high-risk, research-intensive work that can take over a decade and billions of dollars to bring a single treatment to market with success rates below 10%. Despite these odds, since 2000, life science companies have reinvested more than $1 trillion in research and development nationwide demonstrating an unwavering commitment to delivering breakthroughs for patients.[8]

The Coalition objects to the framing of substantial market share as an inherently negative concept, preferring instead it be viewed as indicating consumer support:

> The Commission's proposal mistakenly equates market share with anticompetitive harm. In a competitive market, a market share often simply reflects consumer preference—a clear sign that a company has offered a superior product or service that customers value. Presumptively labeling this success as suspicious punishes popularity gained through meeting consumer needs and fundamentally misunderstands the essence of competition. This approach abandons the established, evidence-based principles of antitrust law, which rightly focus on harm to consumers.[9]

MPA believes discussing substantial state antitrust law changes is premature until the impacts of five recent "major changes affecting M&A deals in California" are sufficiently analyzed.[10] These changes are 1) the 2023 Federal Merger Guidelines[11] 2-3) new reporting standards for grocery,[12] retail pharmacy,[13] and health care mergers and acquisitions[14] 4) revised Hart-Scott-Rodino Antitrust Improvement Act of 1976 (HSR) reporting requirements,[15] and 5) the possibility of SB 25's enactment.[16] The staff notes that none of these changes address California's lack of a broad merger law that would allow mergers to be addressed in state court.

CalChamber sees no advantages to the merger proposals:

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8 EX 4.
9 EX 1- 2.
10 EX 33.
11 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission.
12 2023 Cal. Stat. ch. 457 (AB 853, Maienschein).
13 2023 Cal. Stat. ch. 457 (AB 853, Maienschein).
14 22 Cal. Code Regs. §§ 97431 – 97442.
15 HSR requires companies to file premerger notifications with the FTC and the Antitrust Division of the U.S. Justice Department for certain acquisitions. A new form was introduced on February 10, 2025, which made a number of changes in the information required from various parties, including those with overlapping business interests, and added a new category of acquisitions. For more detail, see the FTC's 2025 HSR Form Updates: What Filers Need to Know.
16 SB 25 (Umberg). This bill would allow swifter state access to federal HSR filings. As of September 10, 2025, the bill was on the Assembly's Inactive File.

> In any event, the proposals set forth in the Merger Memo are unlikely to make merger reviews in California more accurate or less expensive than those in the federal system. To the contrary, the proposals come with a huge price tag and, for the most part, rely on lax presumptions that do not call for a robust examination of the likely anticompetitive and procompetitive aspects of contemplated mergers.[17]

Further comments from these groups directed towards individual proposals are detailed under the respective Options below.

Comments on Option One: Clayton Act

The staff is first summarizing public comments on the merger language option that largely mirrors the Clayton Act.[18]

> **Section X is added to read:**
>
> (a) No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, or acquire the whole or any part of the assets of another person where the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state.
>
> (b) This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation from forming subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Arguments in favor:

In addition to encouraging individuals on the Commission's Antitrust Study listserv to provide comment, the staff reached out to the expert working groups. The five members of the Mergers and Acquisitions Working Group split in their endorsement, with four joining a letter endorsing Option One.[19]

> We make this recommendation not because we believe that merger enforcement is currently ideal. We acknowledge that federal enforcement has allowed some mergers and acquisitions to occur that have harmed consumers. However, we believe that the standard of substantial harm to competition in the Clayton Act is sufficiently flexible to allow for stricter enforcement without new legislation. There

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[17] EX 142-143.

[18] 15 U.S.C. § 18.

[19] Profs. Richard Gilbert, Prasad Krishnamurthy, D. Daniel Sokol, and Guofu Tan. See page 4 for biographical information.

> have been decades of both lax and aggressive federal enforcement of mergers and acquisitions, with no change in the statutory language of the Clayton Act.[20]
>
> Moreover, we believe that consistency with federal merger law is of primary importance. Neither consumers nor businesses benefit from a fragmented collection of statutes regarding acceptable mergers and acquisitions. For this reason, we believe that it is essential that a California statute regarding mergers and acquisitions includes a provision to adopt amendments that might occur to the Clayton Act or other operable federal antitrust law.[21]

The Mergers and Acquisitions Working Group majority also suggests that if the Commission recommends adopting a California merger provision that closely mirrors federal law, the Commission should also add an amendment tying state law to future federal antitrust amendments to ensure state and federal language remain parallel.[22] The staff believe that tying California merger law to unknown and unknowable future federal legislation would undermine the independence of a state law and the value of state judicial interpretations. Additionally, this is likely not possible under California law, as committing the Legislature to ratifying unknown statutes would probably be viewed as an unlawful delegation of authority[23] and possibly violate the "general rule that one legislative body cannot limit or restrict its own power or that of subsequent legislators, and that the act of one Legislature does not bind its successors."[24] The Commission could alternatively suggest to the Legislature that it direct the Commission to analyze future federal amendments and make recommendations for adoption.

Arguments against:

While CLS and CalChamber acknowledge that adopting Clayton Act-like language would be widely understood by the legal community, they are concerned about the potential confusion and uncertainty arising from state judicial interpretations that depart from federal interpretations. CLS believes the industry will react with a "decrease [in] procompetitive M&A activity that is essential to early-stage biotech firms and innovation-driven partnerships"[25] while state courts sort out the extent, if any, to depart from federal

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[20] Indeed, as Justice Kagan has articulated regarding the Supreme Court's antitrust jurisprudence, "We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and … to reverse antitrust precedents that misperceived a practice's competitive consequences." *Kimble v. Marvel Ent., LLC* (2015) 576 U.S. 446, 461.

[21] EX 141.

[22] The staff is not aware of another state with a similar requirement.

[23] This means the California Legislature would be abrogating its duty to deliberate on and pass subsequent bills, instead automatically deferring to Congress.

[24] *Ex parte Collie* (1952) 38 Cal.2d 396, 398. Similar to the prior concept, this means the Legislature would be binding the will of future Legislatures by preventing them from opining on subsequently adopted legislation.

[25] EX 5.

decisions.

Professor John Kwoka, also part of the Mergers and Acquisitions Working Group, departed from his colleagues in their support for a California state law that largely reflects existing federal law:

> It is useful to recall that the key section of the Clayton Act, which was passed in 1914, is the prohibition of mergers whose effects "may be substantially to lessen competition, or to tend to create a monopoly." Indeed, one option set out in the Staff Memorandum (Option 1) is simply for the state to adopt the Clayton Act as written for the state of California. I believe, however, that it would be an error at this crucial point in time not to take into account what we know about the effectiveness of that statute, which of course has a long history of use by the FTC and DOJ, a long history of judicial interpretation, and a long history of its effects in the economy. We know much about these issues, and in my view they speak clearly and unambiguously for the need to adapt the language of the Clayton Act in modest but important ways, to ensure that certain weaknesses of the Clayton Act are not replicated for the state of California.[26]

Professor Kwoka's letter then reiterates the concerns noted in the Working Group report[27] and staff Memorandum[28] that courts have over time increased the burdens of proof for proving a merger "may be substantially to lessen competition" despite no statutory changes and recommends additional revisions discussed later in this memorandum.

American Economic Liberties Project, California Nurses Association, Consumer Federation of California, Democracy Policy Network, Economic Security California Action, Ending Poverty in California, Institute for Local Self Reliance, Rise Economy, Small Business Majority, Service Employees International Union of California (SEIU), TechEquity Collaborative, United Domestic Workers (UDW/AFSCME Local 3930), United Food and Commercial Workers Western States Council (UFCW), and Writers Guild of America West (ESCA and Partners) recommend rejecting Option One because they believe it would "perpetuate the very defects that necessitate reform" and "import decades of weak federal jurisprudence that has raised the burden of proof and undermined merger enforcement."[29] IBT Coalition[30] and CAMEO Network[31] also do not support Option One.

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[26] EX 9.
[27] Memorandum 2024-25, pp. 2, 18.
[28] Memoranda 2025-31, p. 3.
[29] EX 172.
[30] EX 156.
[31] EX 177.

Would the Commission like the staff to make revisions or conduct further analysis on this option?

Comments on Option Two: Philadelphia National Bank

The staff next presents comments on the draft Option Two, which takes Option One's base language and adds the presumption established in *United States v. Philadelphia National Bank*[32] that highly concentrated markets are presumptively uncompetitive. This option also incorporates the 2023 Merger Guidelines of the U.S. Department of Justice and the Federal Trade Commission (Merger Guidelines)[33] to guide courts' analyses.

> **Section X is added to read:**
>
> (a) No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, or acquire the whole or any part of the assets of another person where the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state.
>
> (b) A merger that may produce 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 shall be deemed to substantially lessen competition in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[34] This section is intended to codify the holding in *United States v. Philadelphia National Bank* (1963) 374 U.S. 321.
>
> (c) In interpreting this section, the 2023 Merger Guidelines of the U.S. Department of Justice and the Federal Trade Commission shall be considered persuasive authority and understood to complement and be harmonized with this section.
>
> (d) This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation from forming subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

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[32] (1963) 374 U.S. 321.

[33] The Merger Guidelines provide direction to the market about the federal agencies' enforcement priorities. 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission.

[34] This language is drawn from *U.S. v. Philadelphia National Bank* (1963) 374 U.S. 321, 362-363:

> Specifically, we think 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 evidence clearly showing that the merger is not likely to have such anticompetitive effects.

Arguments in favor:

Several public comments support Option Two with additional amendments. Professor Kwoka, a member of the Mergers and Acquisitions Working Group, endorses codifying the *Philadelphia National Bank* presumption:

> [The *Philadelphia National Bank*] standard obviously was intended to create a very strong presumption against large mergers in concentrated markets. Such a standard would be consistent with economic evidence about the effects of such mergers, rendering the usual analysis of effects in those cases unnecessary. Indeed, given the pitfalls of specific-case analysis, there is likely a greater risk of incorrect determination from analysis than any error from application of the presumption.[35] For these good reasons, in such cases, the court said, this presumption can be invoked.
>
> …
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> I would recommend that the California merger control statute reject [the] remarkable ad hoc reversal of the U.S Supreme Court and restore the [The *Philadelphia National Bank*] structural presumption for purposes of state enforcement. As noted, this would be consistent with economic evidence that large mergers in concentrated industries are anticompetitive, and also would aid enforcement by avoiding the need to prove what is already known.[36]

However, Professor Kwoka did not use the case name in his suggested draft, and also advocates for changing the standard of review in a manner similar to Option Four. His proposal reads as follows:

> A merger that may produce a firm controlling an undue percentage share of the relevant market and result in a significant increase in the concentration of firms in that market shall be deemed to lessen competition to a not insignificant degree.[37]

The IBT Coalition[38] and ESCA and Partners[39] also both support codifying the structural presumption in *Philadelphia National Bank.* However, because both groups also support a different variation of Option Four,[40] the standard presented in Option Two would have to be commensurately changed because *Philadelphia National Bank* held that "an undue percentage share of the relevant market [that] results in a significant increase in the concentration of firms in that market" violates the "substantially lessen competition" prong of the Clayton Act. IBT Coalition and ESCA and Partners would replace "substantially

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[35] These probabilities are discussed in a forthcoming Antitrust Law Journal article, J. Kwoka and T. Valletti, "Confronting Consummated Mergers."

[36] EX 12.

[37] EX 13.

[38] EX 159.

[39] EX 172.

[40] Option Four suggests the standard "create an appreciable risk of lessening competition more than a de minimis amount." See page 12 of this memorandum.

lessen competition" with "create an appreciable risk of lessening competition."

Below is one option for this proposed revision:

> (b) A merger that may produce 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 shall be deemed to ~~substantially lessen competition~~ create an appreciable risk of lessening competition in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. This section is ~~intended to codify~~ derived from the holding in *United States v. Philadelphia National Bank* (1963) 374 U.S. 321.

Rephrasing *Philadelphia National Bank* in this way would deem the roughly 30% market share that was found to violate the "substantially lessen" standard in the Clayton Act would now violate the "appreciable risk of lessening" standard. ESCA and Partners argue "This approach would restore the incipiency principle that Congress intended and restore the recognition that highly concentrated markets are inherently uncompetitive."[41]

CAMEO Network supports Option Two with a variation of Option Four's standard, "appreciable risk of materially lessening competition," which was used in Sen. Klobuchar's Competition and Antitrust Law Enforcement Reform for the Twenty First Century Act.[42]

CAMEO Network,[43] the IBT Coalition,[44] and ESCA and Partners[45] also support citing the Merger Guidelines as persuasive authority. The IBT Coalition writes:

> The [Merger] Guidelines reflect best practices and are firmly rooted in the law. Where some prior iterations downplayed concerns related to market structure, the 2023 Merger Guidelines give appropriate weight to these concerns, drawing on extensive legal precedent and the agencies' practical experience, including the FTC's history of market studies. Critically, the [Merger] Guidelines recognize that "[l]abor markets frequently have characteristics that can exacerbate the competitive effects of a merger between competing employers," such as "high switching costs and search frictions associated with finding, applying, interviewing for, and acclimating to a new job."[46] Finally, the [Merger] Guidelines provide important guidance on how to assess rebuttal evidence, including the prospect of entry by other firms and procompetitive efficiencies.[47]

Professor Kwoka did not explicitly support endorsing the Merger Guidelines as persuasive authority.[48]

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41 EX 172.
42 Sen. No. 225, 117th Cong. 1st Sess. (2021).
43 EX 180.
44 EX 163-164.
45 EX 172.
46 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, § 2.10, Guideline 10.
47 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, § 3.
48 EX 13.

Professor Robert H. Lande, Professor John M. Newman, and FTC Commissioner Rebecca Kelly Slaughter[49] (Antitrust Authors) do not advocate for a specific option but instead recommend an amendment to distinguish the second prong of the Clayton Act, "tend to create a monopoly,"[50] which could work with any of the merger options. Because the staff intended Option One to be read as the closest analogue to federal law, this amendment proposal should be read as possibilities for amendments to options Two, Three, and Four.

The Antitrust Authors argue that the federal judiciary's decades-long disregard of the "tend to create a monopoly" prong is central to the current state of market consolidation, and Congress originally intended both prongs to be mutually reinforcing to protect against abuses.

> Antitrust economics has long recognized that the more power a firm wields, the more harm it can cause to consumers, workers and other input suppliers, and society at large.[51] Mergers and acquisitions, which consolidate multiple separate firms into one, can facilitate such harms. A relatively small firm can use a substantial acquisition to gain market power, and a relatively large firm can use even small acquisitions to increase or entrench its power. The U.S. Congress sought to address both of these problems via a sliding scale. Clayton Act Section 7's first prong focuses on the first, and its second prong focuses on the second.
>
> This sliding-scale approach was meant to ensure that the statute applies to both types of harmful mergers while avoiding overreach. We believe that failure to enforce the statute's second prong has upset the balance originally envisioned by Congress. To put it bluntly, federal enforcers have allowed too many harmful mergers to occur, and too many harmful monopolies to form.[52]

The Antitrust Authors further note that the language remains good law, if infrequently used, and has been successfully deployed to California's defense.

> Our research identified cases that historically put this prong to good use.[53] One example especially salient to the Commission's ongoing work is *California v.*

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[49] See fn. 7 supra for clarification of Rebecca Kelly Slaughter's Commissioner status.

[50] The Antitrust Authors note, "Our research led us to the reluctant conclusion, shared by this Commission, that federal antitrust law has, in practice, failed to respect Congress's intent regarding the tend-to-create-a-monopoly clause." EX 94. See also the Mergers and Acquisitions Working Group Report which notes, "The Clayton Act does not impose a rigid standard for merger enforcement, notwithstanding the language 'to substantially lessen competition' in the Act." Memorandum 2024-25, p. 20. The report discusses and acknowledges the phrase "tend to create a monopoly" only once, as opposed to the first prong's seven mentions.

[51] Robert H. Lande, John M. Newman and Rebecca Kelly Slaughter, *The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act Section 7*, 103 TEX. L. REV. 711, 787-788 (2025).

[52] EX 95.

[53] Robert H. Lande, John M. Newman and Rebecca Kelly Slaughter, *The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act Section 7*, 103 TEX. L. REV. 711, 808-813 (2025).

Mirant Corp.,[54] a lawsuit filed by the State of California to unwind several electricity-generation acquisitions. According to California's complaint, after the acquisitions, the defendants had doubled—and in some cases tripled—electricity prices to Californian consumers. The defendants offered a clever argument in response: because Pacific Gas & Electric had historically controlled all electricity generation in California, the acquisitions could not have lessened "competition." But the court was able to cut through the defendants' dust by relying on the statutory tend-to-create-a-monopoly clause.[55] Regardless of whether these harmful acquisitions had lessened "competition," they had clearly moved the defendants toward holding monopoly power in their respective geographic markets.[56] As a result, California's complaint survived the defendants' motion to dismiss.[57]

The Antitrust Authors suggest "By simply splitting the two distinct prohibitions into two separate sentences, the California legislature could make clear that it is adopting the balanced, effective, sliding-scale approach long forgotten by federal enforcers."[58]

Their proposal would revise Option Two as follows:

Section X is added to read:

(a) No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, or acquire the whole or any part of the assets of another person where the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition~~, or to tend to create a monopoly or monopsony~~ in any line of commerce or in any activity affecting commerce in any section of the state.

<u>(b) No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, or acquire the whole or any part of the assets of another person where the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be to tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state.</u>

(~~b~~<u>c</u>) A merger that may produce 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 shall be deemed to substantially lessen competition in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. This section is intended to codify the holding in *United States v. Philadelphia National Bank* (1963) 374 U.S. 321.

(~~c~~<u>d</u>) In interpreting this section, the 2023 Merger Guidelines of the U.S. Department of Justice and the Federal Trade Commission shall be considered persuasive authority and understood to complement and be harmonized with this

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[54] *Calif. v. Mirant* Corp. (2003 N.D. Cal.) 266 F. Supp. 2d 1046, 1055, *aff'd sub nom. Calif. v. Dynegy, Inc.* (9th Cir. 2004) 375 F.3d 831, *op. amended on denial of reh'g and aff'd*, (9th Cir. 2004) 387 F.3d 966.

[55] *Id*. at 1054-1055.

[56] *Id.* ("Allegations of the ability to control prices . . . suffice to allege that an acquisition tends toward monopoly.").

[57] EX 94.

[58] EX 96.

section.

(~~d~~e) This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation from forming subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

The staff believes the proposed amendment presents an elegant solution that balances the familiarity and certainty of federal antitrust language while emphasizing California's refocus towards capturing the Clayton Act's original intent.

Arguments against:

CLS opposes the underlying notion of *Philadelphia National Bank* and the 2023 Merger Guidelines that mergers in highly concentrated markets are anticompetitive, and provides counter examples from the life sciences industry:

> This proposed standard would be far beyond existing case law and present unique risks for life sciences companies. For example, life science market segments are often concentrated, especially in rare diseases and emerging technology areas. High concentration levels in these areas reflect the extraordinary difficulty in developing treatments, and the tremendous costs associated with that development. Automatically treating transactions in these segments as presumptively harmful ignores scientific reality and would make it harder, not easier, for treatments to advance. M&A activity in this space is predominantly procompetitive, routinely combining complementary platforms or uniting resources to accelerate innovation. Presuming that such conduct is inherently anticompetitive will chill innovation and slow the development of treatments for patients.[59]

CalChamber is concerned that California will fall out of step with federal enforcement priorities following the next revision of the merger guidelines, increasing uncertainty for businesses as well as compliance costs and risks. CalChamber also takes a dim view of the legal presumptions based on market share, finding them simultaneously inadequate and burdensome:[60]

> But antitrust enforcement decision-making based on market share and market concentration presumptions are, by comparison, a blunt instrument. While the HHI is a straight-forward arithmetic calculation, it cannot capture the richness of the

[59] EX 5.

[60] The staff notes that the presumptions about market concentrations and market shares in *Philadelphia National Bank* may be rebutted with evidence of market structure and operation. Option Two designates the 2023 Merger Guidelines as persuasive authority and therefore does not require strict adherence to its HHI formulations.

data and the information in documents available to an agency involved in a merger investigation. Merger analysis is a fact-intensive exercise, and no simple market structure presumption can adequately evaluate the nuances present in specific markets across the economy. Indeed, reducing important antitrust decisions to simple mathematical calculations risks chilling the vibrancy of the California economy because it would treat industries as diverse as tech, entertainment, healthcare, agriculture, biotech, manufacturing and tourism, among others, in a one-size-fits all manner. Creating a merger review regime that bases important decisions on back-of-the-envelope calculations is not a productive way to develop California law.

…

In fact, the market share and market concentration presumptions in Options Two and Three could increase costs by increasing the importance of market definition in merger enforcement. In that the outcomes of a merger investigation may depend on market structure computations, like HHI and market share, they are inherently based on market definition. This fact will make market definition analysis itself more important, contentious, difficult, time- consuming and expensive.[61]

The staff notes that although the 2023 Federal Guidelines are not law, they describe existing federal antitrust enforcement practices.

Would the Commission like the staff to make revisions or conduct further analysis on this option?

Comments on Option Three: Federal Merger Guidelines

Option Three builds on Option Two's base language, codifies specific language from the Merger Guidelines drawn from *United States v. Philadelphia National Bank,*[62] and adds new language instructing how to rebut the presumptions.

Section X is added to read:

(a) No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, or acquire the whole or any part of the assets of another person where the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state.[63]

(b) This section is intended to codify the holding in *United States v. Philadelphia National Bank* (1963) 374 U.S. 321, which found that a merger which may produce 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

[61] EX 151.

[62] (1963) 374 U.S. 321.

[63] This language is based on 15 U.S.C. § 18.

> deemed to substantially lessen competition in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[64]
>
> (c) A merger shall be presumed to substantially lessen competition or tend to create a monopoly or monopsony if it results in:
>
> (1) A market with a Herfindahl-Hirschman Index ("HHI") greater than 1,800 or more and a change in HHI greater than 100 points; or
>
> (2) A person with a market share over thirty percent of the market and a change in HHI greater than 100 points.[65]
>
> (d) A defendant may rebut the presumption in (c) by demonstrating by a preponderance of the evidence that there are no likely anticompetitive effects of the transaction or that the anticompetitive effects are de minimis and that any potential anticompetitive effects are clearly outweighed by the distinct procompetitive benefits of the transaction in the same relevant market.
>
> (e) This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation from forming subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Arguments in favor:

Since denoting the 2023 Merger Guidelines as "persuasive" in Option Two does not make them binding,[66] Option Three codifies the 2023 Merger Guidelines' interpretation of the *Philadelphia National Bank* presumption. As with Option Two, Option Three is supported by the CAMEO Network, IBT Coalition, and ESCA and Partners with additional amendments. The proposed amendment to emphasize the "tend to create monopoly" prong from the Antitrust Authors noted in Option Two may also be applied to this option.

ESCA and Partners[67] and CAMEO Network write in support of codifying the *Philadelphia National Bank* presumption as operationalized in the 2023 Merger Guidelines and as reflected in subdivision (c):

> Codifying these bright-line rules would give enforcers practical tools, create predictability for businesses, and reduce costly evidentiary burdens by establishing clear parameters for the otherwise vague terms "undue concentration" and

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[64] This language is drawn from *U.S. v. Philadelphia National Bank* (1963) 374 U.S. 321.

[65] This subdivision mirrors Section 2, 2.1: Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market, 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, pp. 5-6.

[66] Professor Kwoka notes that the "Merger Study Group went on to caution, however that these Guidelines do not have the force of law and so courts and even agencies are free to follow the more familiar-but-inadequate—existing path." EX 10.

[67] EX 172-173.

> "significant increase" relied on in *Philadelphia National Bank*. The Guidelines were adopted by federal agencies following rigorous national vetting and have been relied upon by courts, providing direct guidance based on established metrics.[68]

The IBT Coalition also supports codifying the 2023 Merger Guidelines language but suggests increasing the burden of proof from "preponderance of the evidence"[69] to "clear and convincing" to rebut the general presumption that a merger or acquisition resulting in a significant increase in the concentration of firms in a market is illegal:

> (c) Paragraph (b) shall not apply if the defendant establishes by clear and convincing evidence that, in any line of commerce or in any activity affecting commerce in any section of the state, the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, would not be to (1) create an appreciable risk of lessening competition, or (2) tend to create a monopoly or monopsony.[70]

The IBT Coalition also suggests additional changes discussed later in the memorandum.

Arguments against:

CLS and CalChamber are opposed to codifying the 2023 Merger Guidelines and have specific concerns with enshrining the HHI thresholds in law. From CLS:

> While these HHI metrics are currently used to inform federal enforcement decisions, they are not legally binding – with good reason. Codifying them into state law would introduce rigidity and remove important context- based analysis which is the foundation of antitrust analysis. Decades of case law and enforcement policy have focused on how to assess proposed transaction under the "rule of reason," which is a balancing test. Imposing a presumption of harm based on HHI metrics would undermine sound antitrust analysis and would be particularly inappropriate in life sciences markets, which are often inherently small and concentrated. M&A activity in these areas will often easily exceed HHI thresholds and trigger legal presumptions of harm, even though most transactions would improve patient outcomes. Further, imposing a requirement that firms show procompetitive benefits "clearly outweigh" potential risks set an unreasonably high bar, especially in cases where the primary benefit is enhancement of long-term innovation and development of pipeline treatments.[71]

CalChamber is additionally opposed to subdivision (d), which states that a defendant can only rebut the presumption that a merger is unlawful by demonstrating it will have no anticompetitive effects or that the effects are de minimis, and that any potential

[68] EX 181.
[69] This is the current standard for a rule of reason analysis.
[70] EX 165-166.
[71] EX 5-6.

anticompetitive effects are outweighed by procompetitive benefits:

> This limits the evaluation of efficiencies to mergers where anticompetitive effects are absent or de minimis. Thus, even if a proposed transaction would result in large and verifiable efficiencies sufficient to prevent the transaction from harming competition, Option Three would not take these efficiencies into account. Put another way, the merger efficiencies analysis standard in Option Three would block a merger that raises small (but not de minimis) competitive harms in one market even if there were large and certain efficiencies or benefits created in other markets that could not otherwise be achieved. Such a standard is not in the best interest of California consumers, workers or the overall economy.[72]

Would the Commission like the staff to make revisions or conduct further analysis on this option?

Comments on Option Four: Appreciable Risk

Option Four takes the basic framework from Option One but reduces the Clayton Act's standard prohibiting mergers whose effect "may be substantially to lessen competition" to those whose effect "may be to create an appreciable risk of lessening competition more than a de minimis amount," based on Sen. Klobuchar's Competition and Antitrust Law Enforcement Reform Act (CALERA).[73]

> **Section X is added to read:**
>
> (a) No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, or acquire the whole or any part of the assets of another person where the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be to create an appreciable risk of lessening competition more than a de minimis amount, or to tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state.
>
> (b) This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation from forming subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

[72] EX 151-152.

[73] Sen. No. 225, 117th Cong. 1st Sess. (2021). This bill was reintroduced as Sen. No. 130 119th Cong. 1st Sess. (2025).

Arguments in favor:

CAMEO Network, the IBT Coalition, ESCA and Partners, and Professor Kwoka support variations of Option Four. The proposed amendment from the Antitrust Authors noted in Option Two may also be applied to this option, however the operative standard for the first prong of (a) must reflect the different language.

Below is Professor Kwoka's slight wording change from the staff language:

> (a) No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, or acquire the whole or any part of the assets of another person where the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be to create an appreciable risk of materially lessening competition more than ~~a de minimis~~ an insignificant amount, or create or ~~to~~ tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state. (underlines and strikethroughs to note differences)[74]

Professor Kwoka advocates adopting the "appreciable risk" standard to signal a clear departure from the Clayton Act and explains his use of "materially:"

> My further recommendation is to replace the term "substantially" (as in "substantially...lessening competition") with the term "materially lessening competition. This would prevent the magnitude of harm from becoming the alternative to the debate over likelihood of harm, as the key impediment to enforcement under the Clayton act. That is, if "appreciable risk" is adopted, one can envision an effort to elevate what constitutes a "substantial" lessening of competition as the new barrier to enforcement. Any beyond that, based on good economic evidence, we know that merger enforcement under the Clayton Act's has been too permissive. This change in terminology would constitute a necessary reset of the magnitude of harm justifying enforcement.[75]

In a follow-up email to the Commission staff, Professor Kwoka clarified his suggestion to replace "a de minimis amount" with "an insignificant amount:

> I opted for "more than insignificant" as less legalese and therefore easier to convey to non-lawyers and not-specialists. I think that there is value in being able to explain the principles of merger enforcement in a manner that is easily understood. "More than de minimus" sounds too much like insider's language—as indeed it is.[76]

Finally, he suggests adding clarifying language that mergers which do, in fact, create monopolies are also prohibited.[77] The staff does not believe the latter is necessary, but it

[74] EX 13.
[75] EX 26.
[76] EX 27.
[77] EX 13.

could be helpful.

As noted in the discussion of Option Two, the IBT Coalition and ESCA and Partners both support a variation of Option Four's "create an appreciable risk of lessening competition." The IBT Coalition argues "The plain language of this standard would disallow a court from requiring a plaintiff to show that a proposed merger '*will*' lessen competition, replacing inappropriately burdensome certitude[78] with something more like a *cognizable possibility*."[79]

Similarly, ESCA and Partners write:

> We support language that establishes an "appreciable risk" standard <u>without the additional "materially lessening" or "more than a de minimis amount" qualifiers because we believe that the</u> words "appreciable risk" provide courts with sufficient discretion to block only those mergers that create a cognizable ("appreciable") threat ("risk") to competition.[80] (emphasis in original)

CAMEO Network supports the phrase "appreciable risk of materially lessening competition," which it believes "would restore the Clayton Act's original prophylactic purpose."[81]

Arguments against:

CLS and CalChamber[82] are opposed to introducing a new and untested legal standard that they believe would cause substantial uncertainty. While Option Four is intended to reduce the burden of proof for proving unlawful mergers, there is no caselaw history for courts to draw upon when interpreting this new language, which would, according to CLS, make all California businesses a "testing ground."[83]

Additional Comments

IBT Coalition

In addition to the comments noted above, the IBT Coalition requests the following additional provisions:

- Provide explicit direction to the California Department of Justice to consider a

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[78] *Cf. Fed. Trade Comm'n v. Microsoft Corp*. (N.D. Cal. 2023) 681 F. Supp. 3d 1069, 1090, *aff'd*, No. 23-15992, 2025 WL 1319069 (9th Cir. May 7, 2025) (finding that plaintiff failed to meet a burden of showing that competition "would *probably* be substantially lessened" by proposed transaction) (emphasis added).
[79] EX 162.
[80] EX 176.
[81] EX 181.
[82] EX 155.
[83] EX 4.

merger's effects on labor markets and workers
- Formalize a role for workers in the California Department of Justice's merger review process[84]

These two suggestions are drawn from New York's Twenty-First Century Anti-Trust Act.[85] While none of the merger options specifically direct the Attorney General to consider a merger's effects on labor markets and workers, the staff's inclusion of "monopsony" in all the single firm conduct and merger options was intended to address the historical underenforcement of buyer-side monopolies that impact labor.[86] Additionally, the staff draft findings and declarations address workers in the basic purpose statement, and workers and labor markets in the enhanced purpose statement.[87] To IBT's second point regarding formalizing a role for workers within the merger review process, because the Commission is not currently working on pre-merger notification or review out of deference to SB 25 (Umberg),[88] the staff believes this request is better placed with the bill's author.

CAMEO Network, IBT Coalition and ESCA and Partners

CAMEO Network,[89] the IBT Coalition [90] and ESCA and Partners[91] recommend that the Commission adopt a presumption that mergers and acquisitions by firms with a capitalization over $100 billion are unlawful unless the merging parties can prove to a "clear and convincing" standard that the merger would not create an appreciable risk of lessening competition or tend to create a monopoly or monopsony. In a nod to certain transactions, the IBT Coalition noted it would be appropriate to provide an exception for smaller acquisitions (as yet unspecified) that would still be subject to the general merger statute.[92]

"Clear and convincing" is higher than the status quo; a prima facie antitrust case is generally rebutted by a preponderance of the evidence standard, which means that the evidence in support must merely be greater than the evidence against.[93] However,

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[84] EX 159.
[85] S335 (Gianaris, 2025).
[86] See Memorandum 2025-21, p. 2, fn.7.
[87] Memorandum 2025-21, pp. 10-11,
[88] See also Memorandum 2025-31, p. 1. SB 25 is sponsored by the Uniform Law Revision Commission (ULC) and is currently on the Assembly Inactive File. However, according to the ULC, Senator Umberg intends to pursue passage of the bill early next year.
[89] EX 181.
[90] EX 164-165.
[91] EX 173.
[92] EX 165.
[93] See e.g. BAJI No. 2.60, which defines "preponderance of the evidence" as "evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on

Philadelphia National Bank presumes some mergers in highly concentrated markets are unlawful unless the merging parties "clearly" show the merger will not have anticompetitive effects. [94] While "clearly" is a term often used in various legal contexts to also mean evidence with more than a 50% persuasiveness, adoption of a "clear and convincing" standard of proof is generally understood to require a higher degree of probability.[95]

Shifting and raising the burden of proof on rebuttal for mergers involving firms with a market capitalization of over $100B would reach acquisitions which may not result in significant market concentration or otherwise trigger the *Philadelphia National Bank* presumption and its "clearly" standard. In particular, acquisitions of nascent or potential competitors may not trigger the *Philadelphia National Bank* presumption, yet may pose competition challenges when done to extend the market power of very large companies.[96]

Professor John Kwoka, CAMEO Network, and ESCA and Partners

Professor John Kwoka, CAMEO Network,[97] and ESCA and Partners[98] argue that any merger law should extend beyond horizontal mergers. Professor Kwoka proposed the following language clarifying that California's merger statute applies to all mergers:

> All parts of this Act are to be understood to apply, with appropriate adaptation as necessary, to labor and other input markets, vertical mergers, to platform mergers, mergers involving potential and nascent competitors, and other mergers without limitation.[99]

The staff does not believe that the proposed broad merger standards need to clarify that they apply to all mergers, given that the term "monopsony" is included. There is a concern that because certain types of mergers are noted, even with the expansive language "and

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either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it."; see also *People ex. Rel. Brown v. Tri-Union Seafood, LLC* (2009) 171 Cal. App.4th 1549, 1567.

[94] *Philadelphia National Bank* states, "A merger that may produce 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 shall be deemed to substantially lessen competition in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." (1963) 374 U.S. 321, 363.

[95] See e.g. California BAJI No. 2.62, which defines "clear and convincing evidence" as evidence demonstrating "a high probability of the truth of the fact for which it is offered as proof" (BAJI No. 2.62 (8th ed. 1994 bound vol.); In re Angelia P. (1981) 28 Cal.3d 908, 919 ("Clear and convincing" evidence requires a finding of high probability) McBaine, *Burden of Proof Degrees of Belief* (1944) 32 Cal. L, Rev. 242, 254 ("clear and convincing evidence" is an intermediate standard lying between "preponderance of the evidence" and "beyond a reasonable doubt.").

[96] See Memorandum 2025-32, p. 6 for a discussion of various thresholds from federal bills targeting large companies. According to www.companiesmarketcap.com accessed on August 21, 2025, there are 199 companies with a market capitalization over $100B and 19 over $500B.

[97] EX 181.

[98] EX 173, ESCA p. 6.

[99] EX 13.

other mergers without limitation," some may believe those types of mergers not specifically named are not covered, which is likely not the Commission's intention.

CAMEO Network and ESCA and Partners

CAMEO Network[100] and ESCA and Partners[101] additionally recommend California adopt a pre-merger notification system and require heightened scrutiny of mergers in the healthcare, grocery, and technology industries. As indicated earlier,[102] the Commission is not addressing pre-merger notification in deference to SB 25, and the Commission voted to draft broad laws that would be applicable to all industries.[103] In addition, CAMEO Network[104] and ESCA and Partners[105] recommend including a directive to consider the impact of a merger on wage suppression, union bargaining power, effects on small businesses and communities of color, and reinvestment obligations in banking and fintech. We have addressed the impact on labor above.

Would the Commission like the staff to make revisions or conduct further analysis on these suggestions?

Respectfully submitted,

Sarah Huchel
Chief Deputy Director

Sharon Reilly
Executive Director

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[100] EX 182.

[101] EX 173-174.

[102] The staff notes the Commission is deferring discussion on a pre-merger notification system in deference to SB 25 (Umberg). See also Memorandum 2025-31, p. 1.

[103] The Commission voted to approve the staff recommendation against Big Techspecific antitrust laws and instead to instead ensure that any proposed antitrust language is drafted sufficiently broad and flexible enough to encompass Big Tech as well other industries. Minutes (January 2025), p. 4.

[104] EX 182.

[105] EX 174. The staff requested further clarification from ESCA and Partners whether the last suggestion relates to pre-merger notification review or merger review as anticipated in the options in this memorandum. The staff did not receive a response by the time of publication.

California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

Subject: Proposed Antitrust Changes Hurt California's Residents, Businesses, and Economy

Dear Chair and Honorable Members of the California Law Revision Commission,

We the undersigned organizations and businesses are writing to express our profound concerns regarding the California Law Revision Commission's (Commission) proposed changes to California's antitrust laws. While we appreciate your dedication to fostering a fair and competitive marketplace, we believe these proposals risk fundamentally undermining established antitrust principles, ultimately harming consumers, stifling innovation, and severely damaging California's economic competitiveness.

Our core concerns are as follows:

Punishing Success, Not Harmful Conduct. The Commission's proposal mistakenly equates market share with anticompetitive harm. In a competitive market, a market share often simply reflects consumer preference—a clear sign that a company has offered a superior product or service that customers value. Presumptively labeling this success as suspicious punishes popularity gained through meeting consumer needs and fundamentally misunderstands the essence of competition. This approach abandons the established, evidence-based principles of antitrust law, which rightly focus on harm to consumers.

Prohibiting Everyday, Pro-Consumer Business Practices. Your proposals would cast a shadow of suspicion over many standard business activities that directly benefit consumers. Practices like offering bundled products at lower prices, providing volume discounts and loyalty rebates, or designing integrated product ecosystems (often called "self-preferencing") would be presumed unlawful. Forcing innovators to second-guess these consumer-friendly activities would lead to higher prices, reduced functionality, and less choice for Californians. Imagine a company improving its own mapping service within its mobile operating system; this innovation should be celebrated, not targeted by litigation for "self-preferencing."

Guilty-Until-Proven Innocent: The Dangerous "Burden-Shifting" Framework. The proposal to establish a rebuttable presumption of illegality reverses a foundational principle of law. Instead of the government proving anticompetitive harm, companies would be forced to prove their innocence, creating a permanent cloud of litigation risk over everyday business decisions - chilling innovation.

Existing Law Works. The current, proven antitrust framework works because it focuses on harmful conduct, not a company's size or popularity. Federal authorities are actively enforcing existing antitrust laws against a range of companies - with nearly half the S&P 500 by market cap under scrutiny. The Commission has identified no gap in existing law that requires a radical new system that would punish companies simply for being successful and chosen by consumers. When business tactics like bundling or predatory pricing are used to harm competition and create monopolies at consumer expense, Section 2 of the Sherman Act provides clear guidance and established case law for regulators and courts.

Threatening California's Investment Climate. A state's legal and regulatory environment significantly influences where the private sector invests and locates. If California adopts proposals that expose companies to undefined but potentially costly antitrust risks, the state could deter businesses from investing in startups and new ventures. Misguided proposals could scare away investment and job creation. It's crucial to note that no other state has deviated from the nation's bipartisan consensus that antitrust law protects consumers, not particular competitors. And when a handful of state legislators were urged by outside groups to push European "abuse of dominance" standards, industry-wide opposition was clear. This proposed radical change would make California a national outlier, undermining our position as a global innovation leader.

We urge the Commission to carefully reconsider these proposals and refrain from adopting changes that would undermine the very principles of competition they seek to uphold. We firmly believe that maintaining a clear focus on actual consumer harm and preserving the established, evidence-based framework of antitrust law is crucial for fostering innovation, promoting economic growth, and ensuring a vibrant and competitive marketplace in California.

Sincerely,

Los Angeles County Business Federation (LA BizFed)
Silicon Valley Leadership Group
La Cañada Flintridge Chamber of Commerce
Torrance Chamber of Commerce
Employers Group
LA County Taxpayers Association

Multicultural Business Alliance
California African American Chamber of Commerce
San José Chamber of Commerce
San Mateo County Economic Development Association
Chamber San Mateo County
Central Valley Business Federation
Valley Industry and Commerce Association (VICA)
Los Angeles Chamber of Commerce
San Diego Regional Chamber of Commerce
Bay Area Council

July 31, 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 2025-31: Draft Language for Merger Provisions

Dear Chairperson Carrion and Honorable Commissioners,

We write on behalf of California Life Sciences (CLS), representatives of the life sciences industry, which directly employs over 400,000 Californians and encompasses more than 1,300 organizations across California. This includes pharmaceutical, biotechnology, and medical technology companies, as well as academic research institutions all committed to advancing innovation and improving health outcomes worldwide. We are writing to express concerns regarding the merger provisions proposed in the California Law Revision Commission's (CLRC) Staff Memo 2025-31.

California's life sciences ecosystem depends on dynamic partnerships and requires substantial financial risk. Mergers and acquisitions (M&A) are essential mechanisms that enable new discoveries to reach patients. M&A allows smaller firms to access the capital, infrastructure, and regulatory expertise needed to bring innovative treatments to market more quickly, affordably, and at scale. Without access to capital markets, the entire ecosystem would be at risk, in particular small start-ups. More than 90% of California's life sciences companies have fewer than 10 employees. Most operate without turning a profit, engaging in high-risk, research-intensive work that can take over a decade and billions of dollars to bring a single treatment to market with success rates below 10%. Despite these odds, since 2000, life science companies have reinvested more than $1 trillion in research and development nationwide demonstrating an unwavering commitment to delivering breakthroughs for patients.

We recognize that policymakers are concerned about rising consolidation across industries. However, we urge the Commission to proceed cautiously. Enacting a California-specific merger law that diverges significantly from antitrust precedent or introduces vague legal standards could seriously destabilize the life sciences sector.

Below, we outline our concerns with each of the options presented in Memo 2025-31 and explain how they may negatively affect our industry.

Option one largely mirrors the federal Clayton Act's language, prohibiting mergers whose effect "may be to substantially lessen competition or to tend to create a monopoly." While this language is familiar and generally consistent with existing legal standards, applying it at the state level would shift enforcement to state courts. This introduces significant uncertainty, as state courts may interpret and apply these standards differently than federal courts. Whether state courts follow existing federal case law or move in a different direction, it will take years before the industry will have a clear sense for how the state courts interpret this language. During the intervening period, this uncertainty will decrease procompetitive M&A activity that is essential to early-stage biotech firms and innovation-driven partnerships.

Option two includes the Clayton Act language of option one and creates a rebuttable presumption that mergers in highly concentrated markets are inherently anticompetitive. This proposed standard would be far beyond existing case law and present unique risks for life sciences companies. For example, life science market segments are often concentrated, especially in rare diseases and emerging technology areas. High concentration levels in these areas reflect the extraordinary difficulty in developing treatments, and the tremendous costs associated with that development. Automatically treating transactions in these segments as presumptively harmful ignores scientific reality and would make it harder, not easier, for treatments to advance. M&A activity in this space is predominantly procompetitive, routinely combining complementary platforms or uniting resources to accelerate innovation. Presuming that such conduct is inherently anticompetitive will chill innovation and slow the development of treatments for patients.

Option three includes the Clayton Act language of option one but also codifies Herfindahl-Hirschman Index (HHI) thresholds and uses them to create bright-line rules regarding which transactions are prohibited. While these HHI metrics are currently used to inform federal enforcement decisions, they are not legally binding – with good reason. Codifying them into state law would introduce rigidity and remove important context-based analysis which is the foundation of antitrust analysis. Decades of case law and enforcement policy have focused on how to assess proposed transaction under the "rule of reason," which is a balancing test. Imposing a presumption of harm based on HHI metrics would undermine sound antitrust analysis and would be particularly inappropriate in life sciences markets, which are often inherently small and concentrated. M&A activity in these areas will often easily exceed HHI thresholds and trigger legal presumptions of harm, even though most transactions would improve patient outcomes. Further, imposing a requirement that firms show procompetitive benefits "clearly outweigh" potential risks set an unreasonably high bar, especially in cases where the primary benefit is enhancement of long-term innovation and development of pipeline treatments.

Option four introduces a novel and untested legal standard: that a merger may not pose "an appreciable risk of lessening competition more than a de minimis amount." This departs significantly from the Clayton Act and is based on language proposed in the federal CALERA bill, which has not been enacted. The vague and subjective nature of this standard would inject widespread uncertainty into the regulatory environment. Specifically for the life sciences the subjective language "appreciable risk" and "more than a de minimis amount" make it unclear what level of conduct will trigger enforcement. As with the other proposed options, this ambiguity disproportionately hurts early-stage biotech firms whose exit path often depends on M&A certainty. If potential funders or acquirers are unsure whether a transaction will face unpredictable legal risk, investment will dry up. A gene-editing startup, for example, may lose essential funding or acquisition opportunities simply because potential partners are unsure how "appreciable risk" or "more than a de minimis amount" would be interpreted in practice.

All the proposed options create significant uncertainty and risk, and they are not necessary. California already has strong tools to evaluate and challenge problematic mergers. The Attorney General has the authority to enforce Section 7 of the Clayton Act, and this authority can be exercised by California alone, or in conjunction with other states and/or the Department of Justice (DOJ) or Federal Trade Commission (FTC). In fact, federal antitrust enforcement has become increasingly aggressive in recent years, including the implementation of updated DOJ/FTC Merger Guidelines (2023) and expanded information requirements under the pre-merger notification regulations. These mechanisms provide robust safeguards without introducing new uncertainty or deviating from established standards.

California's existing regulatory ecosystem has been wildly successful in developing and encouraging growth in the life sciences industry. The legal and regulatory approach has struck the right balance between certainty and aggressive antitrust enforcement, allowing companies and partnerships across the spectrum to produce high-quality research, jobs, new products and life-saving treatments. It has kept California at the epicenter of the life sciences industry, birthing and sustaining thousands of companies, employing millions of Californians, and generating the tax revenue that comes when that research turns into locally manufactured products. As our biotechnology companies continually evaluate worldwide investment decisions, we respectfully urge the Commission not to pursue merger provisions that introduce ambiguity into an ecosystem that thrives on collaboration, investment, and scientific risk-taking. We welcome the opportunity to work with the Commission to develop policies that protect competition without undermining innovation or patient outcomes.

We appreciate this opportunity to express our concerns. 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

MEMO TO: California Law Review Commission

FROM: John Kwoka, Finnegan Professor of Economics
Northeastern University
Member, CLRC Merger Study Group

DATE: July 31, 2025

RE: Final Recommendations

I. INTRODUCTION

The California Law Review Commission evaluation of antitrust legislation in the state has culminated in Staff Memorandum 2025-31 ("Draft Language for Merger Provisions," June 16, 2025). This Staff Memorandum offers a useful summary of merger control statutes and enforcement practices both at the federal level and at with respect to the state of California. It notes the current absence of a merger statute for California, limiting state merger control to actions in certain regulated industries and under the federal Clayton Act.

This Memorandum further notes that the Commission has accepted staff recommendations that California adopt its own merger control statute and merger notification standards. I support those measures and will not comment further on them.The Staff Memo very helpfully goes on to outline four possible alternatives for a possible state statute. These options are all based on the federal Clayton Act but differ in important specifics. They also reflect comments and proposals submitted earlier in this proceeding by many interested parties, as well as from the earlier report by the Merger Study Group established by and reporting to commission staff ("California Antitrust Law and Mergers," May 2024).

I was pleased to be a member of that Merger Study Group reporting to staff in 2024. Our report described the institutions and procedures of merger control. It also set out the relevant economic and legal issues but made no recommendations. I appreciate the opportunity now to provide comments on the recommendations, which I submit in my name only.

I am the Neal F Finnegan Distinguished Professor of Economics at Northeastern University. I have previously taught at several universities, and served at various times at both federal antitrust agencies. Most recently, I served as Chief Economist to Chair Lina Khan of the Federal Trade Commission, working on (among other things) the new Merger Guidelines jointly issued in 2023 by the FTC and the Antitrust Division of the Justice Department. I have also conducted research and written extensively on antitrust policy issues. My full CV is attached.

II. ANALYSIS AND RECOMMENDATIONS

I accepted the invitation to serve on the Merger Study Goup and I now offer these comments since I believe this is an important moment for California to consider its antitrust needs. The state has a very diverse and very robust structure of its business activity. That activity is important for the state, of course, but also for the country at large and, indeed, beyond. This vitality must be protected. The adoption of an appropriate state statute with respect to mergers would fill an important void in the state's tools to ensure competition. The statute should establish clear standards and facilitate necessary enforcement actions against anticompetitive mergers in and affecting the state. The challenge is to determine what constitutes "an appropriate merger control statute" for the state.

In this memo, I offer my recommendations, informed by my work on this matter, as well as my recent experience at the Federal Trade Commission and my extensive research and experience in antitrust matters.

A. The framework of the Clayton Act

There is no disagreement that an appropriate statute for the state of California must be consistent with federal law and precedent. All of the four options set out by staff accept the federal Clayton Act as the foundation of a state statute. I certainly concur with that assessment.

It is useful to recall that the key section of the Clayton Act, which was passed in 1914, is the prohibition of mergers whose effects "may be substantially to lessen competition, or to tend to create a monopoly." Indeed, one option set out in the Staff Memorandum (Option 1) is simply for the state to adopt the Clayton Act as written for the state of California. I believe, however, that it would be an error at this crucial point in time not to take into account what we know about the effectiveness of that statute, which of course has a long history of use by the FTC and DOJ, a long history of judicial interpretation, and a long history of its effects in the economy. We know much about these issues, and in my view they speak clearly and unambiguously for the need to adapt the language of the Clayton Act in modest but important ways, to ensure that certain weaknesses of the Clayton Act are not replicated for the state of California.

What are those weaknesses? Our Merger Working Group report discussed in particular how key language in the Clayton Act has been re-interpreted–really, mis-interpreted--over time in a manner that has made enforcement more difficult than intended and resulted in more anticompetitive mergers to be permitted. The Staff Report succinctly observed that while the Clayton Act prohibited those mergers whose effect "may be substantially to lessen competition,"

> there is widespread acknowledgment that judicial interpretation has eroded [the] original meaning [of this phrase]. Some argue the standard as interpreted by the courts now requires proof that the merger 'will probably' or is 'likely' to cause harm, rather than the original which was construed as requiring evidence only of 'a reasonable probability' or

'a reasonable likelihood' of competitive harm."[1]

This "standards creep" is understandable: every court would prefer a greater degree of certainty of an anticompetitive outcome before ruling against a merger. But merger control is almost always prospective, requiring the enforcement agency to predict the consequences of a particular transaction. In recognition of the inherent uncertainty of that process, the original Clayton Act required the agency to show only that the transaction "may" be anticompetitive, not that it "would" or even that it "would likely" do so. Unfortunately, the current re-interpretation of the original language is now widespread as trial courts in merger cases have come to require a higher degree of demonstration, sometimes bordering on near proof, that a prospective merger will result in the lessening of competition.

Our Merger Study Group discussed several harmful consequences of this "standards creep." We cited economic and statistical evidence for the conclusion "that antitrust authorities have failed to prevent mergers or acquisitions that have had anticompetitive effects."[2] We further noted that "this narrowing of enforcement has coincided with substantial increases in market concentration, the rise of dominant firms, and unusually high profit rates in the economy."[3] We also observed that these and other factors led the Federal Trade Commission and the Antitrust Division of the Justice Department in 2023 to formulate and issue new Merger Guidelines. These new Guidelines (on which I worked) sought to update and rebalance federal enforcement by strengthening standards and enumerating specific antitrust offenses. Our Merger Study Group went on to caution, however, that these Guidelines do not have the force of law and so courts and even agencies are free to follow the more familiar–but inadequate--existing path.

For these reasons, it is in my view crucial that in developing an appropriate merger control statute California avoid the harmful consequences of this "standards creep" of judicial interpretation of Clayton Act language. This can be accomplished by a modest but important change in the language of that statute that makes clear that actions against likely anticompetitive mergers do not require a demonstration of "probability," much less "likelihood" or "certainty," but rather only the "risk" of an anticompetitive outcome. Appropriate alternative language appears as part of Option 4 of the Staff Memorandum.[4] That Option cites a legislative proposal that would replace the Clayton Act's prohibition on mergers whose effect "may be substantially to lessen competition" with a prohibition on those that "may create an appreciable risk" of doing so.

Therefore, while I would accept the basic framework of the Clayton Act for purposes of a merger control statute for California, I strongly recommend adopting the phrase "may create an

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[1] Staff Report 2025-31, p. 3. Internal footnotes omitted.

[2] Study Group Report, p. 19

[3] Study Group Report, p. 3

[4] Staff Report, p. 11. This is adapted from Sen Klobuchar's proposed Competition and Antitrust Law Enforcement Reform.

appreciable risk" in place of "may." This change in terminology would itself signal a difference from the Clayton Act, while the term "appreciable risk" would define a new operative standard for the state of California, not requiring a showing of "likelihood."

Regarding Option 4 in the Staff Memorandum, I note that it would also replace the term "substantially" (as in "substantially to lessen competition") by the phrase "lessen competition by more than a de minimus amount". I view the term "substantial" to be less problematic in actual enforcement practice than the term "may" and so I am primarily concerned with the need to replace the latter "may." I recognize, however, that the risk of "standards creep" for the term "substantial" may be increased by replacing "may" with "appreciable risk" as parties' arguments might increasingly focus on the substantiality of any risk of lessening competition. For that reason, I would propose replacing "substantially to lessen competition" with the phrase "to lessen competition by more than an insignificant amount." I believe this would prevent this spillover creep, while ensuring that actions are not taken against insignificant competition issues.

I would further recommend two smaller changes to Clayton Act language for purposes of clarity in a California merger control statute. The first would be to add the term "monopsony" to "monopoly" as a description of the anticompetitive market structure to be prohibited. Monopsony is market power in the hands of buyers rather than a monopoly of sellers, but otherwise raises analogous competition concerns. While the current statute has been used successfully against some mergers raising concern over buyer power, most observers agree that including monopsony explicitly would also help clarify the intent and coverage of the law.

The second small change would make clear that actual mergers to monopoly or monopsony are prohibited. At present the Clayton Act language prohibits mergers "that tend to create a monopoly," and while that may seem obviously to cover those mergers that actually create monopolies, this clarification would remove any doubt. This clarification is doubly important since it declares such mergers automatically illegal, dispensing with the need for further analysis.

B. Operationalizing a state Clayton-type Act

I further recommend adding some specificity to a California statute in terms of operational criteria and conditions that might be expected to lessen competition. These will help provide important clarity for the benefit of businesses and the public, and also help to simplify the often burdensome task of enforcement by the agencies.

The key provision that I recommend would codify the criteria for an anticompetitive merger originally set out by the U.S. Supreme Court in its Philadelphia National Bank opinion.[5] The Philadelphia National Bank court held that

> a merger which produces a firm controlling an undue percentage share of the relevant

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[5] U.S. v. Philadelphia National Bank (1963) 374 U.S 321. A version of this is now incorporated in the 2023 Merger Guidelines

> 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 evidence clearly showing that the merger is not likely to have such anticompetitive effects.

This standard obviously was intended to create a very strong presumption against large mergers in concentrated markets. Such a standard would be consistent with economic evidence about the effects of such mergers, rendering the usual analysis of effects in those cases unnecessary. Indeed, given the pitfalls of specific-case analysis, there is likely a greater risk of incorrect determination from analysis than any error from application of the presumption.[6] For these good reasons, in such cases, the court said, this presumption can be invoked.

Our Merger Study Group report noted, however, that in actuality "[s]ince at least the 1980s, the federal courts have not accorded such weight to the plaintiff's initial showing, despite the fact that *Philadelphia Bank* has never been formally overruled."[7] We observed, "With the passive acquiescence of the Supreme Court...the federal courts have reversed the Philadelphia Bank 'structural presumption'." [8]

I would recommend that the California merger control statute reject this remarkable ad hoc reversal of the U.S Supreme Court and restore the structural presumption for purposes of state enforcement. As noted, this would be consistent with economic evidence that large mergers in concentrated industries are anticompetitive, and also would aid enforcement by avoiding the need to prove what is already known. The specifics of my recommendation follow language in paragraph (b) of Option 2 of the Staff Memorandum[9] and track provisions of the 2023 Merger Guidelines that also articulate such a presumption.[10]

I would further recommend a provision to a California statue that explicitly notes that, despite some language, the statute is not limited to horizontal mergers involving sellers and products, that is, horizontal mergers. Rather, the statute is universally applicable to mergers and acquisitions generally, sometimes requiring adaptation of the provisions. My proposed language would specifically identify labor markets (where in addition to wages, working conditions and other matters are implicated in competition effects), vertical mergers (those between stages of production), mergers involving platforms (as in the tech sector) are all covered, mergers involving potential and nascent competitors (those positioned to quickly enter, as well as others with the capability of evolving into competitors), as well as any others despite not being enumerated.

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[6] These probabilities are discussed in J.Kwoka and T. Valletti, "Confonting Consummated Mergers", Antitrust Law Journal, forthcoming

[7] Study Group Report, p. 18.

[8] Ibid.

[9] Staff Memorandum, p. 5-6.

[10] Merger Guidelines, Fderal Trade Commission and the Department of Justice, 2023, p. 5-6.

III. RECOMMENDED MERGER CONTROL STATUTE

In this section, I set out the exact language of the merger control statute that I recommend, incorporating all of my specific recommendations for language and substance modifications to the Clayton Act.

(A) No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital, or acquire the whole or any part of the assets of another person where the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be to create an appreciable risk of materially lessening competition more than an insignificant amount, or create or tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state.

(B) A merger that may produce a firm controlling an undue percentage share of the relevant market and result in a significant increase in the concentration of firms in that market shall be deemed to lessen competition to a not insignificant degree..

(C) All parts of this Act are to be understood to apply, with appropriate adaptation as necessary, to labor and other input markets, vertical mergers, to platform mergers, mergers involving potential and nascent competitors, and other mergers without limitation.

IV. CONCLUSIONS

This proceeding offers an important opportunity for the State of California. The state can fashion a merger control statute best suited for the state, one that builds in a careful, incremental, but important manner on all that has preceded under existing statutes and enforcement and learned from them.

I have offered recommendations designed in accordance with that objective. My recommendations adopt the basic framework of the Clayton Act, altering language only to restore its intended standard, and then incorporating key Supreme Court guidance for operationalizing the law. I believe these changes are both necessary and sufficient for California to have merger control measures that meet this moment.

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Editorial Board, Journal of Industrial and Business Economics

Previous Academic Positions:

Professor of Economics, George Washington University, 1981-2001
    Columbian Professor, 2001
    Research Professor, 2001-2003
Faculty Associate in Public Policy, George Washington University, 1983-2001
Visiting Professor of Economics, Harvard University, 1994-95
Visiting Associate Professor of Economics, Northwestern University, 1980-81
Assistant Professor of Economics, University of North Carolina at Chapel Hill, 1972-75
Instructor, Lecturer in Economics, University of Pennsylvania, 1970-72

Previous Professional Positions:

Chief Economist to the Chair, Federal Trade Commission (2021-2022)
Board of Directors and Senior Fellow, American Antitrust Institute (1999-2021)
Academic Advisory Board, Open Markets Institute (2019-21)
Non-Governmental Advisor, International Competition Network (2010-21. 2023-present)
Advisory Board, Competition Policy International (2020-21)
Member, Advisory Council to the Competition Commission of Mauritius, 2012
Guest Scholar, Amsterdam Center for Law and Economics, University of Amsterdam, Fall 2008
ENCORE Fellow, University of Amsterdam, 2003-09
General Editor, Review of Industrial Organization, 2001-04
Vice President, Southern Economic Association, 2000-02
Fellow, Center for Business and Government, Kennedy School, Harvard, Summer 2000
Founder and Co-Director, GWU Research Program on Industry Economics and Policy, 1996-2001
Guest Scholar, Brookings Institution, 1995
Special Assistant to the Chief, Common Carrier Bureau, Federal Communications Commission, 1987-88
Associate Editor, Journal of Industrial Economics, 1990-95, 1998-2001

President, Industrial Organization Society, 1998-99
Board of Editors, Journal of Media Economics: 1987-96
Advisory Board, Antitrust Law and Economics Review: 1985-90
Economist, Economic Policy Office, Department of Justice Antitrust Division, 1985
Economist, Bureau of Economics, Federal Trade Commission, 1975-81
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Ph.D. in Economics, University of Pennsylvania, 1972
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PUBLICATIONS

Books:

Antitrust Economics in a Time of Upheaval, co-edited with T. Valletti and L. White, CPI Press, 2023

Controlling Mergers and Market Power: A Program for Reviving Antitrust in America, CPI Publishing, 2020

Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy, MIT Press, 2015, second printing 2018

The Antitrust Revolution, co-edited with Lawrence J. White:
- 7th ed., Oxford University Press, 2019
- 6th ed., Oxford University Press, 2014
- 5th ed., Oxford University Press, 2009
  - Translated into Chinese by Ping Lin and X. H. Zang, Economic Science Press of China, Beijing (2008)
- 4th ed., Oxford University Press, 2004
  - Translated into Chinese by Ping Lin and X. H. Zang, Economic Science Press of China, Beijing (2008)
- 3rd ed., Oxford University Press, 1999
- 2nd ed., HarperCollins, 1994
- 1st ed., Scott, Foresman, 1989.

Power Structure: Ownership, Integration, and Competition in the U.S. Electricity Industry, Kluwer, 1996.

Articles:

"Confronting Consummated Mergers: An Inquiry into Policy and Practice," with T. Valletti, Antitrust Law Journal, forthcoming

"Revisiting Structural Remedies," Antitrust, Fall 2024

"Inherently Stable Cartels: Economics and Policy," Robert H. Lande Festschrift, University of Baltimore Law Review, 2024

"Unscrambling the Eggs: Breaking Up Consummated Mergers and Dominant Firms," with T. Valletti, Industrial and Corporate Change, August 2021.

"The Promise and Perils of Conduct Remedies in Merger Review," in Albert A. Foer Liber Amicorum, Nicholas Charbit, ed., Concurrences, New York, 2020.

"Raising Rivals' Costs by Customer Diversion: The Case of Airline Baggage Fees," with P. Wang, Journal of International Economics and Business," v. 17, Issue 3, 2020.

"You Say You Want an Antitrust Revolution? The Paradox of Modern Merger Control," Antitrust Bulletin, Summer 2020.

"The 'antitrust revolution' and *The Antitrust Revolution*: A perspective from the inside," with L.J. White, Antitrust Bulletin, Summer 2020.

"Merger Remedies: Firm Incentives versus Agency Objectives," in Remedies in EU Competition Law: Substance, Process, and Policy, Damien Gerard and Assimakis Komninos, eds. Wolters Kluwer, 2020.

"Second Thoughts on Double Marginalization," with Margaret Slade, Antitrust, Spring 2020.

"Strategic Responses to Competitive Threats: Airlines in Action," with B. Batkeyev, Review of Industrial Organization, February 2019.

"Non-Price Effects of Mergers: Issues and Evidence," with S. Kilpatrick, Antitrust Bulletin, April 2018

"The Effects of Mergers on Innovation: Economic Framework and Empirical Evidence," in The Roles of Innovation in Competition Law Analysis, Paul Nihoul and Pieter Van Cleynenbreuge, eds., Edward Elgar, 2018.

"The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?" Antitrust Law Journal, December 2017

"Merger Remedies: An Incentives/Constraints Framework," Antitrust Bulletin, June 2017

"From the Fringe to the Forefront: Low-Cost Carriers and Airline Price Determination," with K. Hearle and P. Alepin, Review of Industrial Organization, March 2016.

"The Changing Nature of Efficiencies in Mergers and in Merger Analysis," Antitrust Bulletin, September 2015.

"Predicting Merger Outcomes: The Accuracy of Stock Market Event Studies, Market Structure Characteristics, and Agency Decisions," with C. Gu, Journal of Law & Economics, August 2015.

"Structure, Conduct, Policy, and Performance: The 'Simple Model' of F. M. Scherer," Journal of Industrial and Business Economics, March 2014.

"Rockonomics: The Ticketmaster-Live Nation Merger and the Rock Concert Business," in The Antitrust Revolution, J. Kwoka and L. White, eds., 2014, revised 2019

"Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes," Antitrust Law Journal, v. 78, n. 3, 2013.

"Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement," with Diana Moss, Antitrust Bulletin, December 2012

"Mergers That Eliminate Potential Competition," Research Handbook on the Economics of Antitrust Laws, Einer Elhauge, ed., Edward Elgar, 2012.

"Reflections on the Tenth Anniversary of the Antitrust and Regulatory Update," Review of Industrial Organization, December 2011

"The Cost Structure of Regional Transmission Organizations," with Daniel Greenfield, Energy Journal, v. 32, n., 2011.

"Price Spikes in Energy Markets: 'Business by Usual Methods' or Strategic Withholding?" with Vladlena Sabodash, Review of Industrial Organization, May 2011.

"The Price Effect of Eliminating Potential Competition: Evidence from an Airline Merger," with Evgenia Shumilkina, Journal of Industrial Economics, December 2010.

"Incentive Regulation, Service Quality and Standards in U.S. Electricity Distribution," with Anna Ter-Martiroysan, Journal of Regulatory Economics, December 2010.

"Do Mergers Improve Efficiency? Evidence from Restructuring the U,S. Electric Power Sector," with Michael Pollitt, International Journal of Industrial Organization, November 2010.

"Divestiture Policy and Operating Efficiency in U.S. Electric Power Distribution," with Michael Pollitt and Sanem Sergici, Journal of Regulatory Economics, June 2010.

"Competition Policy and the Transition to a Low-Carbon, Efficient Electricity Industry," with Diana Moss, Electricity Journal, August-September 2010.

"The U.S. Auto Industry Under Duress: Fit, or Finished?" Competition Policy International, Autumn 2009.

"Restructuring the U.S. Electric Power Sector: A Review of Recent Studies," Review of Industrial Organization, May 2008.

"Eliminating Potential Competition," Issues in Competition Law and Policy, Dale Collins, ed., American Bar Association, 2008.

"The Proposed Merger of United Airlines and US Airways," in A Revolucao do Antitruste no Brasil, Cesar Mattos, ed., Sao Paolo, Editora Singular, 2nd ed., 2008 (Portuguese).

"Making Markets Work," with Kamen Madjarov, Electricity Journal, November 2007.

"F.M. Scherer," in Pioneers of Industrial Organization, W.G. Shepherd and H. W. de Jong, eds., Edward Elgar, 2007.

"The Role of Competition in Natural Monopoly: Costs, Public Ownership, and Regulation," Review of Industrial Organization, August-September 2006.

"Electric Power Distribution: Economies of Scale, Mergers, and Restructuring," Applied Economics, Nov. 2005.

"The FTC and the Professions: A Quarter Century of Accomplishment and Some New Challenges," Antitrust Law Journal, 2005.

"Networks and Natural Monopoly," in Network Access, Regulation, and Antitrust, Diana Moss, ed., Routledge, 2005.

"Freight Railroads," with L. J. White, in Network Access, Regulation, and Antitrust, Diana Moss, ed., Routledge, 2005.

"The Comparative Advantage of Public Ownership: Evidence from U.S. Electric Utilities," Canadian Journal of Economics, May 2005.

"Dynamic Adjustment in the U.S. Higher Education Industry," with Christopher Snyder, Review of Industrial Organization, May 2004.

“A Study in Merger Enforcement Transparency: The FTC’s Cruise Merger Decision and the Presumption Governing High Concentration Mergers,” with Warren Grimes, Antitrust Source, May 2003.

"The U.S. Automobile Industry: Overtaking an Oligopoly," in Industry Studies, Larry Duetsch, ed., Prentice-Hall, 3rd ed., 2002; 2nd ed., 1998; 1st ed.,1993

“Twenty-five Years of Deregulation: Lessons for Electric Power,” Loyola University Chicago Law Journal, Summer 2002.

“Governance Alternatives and Pricing in the U.S. Electric Power Industry,” Journal of Law, Economics, & Organization, April 2002.

“Vertical Economies in Electric Power: Evidence on Integration and Its Alternatives,” International Journal of Industrial Organization, May 2002

“Non-Incumbent Competition: Mergers Involving Constraining and Prospective Competitors,” Case Western Reserve Law Review, Fall 2001.

“Automobiles: The Old Economy Meets the New,” Review of Industrial Organization, August 2001.

“The New Industrial Organization and Small Business,” with L. J. White, Small Business Economics, February 2001.

"Commitment to Competition: An Assessment of Antitrust Enforcement Budgets," IOS Presidential Address, Review of Industrial Organization, June 1999.

"Manifest Destiny? The Union Pacific-Southern Pacific Railroad Merger," in The Antitrust Revolution, with L. J. White, 4th ed., 2004; 3rd ed., 1999.

"Herfindahl Concentration with an Import Fringe and with Supply Constraints," Review of Industrial Organization, August 1998.

"Transforming Power: Lessons from British Electricity Restructuring," Regulation, Summer 1997

"The Price Effects of Bidding Conspiracies: Evidence from Real Estate Auction 'Knockouts'," Antitrust Bulletin, Summer 1997.

"Altering the Product Life Cycle of Consumer Durables: The Case of Minivans," Managerial and Decision Economics, January/February 1996.

"The Sales and Competitive Effects of Styling and Advertising Practices in the U.S. Automobile Industry," Review of Economics and Statistics, November 1993.

"Implementing Price Caps in Telecommunications," Journal of Policy Analysis and Management, Fall 1993.

"Regulation and Deregulation American Style," Sosyal Bilimler Dergisi, Fall 1993

"The Effects of Divestiture, Privatization, and Competition on Productivity in U.S. and U.K. Telecommunications," Review of Industrial Organization, no. 1, 1993

"The Effects of Divestiture, Privatization, and Competition on Productivity in U.S. and U.K. Telecommunications: A Briefer Reply," in Review of Industrial Organization, 1993.

"Market Segmentation by Price/Quality Schedules: Some Evidence from Automobiles," Journal of Business, October 1992.

"The Output and Profit Effects of Horizontal Joint Ventures," Journal of Industrial Economics, September 1992.

"The American Antitrust Revolution," Consumer Policy Review, July 1992.

"Price Squeezes in Electric Power: The New Battle of Concord," Electricity Journal, June 1992.

"Productivity and Price Caps in Telecommunications," in Price Caps and Incentive Regulation in Telecommunications, M. Einhorn, ed., Kluwer, 1991.

"Price Cap Reform in Telecommunications: A Penny Saved..." Regulation, Winter 1991.

"The Effect of Market Growth and Contraction on Industry Price-Cost Margins," Eastern Economic Journal, July-September 1990.

"The Private Profitability of Horizontal Mergers with Non-Cournot and Maverick Behavior," International Journal of Industrial Organization, Fall 1989.

"International Joint Venture: General Motors and Toyota," in The Antitrust Revolution, J. Kwoka and L.J. White, eds. Scott, Foresman, 1989; 2nd ed., HarperCollins, 1994.

"Design Criteria for Incentive Regulation," in Report of D.C. Public Service Commission on Symposium, "Competition and the Regulation of Telecommunications Services in the District of Columbia," December 1988.

"Accounting for Losses: The Great Detroit Newspaper War," Journal of Media Economics, Fall 1988.

"Cooperation vs. Rivalry: Price-Cost Margins by Line of Business," with David Ravenscraft, Economica, August 1986.

"Efficiencies, Failing Firms, and Alternatives to Merger: A Policy Synthesis," with Frederick R. Warren-Boulton, Antitrust Bulletin, Summer 1986.

"Messy Merger Guidelines: A Comment," Antitrust Law and Economics Review, 1986

"The Herfindahl Index in Theory and Practice," Antitrust Bulletin, Winter 1985.

"Markets: A Magical Mystery Tour of Current Policy," Society, November/December 1984; reprinted in Thomas Swartz and Frank Bonello, Taking Sides (Duskin, 1986).

"Market Power and Market Change in the U.S. Automobile Industry," Journal of Industrial Economics, June 1984.

"Market Share Distribution and Industry Performance: A Reply," Review of Economics and Statistics, May 1984.

"Output and Allocative Efficiency Under Second-Degree Price Discrimination," Economic Inquiry, April 1984.

"Advertising and the Price and Quality of Optometric Services," American Economic Review, March 1984.

"The Limits of Market-Oriented Regulatory Techniques: The Case of Automotive Fuel Economy," Quarterly Journal of Economics, November 1983.

"Self-Regulation in Optometry: The Impact on Price and Quality," with R. Bond, J. Phelan, and I. Whitten, Law and Human Behavior, Vol. 7, Nos. 2/3, 1983.

"Monopoly, Plant, and Union Effects on Manufacturing Wages," Industrial and Labor Relations Review, January 1983.

_____, reprinted (in Spanish) in El Mercado de Trabajo y la Estructura Salarial, Centro de Publicaciones, Ministerio de Trabajo y Seguridad Social, Madrid, 1988.

"Regularity and Diversity of Firm Size Distributions in U.S. Industries," Journal of Economics and Business, October 1982.

"Does the Choice of Concentration Measure Really Matter?" Journal of Industrial Economics, June 1981.

Effect of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry, with R. Bond, J. Phelan, and I. Whitten, FTC Staff Report, September 1980.

"Establishment Size, Wages, and Job Satisfaction: The Trade-offs," in The Economics of Firm Size, Market Structure and Social Performance, Conference Proceedings, Federal Trade Commission, July 1980.

"EIS Market Share Data: Nature, Reliability, and Uses," Antitrust Law Journal, Vol. 47, No. 3, 1979.

"The Effect of Market Share Distribution on Industry Performance," Review of Economics and Statistics, February 1979.

______, excerpt in Donald Watson and Malcolm Getz, Price Theory in Action, (Houghton Mifflin, 1981).

Market Shares, Concentration, and Competition in Manufacturing Industries. FTC Staff Report, August 1978.

"Regional Distribution of the 'Subsidy' Under Federal Milk Market Regulation," in Farm Size and Regional Distribution of the Benefit Under Federal Milk Market Regulation. FTC Staff Report by David R. Fronk, May 1978.

"Pricing Under Federal Milk Market Regulation," Economic Inquiry, July 1977.

"Large Firm Dominance and Price-Cost Margins in Manufacturing Industries," Southern Economic Journal, July 1977.

"The Organization of Work: A Conceptual Framework," Social Science Quarterly, December 1976.

"Federal Milk Market Regulation: The Multiple Pricing System," Proceedings, Conference on Milk Prices and the Market System, Community Nutrition Institute, Washington, D.C., January 1976.

"Optimal Policy When Effects on Distribution are Unknown," with James C. Ohls, Public Finance Quarterly, April 1975.

Policy Essays:

"Methodology Matters: The 2017 FTC Remedies Report," CPI Chronicle. 2024

"The Next Administration Must Finish the Merger Guidelines Revision," ProMarket June 2024

What Is Bold, Old, and Necessary about the DOJ's Lawsuit Against Live Nation-Ticketmaster," Promarket, September 2023

"Revising the Merger Guidelines to Return to a Sound Economic and Legal Foundation," Promarket, June 2023

"Closing the Gap in Merger Enforcement," Promarket, June 2023

"Breaking Up Firms," with T. Valletti, CPI Chronicle, Jan 2022

"Fix It or Forget It: A 'No-Remedies' Policy for Merger Enforcement," with Spencer Waller, CPI Antitrust Chronicle, August 2021

"Competition–and Competition Policy–in Digital Markets: The House Report," with Tommaso Valletti, Competition Policy International, January 2021.

"Unscrambling the Eggs: Merger Control in the New Administration," with Tommaso Valletti, Concurrences, January 2021.

"Conduct Remedies, with 2020 Hindsight: Have We Learned Anything in the Last Decade?" CPI Chronicle, 2020

"Scrambled Eggs and Paralyzed Policy," with T. Valletti, CPI Chronicle, 2020

"Restoring Antitrust, Restoring Competition," CPI Chronicle, October 2019

"Competitive Edge: Structural Presumption in U.S. Merger Control Policy Would Strengthen Modern Antitrust Enforcement," Washington Center for Equitable Growth, 2018

"Mergers, Merger Control, and Remedies: A Response to the Vita-Osinksi Critique, Antitrust Law Journal, 2018

"U.S. Antitrust and Competition Policy amid the New Merger Wave," Washington Center for Equitable Growth, July 2017

"Squaring the Deal," Milken Institute Review, 4th Quarter, 2017

"Evidence-Based Policy in Antitrust: The Need for Ongoing Merger Retrospectives," with M. Jarsulic, ProMarket, 2017.

"One-and-a-Half Cheers for the New FTC Remedies Study," ssrn, 2017

"Mergers, Merger Control, and Remedies: A Response to the FTC Critique," ssrn 2017

"Resetting Merger Policy in the New Administration," with J. Farrell, Concurrences, 2016.

Monographs (not otherwise published:

"The Direct Costs and Benefits of US Electric Utility Divestitures," with T. Triebs and M. Pollitt, EPRG Working Paper 1024, Cambridge University, Sept. 2010.

"Investment Adequacy Under Incentive Regulation," Northeastern University Department of Economics Working Paper 09-001

"The Attack on Antitrust Policy and Consumer Welfare: A Response to Crandall and Winston," Northeastern University Department of Economics Working Paper 03-008, June 2003

"Dynamic Adjustment in the Higher Education Industry, 1955-1997," with Christopher Snyder, Northeastern University Department of Economics Working Paper 03-007, May 2003

"Unilateral Withholding: Market Power and California's Electricity Crisis," GWU Center for Economic Research Discussion Paper 01-01, May 2001

"Price Caps for Postal Service: Some Lessons and Some Limits," GWU Center for Economic Research Discussion Paper 00-03, April 2000

"The Industrial Organization and Small Business," with L. White, GWU Center for Economic Research Discussion Paper 00-02, March 2000

"Reform of the Electric Power Sector in Britain," GWU Center for Economic Research Discussion Paper 96-02, December 1996.

"The Origins and Purpose of Public Enterprise," GWU Center for Economic Research Discussion Paper 96-01, December 1996

"Privatization, Deregulation, and Competition: A Survey of Effects on Economic Performance," World Bank PSD Occasional Paper No. 27, September 1996.

"Policy and Productivity in the U.S. and U.K. Telecommunications Industries," GWU Department of Economics Discussion Paper D-9004, April 1990.

"Regulation American-Style: Heavy-Handed, Light-Handed, and (Sometimes) Off-Handed," March 1990.

"Unleashing Market Forces: Lessons from Deregulation of U.S. Industry," February 1990.

"Accounting for Losses: The Great Detroit Newspaper War," GWU Department of Economics Discussion Paper D-8809, February 1988.

"Antitrust Policy and Foreign Competition," GWU Department of Economics Discussion Paper D-8711, November 1984.

OTHER

Jerry S. Cohen Award for Best Structural Competition Article, 2019

Issue Editor, "Airline Deregulation," Review of Industrial Organization, February 2019

AAI Award for Best Antitrust Book of the Year, 2016

Jerry S. Cohen Award for Antitrust Scholarship, 2014

ABA Antitrust Section Economics Grant Program recipient, 2012-13

Distinguished Service Award (first), Industrial Organization Society, 2012

Principle organizer and Chair of Local Organizing Committee, International Industrial Organization Conferences, Northeastern University, alternate years since 2003

Award for Meritorious Service, Federal Trade Commission, 1980

Frequent interviews, quotations, and references in business and popular press.

Appearances before congressional and state legislative bodies.

Pro bono work on antitrust and regulatory matters.

Membership in:

- American Bar Association Antitrust Section
- American Economic Association
- European Association for Research in Industrial Economics
- Industrial Organization Society
- International Competition Network
- Southern Economic Association

July 2025

8/26/25 via email

Good morning, Sarah, Sharon. Sorry for the further delay in getting back to you. In response to your questions:

You asked if I had specific arguments for replacing the Clayton phrase "may be substantially to lessen competition" with the phrase "may be to create an appreciable risk or materially lessening competiton." My answer is that these changes would address obstacles to sound merger enforcement posed by debates over (a) the probability and (b) the magnitude of competitive harm that is to be prohibited.

With respect to probability, the word "may" in the Clayton Act has been elevated in federal court interpretation to require a demonstration of high likelihood, contrary to the Clayton Act's plain language and, of course, the impossibility of predicting the outcome of specific mergers with certainty. For that reason, I propose replacing the word "may" with the phrase "may create an appreciable risk" that is intended to denote the requirement only to show the possibilty--the "appreciable risk"--not the actual likelihood of the anticompetitive outcome. While neither phrase implies a particular numerical probability, I believe any court would interpret "appreciable risk" as a lower bar than a high likelihood.

My further recommendation is to replace the term "substantially" (as in "substantially..lessening competition") with the term "materially lessening competition. This would prevent the magnitude of harm from becoming the alternative to the debate over likelihood of harm, as the key impediment to enforcement under the Clayton act. That is, if "appreciable risk" is adopted, one can envision an effort to elevate what constitutes a "substantial" lessening of competiton as the new barrier to enforcement. Any beyond that, based on good economic evidence, we know that merger enforcement under the Clayton Act's has been too permissive. This change in terminology would constitute a necessary reset of the magnitude of harm justifying enforcdement.

For further discussion, let me refer to pages 2, 3, and 4 of my submitted statement.

You also ask if I believe my proposed part (C) is a necessary addition to the statute. The Clayton Act of course does not have any such provision, and its absence has not directly handicapped actions against vertical and other mergers. (I say directly since the courts have been slow to recognize potential competition mergers, vertical mergers and others as possibly anticompetitive, but this has been the result of other considerations, not so much due to the law.) I suggested this new provision (C) only because of my proposed part (B) is obviously directed at horizontal mergers. My concern is that by explicitly noting a standard only for horizontal mergers and saying nothing about other mergers, the state statute might be misinterpreted as limited only to horizontal cases. I therefore proposed to ensure the new statute's broader coverage by this language.

I agree this is a bit awkward, but have not been able to think of a good alternative.

Email 8/30/25

Hi, Sarah. I do not see these phrases as substantively different. I opted for "more than insignificant" as less legalese and therefore easier to convey to non-lawyers and not-specialists. I think that there is value in being able to explain the principles of merger enforcement in a manner that is easily understood. "More than de minimus" sounds too much like insider's language—as indeed it is.

But, to repeat, not substantively different

John

John Kwoka
Neal F. Finnegan Distinguished Professor of Economics
Northeastern University
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From: Sarah Huchel <shuchel@clrc.ca.gov>
Sent: Thursday, August 28, 2025 3:02 PM
To: Kwoka, John <j.kwoka@northeastern.edu>
Cc: Sharon Reilly <sreilly@clrc.ca.gov>
Subject: Re: CLRC comments

Thank you, John — one follow-up: do you feel “more than an insignificant amount” is much different than “more than a de minimis amount”?

MOTION PICTURE ASSOCIATION

August 1, 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 streaming sectors. These companies, plus some new market entrants 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 2025-31 on Mergers and Acquisitions. 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, which is to protect competition and consumers.

15301 Ventura Blvd., Bldg E, Sherman Oaks, CA 91345 (818) 995-6600

I. The Concentration Report Provides No Basis for Further M&A Change, Especially in the Audiovisual Sector

The CLRC was given a massive assignment in Study B-750, but it has sparse resources. To address this limitation, it hired a consultant and sought help from private sector volunteers. In announcing the formation of the private sector volunteer working groups, Memo 2023-16 indicated that "[e]ach group will prepare an *objective* (emphasis in original) report on the topic addressed by the group."[1] The memo goes on to say that the concentration working group "will be preparing an *empirically* based description of the degree and effect of business concentration in California." (emphasis supplied)[2].

Unfortunately, while the consultant and working group participants are talented and respected individuals, some of the work is neither objective nor empirical and suffers from substantial imbalance. The concentration working group is an example of this problem. Two authors are career antitrust plaintiffs' lawyers, one was a distinguished long-time antitrust prosecutor, another is an academic who focused on antitrust reform in the healthcare sector and the final member is a respected economist at the Progressive Policy Institute. There were no participants from the business community.

Given the bias, the Concentration Report unsurprisingly reads like an indictment of California's businesses. It suggests that (1) concentration levels are too high from "waves" of merger activity, (2) market entry is limited, and (3) firms routinely mistreat their workers. The comments are general, high-level and without empirical support, as discussed in detail in MPA's letter to the CLRC dated October 3, 2024.

A. The Concentration Report's Limited Treatment of the Audiovisual Sector

The 47-page Concentration Report only devotes about four paragraphs to audiovisual content. While we agree with some of the points made in the Concentration Report, we strongly disagree with its conclusion that M&A activity has left the sector overly concentrated.

We agree with the Concentration Report's conclusion that "[t]he entertainment industry is a significant engine of California's revenue and employment." MPA members continue to make substantial investments in California, creating thousands of high-paying jobs and supporting a vibrant ecosystem of talent and innovation across the state. The Report notes that "[t]he California film and television production industry produces over 700,000 jobs in California with

[1] Memo 2023-16 at page 3.

[2] Id. at page 4

nearly $70 billion in wages and brings in some $100 billion in tourism."[3]. We also acknowledge that the pandemic and the strikes in 2023 caused significant harm to the sector and Southern California's economy. This harm was exacerbated by the severe, January 2025, fires that devastated several areas of Los Angeles that were home to many entertainment workers. We are thankful for the strong leadership of Governor Newsom and the legislature in helping our sector work to recover.

We strongly disagree, however, with the conclusion on page 42 of the Concentration Report that "waves of mergers" have left the sector overly concentrated. Importantly, while the superficial descriptions of concentration in the report sound dramatic, they don't suggest actual concentration and are based on outdated data. For example, the Concentration Report argues that the "Big 6" media companies control most of the media. It identifies these six companies as Disney, National Amusements, News Corp., Sony, Comcast and Time-Warner. The citation for this reference is an undated blog post from a marketing company that appears to be from November 7, 2016. (The post speaks of AT&T's potential acquisition of Time-Warner, which closed in 2018, and has since been divested, and notes that Sumner Redstone runs National Amusements. Mr. Redstone passed away in 2020 and was succeeded by his daughter, Shari Redstone.) The post consists primarily of listing the companies owned by entertainment companies in 2016. There is no consistent data in the post for measuring the claim. Even if the claim were true in 2016, this might only mean that six companies controlled 51% of the "media market". This translates into merely 8.5% each, which is not a large market share. Assuming the other 49% is controlled by companies smaller than the "Big 6", the overall market would not be concentrated.

Elsewhere in the same paragraph, the report claims that "[t]he three largest mega-entertainment companies" are "Comcast, Disney and Netflix," but the report does not provide any market share data for these companies or for any of the others mentioned above. Further, the report fails to note significant new entrants in the sector such as Amazon Studios, Apple Studios and You Tube TV as well as new competition from social media platforms such as Tik Tok, Instagram and You Tube. The reality is that this vibrant sector now includes major new studio entrants like MPA member Amazon Studios but also others like Apple Studios, innovative distribution platforms such as YouTube TV, and even rapidly evolving content ecosystems on social media sites like TikTok, Instagram, and the broader YouTube platform, all vying for audience attention and content.

[3] Concentration Report at page 39. These employment and wage figures appear to include direct and indirect employment. When limited to direct employment and wages, the figures are smaller and total about 258,860 jobs with $42.6B+ in wages.

B. Response: Audiovisual Sector Economic Report

To provide a more rigorous and scientific review of the competitiveness of the audiovisual sector, we hired Compass Lexecon, a respected economics firm, to review industry data on key indicators of competitiveness in the market. The firm's report is attached to this letter as Exhibit A.

The report analyzes key metrics commonly used by economists to assess the competitive health of industries including prices, output, quality, innovation and entry. It concludes that the audiovisual market is dynamic and exhibits signs of being highly competitive. Importantly, it finds clear evidence that new entrants and technologies can quickly gain market share. This dynamism and competition provide significant benefits to consumers.

It also concludes that the audiovisual labor market, where workers are represented by at least 45 unions, functions in a healthy manner and provides benefits to workers.

The report begins with a section on industry background. It explains the key stages of content production and distribution. It then outlines the industry participants and explains the sector's key role in California's economy.

The report then explores the role of entry and innovation in the sector. It details significant innovations over the last 25 years along with substantial new entry into the sector. New entrants include Netflix, Amazon Studios, Apple Studios and Apple TV+, and over 200 new streaming sites by a vast array of companies.

The report then examines output and quality in the sector. It finds that the amount of content has generally increased over time except for reductions associated with the pandemic and the 2023 strikes. It also finds that quality has increased via new innovations such as 4K, HDR, advanced sound processing, content personalization algorithms and improved user interfaces.

Finally, the report analyzes prices and labor markets. It finds that prices are competitive and have been declining or relatively flat when adjusted for inflation (even when not accounting for improvements in quality, which would result in even lower inflation-adjusted prices). It also finds that the industry pays wages above the national average, that wages have been growing faster than the national average, and that over 45 unions effectively represent the workers.

We submitted the report to you on October 3, 2024, and then brought the economist who authored the report to the CLRC hearing on October 10, 2024, and made him available to you for questions.

In sum, at least with respect to the audiovisual sector in California, the report demonstrates that the audiovisual industry is competitive with strong entry, innovation, output and competitive prices. The Concentration Report, on the other hand, is a biased and superficial indictment that relies heavily on outdated and suspect evidence such as the 2016 blog post from a marketing firm.

II. The "Vast Majority of Mergers" Are Procompetitive and California Effectively Enforces Existing Substantive Law

Memo 25-31 describes four substantive changes to state antitrust law to address alleged deficiencies in M&A enforcement that led to the alleged "waves of mergers" that purportedly increased concentration. However, as noted above, the Concentration Report doesn't support the need for new substantive state rules.

Nor does the report prepared by the mergers and acquisitions (M&A) working group created by the CLRC and its consultant (M&A Report). Indeed, the M&A Report admits that, "[t]he lack of a specific state merger statute does not prevent state attorneys general from challenging mergers relying on the Clayton Act. They do so, sometimes in conjunction with federal agencies . . . but sometimes independently."[4] In fact, state attorneys general can investigate deals, issue subpoenas, compel production of evidence, and challenge mergers in court–with or without federal assistance. This is particularly true in California, where the Attorney General ("AG") has challenged several recent mergers, including Kroger/Albertsons, T-Mobile/Sprint, and Microsoft/Activision, and investigated countless others. The AG has even successfully challenged mergers under current law when they were already approved by the FTC. See *California v. American Stores*, 495 U.S. 271 (1990) (unanimous Supreme Court win for California). There is no evidence that the AG has failed to prosecute proposed acquisitions due to the lack of a state version of the Clayton Act. Instead, in comments leading up to the FTC and DOJ's 2023 Merger Guidelines, the AG described the states as "co-enforcers of the nation's antitrust laws" and touted states' "strong track record of merger enforcement."[5]

The M&A Report also admits that the "vast majority of mergers raise no competitive concerns."[6] Even progressive former FTC Chair Lina Khan explained that "any given year, the antitrust agencies get anywhere between 1,500 and 3,000 merger filings. Of that number, 98% go through

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[4] M&A Report at 16.

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

[6] M&A Report at 2.

without even second questions being asked by the agencies[.]"[7] Empirical economic research underscores this, showing that most mergers drive innovation and competition.[8]

III. No Changes to Substantive State M&A Law Should be Proposed Until the Impact of Five Major New M&A Changes Can be Analyzed in California

Even if there were evidence of undue concentration in California, substantive changes are premature. There have been five major antitrust changes affecting M&A deals in California over the last two years. Rather than rushing into further changes, California policy makers should give these five major changes time to function, and their success should be thoughtfully analyzed before any additional changes are considered. The five major changes are described below.

1. December 18, 2023 - Federal Antitrust Agencies Announce Major New Merger Guidelines

First, on December 18, 2023, the Biden Administration's Federal Trade Commission (FTC), led by Chair Lina Khan, and the U.S. Department of Justice Antitrust Division (DOJ), led by Jonathan Kanter, jointly issued the 2023 Merger Guidelines, "which describe factors and frameworks the agencies utilize when reviewing mergers and acquisitions."[9]

According to the agencies, "[t]he 2023 Merger Guidelines are the culmination of a nearly two-year process of public engagement and reflect modern market realities, advances in economics and the law and the lived experiences of a diverse array of market participants." They are intended to protect workers and consumers from "harmful corporate consolidation."[10] The new guidelines are a significant revision of the 2010 guidelines completed during the Obama Administration.

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[7] Lina M. Kahn, "Remarks of FTC Chair Lina M. Khan, Economic Club of New York," Interview by Peter Orszag (July 24, 2023), available at https://www.youtube.com/watch?v=X7u3JwSfHZY
[8] Robert Kulick, Ph.D., and Andrew Card, "Mergers Industries, and Innovation: Evidence from R&D Expenditure and Patent Applications," NERA Economic Consulting, at 29, *available at* https://www.uschamber.com/assets/documents/NERA-Mergers-and-Innovation-Feb-2023.pdf ("[M]ergers, on average, are associated with an increase in R&D expenditure of between $9.27 billion and $13.52 billion per year in the most R&D intensive industries.").
[9] https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines
[10] Ibid.

Importantly, on February 18, 2025, the Trump Administration's antitrust enforcers, including new FTC Chair Andrew Ferguson, stressing the need for continuity, announced that the FTC and DOJ would continue to follow the 2023 Merger Guidelines and had no intent to change them.[11]

2. January 1, 2024 - New Standards for Grocery and Pharmacy Deals

Second, under AB 853, significant retail grocery and pharmacy M&A deals reached after January 1, 2024, must be reported to the AG's Office for review at least 180 days prior to completion. This change is intended to foster competition in the grocery and pharmacy markets for the protection of consumers and workers.

3. April 1, 2024 - New Standards for Healthcare Deals

Third, under the Health Care Quality and Affordability Act, all healthcare M&A activity after April 1, 2024, must be submitted for review by the newly established Office of Health Care Affordability (OHCA). The OHCA will analyze the potential merger and its impact on competition and drug costs, for the benefit of consumers and workers.

4. February 10, 2025 - HSR Filing Requirements Greatly Expanded

Fourth, starting February 10, 2025, parties engaged in M&A activity valued at over $126.4M must supply the FTC and DOJ with vastly more information than ever provided under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. In a statement announcing the massive changes, Chair Lina Khan and the Democratic Commissioners noted that "[t]his marks the first time in 46 years that the agencies have undertaken a top-to-bottom review" of the pre-merger materials businesses must supply to the federal agencies.[12] They went on to say that this change "marks a generational upgrade that will sharpen the antitrust agencies' investigations and allow us to more effectively protect against mergers that may substantially lessen competition or tend to create a monopoly."[13]

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[11] Memorandum from Chairman Andrew N. Ferguson to FTC Staff Regarding Merger Guidelines, February 18, 2025, https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-memo-re-merger-guidelines.pdf; Memorandum from Acting AAG Omeed Assefi to DOJ Antitrust Division Staff Regarding Use of the 2023 Merger Guidelines, February 18, 2025, https://www.justice.gov/atr/media/1389861/dl?inline; https://www.ftc.gov/news-events/news/press-releases/2025/02/ftc-chairman-andrew-n-ferguson-announces-ftc-dojs-joint-2023-merger-guidelines-are-effect

[12] https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-khan-slaughter-bedoya-final-premerger-notification-form-hsr-rules-fy2023-hsr-report at page 1.

[13] Id. at page 6.

The new filing requirements include:

- **Additional Deal and Competition Documents**: Expanded to include (i) transaction-specific documents created by or for the acquiring party's "supervisory deal team lead," in addition to its directors or officers and, (ii) where the filing parties have or anticipate having overlapping products or services, certain ordinary course documents created within one year of filing that discuss competitive or market information for the overlapping areas that were shared with the CEO or Board.

- **Narrative Responses on Transaction Details, Competitive Overlaps:** Filings will now require narrative responses addressing (i) each party's transaction rationale; (ii) the acquiring party's operating businesses and products and services (current and planned), including whether any compete with those of the other filing party; (iii) the acquiring party's pre-existing diagrams on deal structure; (iv) direct supply relationships between the parties, if any; and, critically, (v) for transactions where the parties have or anticipate having overlapping products or services, additional narrative and geographic data regarding the same.

- **Expanded Company Disclosures**: Filings now call for additional disclosures relating to (i) the acquiring party's ownership structure, directors and officers, and minority holdings and holders; (ii) both parties' foreign subsidies and defense or intelligence contracts; and (iii) the acquired person's prior acquisitions (in addition to just the acquirer's) meeting certain requirements.

5. SB 25 - Greatly Improves Timely Access for AG to Newly Expanded HSR Filings

As noted in the M&A Report and more recently in testimony from the Uniform Law Commission (ULC) to the CLRC, the ULC has completed and recommended to all states the Antitrust Pre-Merger Notification Act (Act) to facilitate an efficient state review of national mergers in a manner that reduces costs for all parties and enhances certainty for the business community. The Act has been introduced in California as SB 25, by Senate Judiciary Chair Tom Umberg. It passed the senate by a vote of 36-1 and passed through Assembly Judiciary by a vote of 10-0. The Act has already passed in Washington State and Colorado. The ULC plans further introductions next year with the goal of enactment in all fifty states and multiple territories.

Under the federal Hart Scott Rodino Antitrust Improvements Act, any party to a merger with a transaction value over $126.4M must file a detailed form and other materials with the federal antitrust enforcers (HSR filing). While the states may enforce the Clayton Act, they are not entitled to access the HSR filing absent party consent or subpoenas/litigation. As a result, the states are often months behind the federal government in merger review and cooperation between the states is impaired. At the same time, businesses that seek certainty may be surprised after receiving federal approval to be later sued by a state or group of states. For example, in *California v. American Stores*, 495 U.S. 271 (1990), California successfully sued and achieved divestitures years after the FTC had already approved the merger.

The ULC Act and SB 25 solve these problems by requiring a party that makes an HSR filing to make the same filing with the AG in the state of its principal place of business and any state where it had over $25.28M in net sales the prior year. This ensures that states where the merger may have an impact, get early notice and transaction details. They can cooperate in the investigation and save taxpayer money. The Act maintains the confidentiality of these filings. The goal of the Act is to enhance early review of deals that may impact certain states, reduce the litigation costs over the filings and provide all parties with enhanced deal certainty.

The Act was drafted over two years with substantial input from enforcers and businesses. The ULC had input at every meeting from three people who act as state antitrust enforcers (CA, NY, ND), the DOJ Antitrust Division, the FTC, the ABA Antitrust Law Section and multiple business lawyers.

The Act was endorsed last summer by the American Bar Association Antitrust Section, a non-partisan group of experts. This endorsement is Exhibit B. The Act was also approved unanimously last year by the California Commission on Uniform State Laws and approved by a vote of the states at the ULC Annual Meeting by a margin of 45-1. (Only Alabama voted "no." California voted "yes.")

The need for the Act has also been recognized by three of the CLRC's working group reports: the M&A Report, the Exemptions and Immunities Report and more recently by the AI Report, which states that "[e]arly information-gathering through simultaneous notification of transactions to federal and state enforcers . . . will be an important tool in furthering [the] goal of . . . more closely monitoring cloud and AI markets for potentially harmful strategic consolidation."[14]

The ULC recommends that California adopt SB 25. MPA agrees with the ABA, the ULC and the California Commission on Uniform State Laws. MPA believes SB 25 is a reasonable and moderate proposal that should be enacted in California and other states.

SB 25 and the four other changes described above should then be given an opportunity to operate before more changes are made to merger law.

[14] AI Report at page 9.

IV. Conclusion

Neither the Concentration Report nor the M&A Report provides a foundation for new substantive M&A laws in California. The state effectively enforces federal merger law under the Clayton Act. Further, there have been five major changes for M&A deals in California over the last two years that will further assist California's M&A enforcement efforts, and these changes should be given time to work. MPA supports SB 25 and the work of the California Commission on Uniform State Laws and the Uniform Law Commission. MPA strongly opposes any other change to California merger law.

Thank you for considering our concerns and comments. We hope this letter and our attached study, plus the American Bar Association's endorsement of SB 25, are helpful in your work on the antitrust study. As noted above, MPA is willing to engage constructively in your process to help ensure you receive more balanced input to ensure that changes to California antitrust law are thoughtful, fair and passable.

Sincerely,

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EXHIBIT A

An Economic Analysis of Indicators of Competition in the Audiovisual Industry

Prepared on Behalf of the Motion Picture Association

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Contents

I. INTRODUCTION

This report assesses the competitive health of the audiovisual industry by analyzing economic outcomes, and concludes that the audiovisual industry is dynamic and shows signs of being a highly competitive industry.[1]

One approach to assessing competition is based on an empirical analysis of economic outcomes. This report analyzes metrics on outcomes that are commonly used by economists to assess the competitive health of an industry—including prices, output, quality, innovation, and entry. A hallmark of a competitive industry is that products that provide more value to consumers thrive and grow in the marketplace and gain share quickly, a key characteristic present in the audiovisual industry. Most recently, this dynamic is clearest with the growing share of time consumers spend with content from online streaming services and short-form video content.

The empirical evidence supports the conclusion that the audiovisual industry is dynamic and exhibits signs of being highly competitive, providing numerous benefits to consumers of audiovisual content. Furthermore, the empirical evidence is consistent with the conclusion that the audiovisual labor market is functioning in a healthy manner, which provides benefits to workers within the industry. The remainder of this report is structured as follows:

- Section II provides an overview of the audiovisual industry, including a discussion of the key stages of content production and distribution, as well as a summary of the industry participants, which encompasses tens of thousands of companies in the United States. Section II also documents the economic importance of the audiovisual industry in California.
- Section III presents economic evidence supporting that the audiovisual industry is dynamic and exhibits signs of a highly competitive industry. Over

[1] This report focuses on motion pictures, television, and other audiovisual content, hereafter collectively termed "the audiovisual industry." Other organizations within the entertainment industry, such as gaming, music, and live events, are not within the scope of this report. However, these sectors of the entertainment industry also compete for the attention of consumers of audiovisual content and for advertiser spending.

the past decade, significant technological advances have driven substantial changes in how content is produced, who is producing content, and how it is being distributed to consumers. The empirical evidence on outcomes in the audiovisual industry—including entry and growth in OTT services, competition from short-form video, increasing output and quality, and competitive pricing in the audiovisual industry—supports the conclusion that the audiovisual industry is well-functioning, dynamic, and exhibits signs of being a highly competitive industry.

- Section IV addresses the competitive health of the audiovisual labor market, by analyzing key metrics, including employment levels and wages. New distribution technologies and services have lowered barriers to entry for entertainment talent to reach consumer audiences. Unionization in the audiovisual industry gives workers collective bargaining power to negotiate employment terms with production and streaming companies. These factors have contributed to stable employment levels and stable or increasing wages in the audiovisual industry.
- Section V concludes, finding 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.

II. Industry Background

The audiovisual industry encompasses a wide range of content that is created and distributed to consumers. This background section provides a summary of audiovisual content production and distribution, as well as a discussion of the numerous firms and organizations that participate in the industry. An important phenomenon in the audiovisual industry throughout its history is entry of and competition from new forms of production and distribution, including most recently short-form, user-generated video. These points are introduced in this section and are discussed in more detail in Section III. Finally, this section summarizes the importance of the audiovisual industry in California, noting that it contributes billions of dollars in spending and about two hundred thousand jobs annually in the state.

A. Key Stages of Content Production and Distribution

There are a handful of key stages to the production and distribution of motion pictures and television (TV) content in the United States:[2]

- **Preparation and Research & Development (R&D).** This stage includes pre-greenlight activities including developing a script, packaging talent, budgeting production scenarios, and developing visual presentations required to pitch and greenlight the project. It also includes R&D of new technologies that might be used in the project.
- **Pre-production.** This stage covers the steps after greenlighting involved in defining detailed plans and processes for production. It includes virtual production and previsualization, which are used to plan more efficient principal photography and ensure the seamless combination of physically and digitally produced elements.
- **Production.** This stage involves capturing and creating content on set, on location, in animation, and visual effects. It includes lights, cameras, sets, talent, grips, green screens, and large media files.
- **Post-production and Mastering.** Often the lengthiest part of the creation process, this includes steps such as editing, adding visual effects, mixing/editing audio, color grading, and creating international masters.
- **Marketing and Distribution.** This stage includes preparing and delivering numerous variants of the content to the owner's distribution partners for

[2] MPA, "The American Motion Picture and Television Industry – Creating Jobs, Trading Around The World," 2022, available at https://www.motionpictures.org/wp-content/uploads/2024/03/MPA_Economic_contribution_US_infographic-1.pdf, p. 1; MovieLabs, "The Evolution of Media Creation – A 10-Year Vision for the Future of Media Production, Post and Creative Technologies," available at https://movielabs.com/prodtech/ML_2030_Vision.pdf, p. 8.

> onward delivery to consumers. Delivery includes theatrical distribution, physical media (optical disc), multichannel video programming distributors (MVPDs), broadcasters, and over-the-top (OTT) internet-based distribution services, such as audiovisual streaming services.

In addition, the rapidly changing audiovisual landscape has given rise to other types of content, including short-form audiovisual content.[3] While the creation process for short-form content can follow some of the same production processes described above, content can also be created more rapidly from a user filming a short video and posting it online. In contrast to such short-form content production, longer-form TV and film content require substantially higher production costs, resulting in substantially more uncertain returns and risk.[4] Popular platforms that distribute short-form content include YouTube, TikTok, Facebook, and Instagram.[5] Recent trends suggest that consumers' preferred length of short-form videos is a

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[3] While there is not a precise delineation between short- and long-form content, audiovisual content of a few minutes in length or shorter are often considered short-form. See Tamilore Oladipo, "Ask Buffer: What is Short-Form Video, and How Can You Use It?," *Buffer*, May 30, 2023, available at https://buffer.com/resources/short-form-video/.

[4] Vogel (2020) notes that "[m]any, if not most, films do not earn any return, even after taking account of new-media revenue sources; it is the few big winners that pay for the many losers […] [I]n a statistical sense, most major-distributed films do no better than to break even financially, with extreme deviations from this mean in both directions. […] Movies, in other words, have a low probability of earning high revenues, and a high probability of earning low revenues. […] This leads to an estimate that perhaps 10% of movies (released by the majors) earn about 85% of the industry's total profits and that exhibition on a large number of screens can as easily lead to rapid failure as to quick and great success." See Harold L. Vogel, Entertainment Industry Economics, *Cambridge University Press,* 10th ed., 2020, pp. 163-167.

[5] Facebook and Instagram are considered social media platforms, but users are spending much of their time on these platforms viewing video content. In 2023, Facebook users' share of minutes spent on video was 46.9 percent, and Instagram's was 55.9 percent. See Variety VIP+, "The Race to Replace TV: A deep-dive data exploration of the new viewing trends revving up U.S. screens," Special Report, First Edition, July 2024, available at https://read-vip.variety.com/html5/reader/production/default.aspx?pubname=&edid=a535829d-aadc-4265-8ade-05912388ed23, p. 11.

TikTok is a social media platform that allows users to create, share, and discover short-form audiovisual content across a wide range of genres, including comedy, music/dance, and education. See Griffin LaFleur, "TikTok," *TechTarget*, available at https://www.techtarget.com/whatis/definition/TikTok.

few minutes.[6] As described in greater detail in the following section, audiovisual content distributed through social media and other OTT providers—referred to as social video or short-form content—is growing rapidly and competing with more traditional audiovisual content distribution.

B. Industry Participants

The audiovisual industry consists of several key types of industry participants that work to bring audiovisual content to consumers:

- **Content Creators.** Production studios create motion picture and television audiovisual content through pre- and post-production processes. They include Walt Disney Company, Sony Pictures, Warner Bros, Paramount, and Universal,[7] as well as numerous other production studios, such as AGC Studios, A24 films, Miramax, ArcLight Films, and Lionsgate Films, each of which produce a variety of motion pictures, including many that are commercially and/or artistically successful.[8] Recently, streaming platforms,

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YouTube hosts video content of varying length, including full-length feature films that are available as part of its premium subscription plans, and YouTube Shorts that are videos that are no longer than 60 seconds. See YouTube, "YouTube Premium & streaming limits," available at https://support.google.com/youtube/answer/7361503?hl=en&co=GENIE.Platform%3DDesktop; Extreme, "Succeeding with YouTube Shorts: a comparison with TikTok and Instagram Reels," October 1, 2024, available at https://madebyextreme.com/insights/youtube-shorts-quick-guide.

[6] One survey found that 55 percent of respondents mostly watched videos on social media that are a "few minutes long," 16 percent of respondents mostly watched videos that are "30 minutes or more," and 29 percent mostly watched videos that are "60 seconds or less." See Variety VIP+, "The Race to Replace TV: A deep-dive data exploration of the new viewing trends revving up U.S. screens," Special Report, First Edition, July 2024, available at https://read-vip.variety.com/html5/reader/production/default.aspx?pubname=&edid=a535829d-aadc-4265-8ade-05912388ed23, p. 21.

[7] Harold L. Vogel, Entertainment Industry Economics, *Cambridge University Press,* 10th ed., 2020, pp. 97-98.

[8] Independent File & Television Alliance, "Membership Directory," available at https://ifta-online.org/membership-directory/; Harold L. Vogel, Entertainment Industry Economics, *Cambridge University Press,* 10th ed., 2020, pp. 97-98; The Economist, "The rise and rise of A24, a champion of storytelling on screen," September 1, 2022, available at https://www.economist.com/culture/2022/09/01/the-rise-and-rise-of-a24-a-champion-of-storytelling-on-screen.

such as Netflix, Amazon Studios, and Apple Studios, have entered the production-side of content creation, often financing and producing full-length, high-budget motion pictures.[9] And, as described earlier, audiovisual content is also created on a smaller scale by individuals and small groups.

- **Exhibitors, MVPDs, Streaming Services, and Other OTT Distribution.** There are hundreds of services that distribute audiovisual content to consumers through multiple channels, including traditional movie theaters, cable and satellite video services, OTT streaming services, and other OTT distribution such as social media platforms. Movie theater "exhibitors" include Regal Entertainment Group, AMC Entertainment, Cinemark USA, Marcus Corp,[10] and independent local theaters.[11] There are numerous MVPDs, including services from Comcast Xfinity, Charter Spectrum TV, Cox, DISH, DirecTV, and Verizon FiOS.[12] Virtual MVPDs (or vMVPDs) services include YouTube TV, Hulu + Live TV, DirecTV Now, Sling TV, and fuboTV.[13] Over 200 OTT streaming services exist in the marketplace including larger, well known streaming services such as Netflix, Hulu, Apple TV+, Amazon Prime, Disney+, Max, Paramount+, Tubi, and Peacock, as well as niche audiovisual OTT services such as Crunchyroll, which streams Japanese animation (anime) content, AfroLandTV and In The Black Network, which stream movies and TV shows with largely African-American-centric content, and Faithlife TV,

[9] Id.

[10] Id., pp. 96-97.

[11] See, e.g., Homero Rosas Navarrete, "Top Independent Movie Theaters in LA," *Do LA,* January 10, 2024, available at https://dola.com/p/top-independent-movie-theaters-in-la. Independent theaters are often known as smaller "mom-and-pop" theaters not owned by the major chains such as Regal Cinemas. The National Association of Theatre Owners defines independent members as companies with no more than 75 screens. See National Association of Theatre Owners, "FAQs," available at https://theatreowners.org/faqs/.

[12] Frankie Karrer, "MVPD and vMVPD: Differences & Similarities Explained," *mntn,* available at https://mountain.com/blog/mvpd-vmvpd/.

[13] Symphony AI, "Virtual Multichannel Video Programming Distributors (vMVPDs)," available at https://www.symphonyai.com/glossary/media/vmpd-virtual-multichannel-video-programming-distributor/.

which specializes in streaming Christian content.[14] Various OTT content-sharing sites and social media platforms such as YouTube, Instagram, Facebook, and TikTok have also have become important channels of content distribution. See discussion in Section III.

- **Labor Unions and Guilds.** Labor unions and guilds play an important role in the audiovisual industry by negotiating labor contract terms and compensation for their members.[15] Labor unions negotiate with content creators' bargaining organization, the Alliance of Motion Picture and Television Producers (AMPTP).[16] Some of the main labor unions include Directors Guild of America (DGA), International Cinematographers Guild (ICG), International Alliance of Theatrical and Stage Employees (IATSE), SAG-AFTRA (Screen Actors Guild merged with American Federation of Television and Radio Artists), and Writers Guild of America (WGA).[17] Members of the AMPTP, which includes members of the Motion Picture Association (MPA), negotiate with more than 45 unions, operating under 64 collective-bargaining agreements.

C. The Audiovisual Industry Plays an Important Role in California's Economy

The audiovisual industry—comprised of the companies and organizations described above—is an important industry within the state of California. A report by the California Film Commission (CFC) noted that between 2009 and 2022, the film and television industry

[14] Crunchyroll, available at https://www.crunchyroll.com/about/; AfroLandTV, available at https://www.afrolandtv.com/about; In The Black Network, "About Us," available at https://itbn.intheblacknetwork.tv/about/; Faithlife TV, available at https://faithlifetv.com/.

[15] Harold L. Vogel, Entertainment Industry Economics, *Cambridge University Press,* 10th ed., 2020, pp. 146-147.

[16] Id.

[17] Id.

employed about 200,000 people per year in California.[18] Film and television projects approved under CFC's tax credit program (Program 3.0), which represent a subset of California's film and television production, have generated a total of $7.3 billion in California in-state spending (through expenditures and wages paid) since Program 3.0 started on July 1, 2020.[19] As of June 30, 2023, projects that were approved under the 2022-2023 fiscal year contributed an estimated $3.1 billion in spending in California.[20] Similarly, MPA reported that in 2022 alone, key film and television companies paid out almost $17.5 billion to 68,235 vendors in California.[21] Since 2017, key film and television companies have paid on average $11.6 billion per year to local vendors in California.[22]

California competes with other states and countries for audiovisual production—e.g., motion picture and television series shooting locations. The economic attractiveness of California compared to other locations can be a determinative factor in how many movies and shows are produced in the state versus out of state. Primarily driven by lower production costs outside California and incentive programs offered by other states to attract studios, "decentralization" of production away from California has been occurring for many years but accelerated during the 2023 labor strikes.[23] The ongoing move away from California adversely impacts employees and companies that rely on the audiovisual industry in California.

[18] California Film Commission, "Film and Television Tax Credit Programs Progress Report," December 2023, available at https://cdn.film.ca.gov/wp-content/uploads/2024/04/Progress-Report-2023.pdf, pp. 3-6. See also analysis presented in Figure 22.

[19] Id., pp. 13-14.

[20] Id.

[21] MPA, "California – Economic Impact of the Motion Picture & TV Industry," April 2024.

[22] Id.

[23] Otis College "Report on the Creative Economy," May 2024, available at https://www.otis.edu/about/initiatives/documents/otis-college-report-creative-economy-may-2024.pdf, p. 2.

III. The Economic Evidence Shows the Audiovisual Industry Is Dynamic and Highly Competitive

A competitive industry provides benefits to consumers of the goods and services sold by firms in that industry. Competition reflects supply-side conduct that raises consumer welfare through innovation and output. A hallmark of a competitive industry is that consumers can move rapidly to products that provide more value. Thus, the competitive health of an industry and the benefits or harms to consumers can be assessed directly and reliably by analyzing economic outcomes such as prices and output in that industry. While a full consumer welfare analysis is outside the scope of this report, the empirical evidence on outcomes in the audiovisual industry—including entry and growth in OTT services that deliver content to consumers anytime, anywhere, competition from short-form video, increasing output and quality, and pricing that is consistent with a competitive industry—supports the conclusion that the audiovisual industry is well-functioning, dynamic, and exhibits signs of healthy competition.

A. The Audiovisual Industry Is Dynamic and Highly Innovative

The audiovisual industry has been, and continues to be, dynamic and highly innovative. There have been technological advances in production and distribution through a proliferation over time of different ways in which consumers can access audiovisual content. Key examples include the shift from videotape to DVD and Blu-ray, and the shift from DVD and Blu-ray to streaming services and OTT access to audiovisual content from anywhere using any device.

There has been innovation in the production and post-production of audiovisual content. In the 1980s, motion pictures began to move from film reels to digital film, which created benefits such as ease of storage, reduced storage costs, reduced production/editing costs, and allowing for higher frame rates to be filmed.[24] Moreover, advances in computer-

[24] History of Film, "Film vs Digital - Film Photography and Digital Cinematography," available at http://www.historyoffilm.net/film-making/film-vs-digital/. Notably, it was not until the early 2000s that digital films were more commercially shot and shown in cinemas. See Id.; Shelby Burr, "When did movie theaters stop using film?," *Legacy Box,* available at https://legacybox.com/blogs/analog/when-did-movie-theaters-stop-using-film; and Europa

generated imagery (CGI)—that is, the application of computer graphics technologies to generate imagery—have led to advances in visual effects for many genres of TV and film.[25] There is also an effort—known as "2030 Vision"—to advance interoperable, secure, cloud-based production technologies with the goal of enhancing efficiency and promoting competition through interoperability and reducing so-called walled gardens in the industry.[26]

The entry and growth of OTT audiovisual distribution services have significantly changed the competitive landscape. OTT services, which include companies such as Netflix, Amazon, Apple TV, Hulu, Max, and YouTube TV, as well as more niche services such as Crunchyroll, AfroLandTV, In The Black Network, and Faithlife TV, among many others, are additional ways for consumers to access audiovisual content anywhere, anytime.[27] These services allow consumers to access massive content libraries almost instantly on a wide variety of devices, both in and out of the home.

Distribution, June 22, 2006, available at https://www.europa-distribution.org/files/bruxelles/digital_cinema_figures.pdf.

[25] For examples of advancements in video CGI over the years, see Stikky Media, "The History of CGI in Movies," May 19, 2020, available at https://www.stikkymedia.com/history-of-cgi-in-movies/; and Ros Tibbs, "Timeline: A brief history of CGI in the movies," *Far Out*, February 28, 2023, available at https://faroutmagazine.co.uk/timeline-history-of-cgi-movies/.

[26] MovieLabs, "The 2030 Vision: A bold 10-year vision for the adoption of new technologies to aid in content production, post and VFX," available at https://movielabs.com/production-technology/the-2030-vision/. A few of the goals of the 2030 Vision include: (1) facilitating direct access between recording equipment and cloud storage to allow the seamless transfer of media files directly from production sets to directors, producers, and executives; (2) integrating software tools that allow artists to directly work on media files stored on the cloud services, eliminating the need to transfer files locally between machines, and the need for a powerful local machine to process artist work; and (3) streamlining the archival process of content and files by moving archive libraries onto the cloud, allowing intellectual property to be stored and retrieved easily. See MovieLabs, "2030 Vision Series - The Evolution of Media Creation," available at https://movielabs.com/prodtech/ML_2030_Vision.pdf, pp. 10, 18-29.

[27] Between July 2021 and August 2024, Nielsen reported that streaming services' share of total TV usage had grown from 28.3 percent to 41.0 percent. See Nielsen, "Amid the fragmented TV landscape, time spent with content is the best planning data there is," January 2024, available at https://www.nielsen.com/insights/2024/amid-the-fragmented-tv-landscape-time-spent-with-content-is-the-best-planning-data-there-is/; Nielsen, "The Gauge – TV viewing trends in the U.S.," available at https://www.nielsen.com/data-center/the-gauge/; Nielsen, "Streaming claims largest piece of TV viewing pie in July," August 2022, available at https://www.nielsen.com/insights/2022/streaming-claims-largest-piece-of-tv-viewing-pie-in-july/.

In addition to distribution, new entrants such as Apple, Netflix, and Amazon have had a significant impact on the marketplace through their production of content that has achieved both critical and commercial success.[28] Examples include the series *Stranger Things* (Netflix) and *The Boys* (Amazon Prime), both of which attracted millions of views within weeks of their releases.[29] Similarly, films like Apple TV's *Killers of the Flower Moon* earned critical acclaim, including 10 academy award nominations, and became one of the most watched movies across all streaming services in the first week of February 2024.[30]

From an economic perspective, OTT services, which have grown to become ubiquitous in the United States, allow subscribers to more easily start and stop service and switch to new services based on changes in subscribers' preferences and/or changes in the prices, quality, and variety of content available on the services. These factors in part

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[28] OTT services that produce content both for distribution through their own streaming service or through other streaming services include Amazon Prime Video, Apple TV+, Crackle, Discovery+, Disney+, Max, Hulu, Netflix, Paramount+, Peacock, and YouTube Premium.

[29] In 2019, *Strangers Things*' third season was viewed by a record of 26.4 million U.S. viewers during its release over the July 4 holiday weekend. *The Boys* reached an audience of 4.1 million within the first 10 days of release. See Sarah Whitten, "Nielsen says new 'Stranger Things' season had record 26.4 million US viewers in first four days," *CNBC*, July 11, 2019, available at https://www.cnbc.com/2019/07/11/stranger-things-had-record-viewership-in-first-four-days.html; Dade Hayes, "Amazon Prime Viewing Added To Nielsen, Which Reveals 'The Boys' Numbers," *Deadline*, October 21, 2019, available at https://deadline.com/2019/10/amazon-prime-viewing-added-to-nielsen-which-reveals-the-boys-numbers-1202765075/.

[30] ABC, "'Killers of the Flower Moon' is nominated for 10 Oscars including best picture, best director," available at https://abc7chicago.com/2024-oscars-killers-of-the-flower-moon-winner-academy-awards/14476601/; John-Anthony Disotto, "Killers of the Flower Moon is the most popular title on streaming this week — Apple TV Plus Original snaps the top spot from Oscars "Best Picture" rival, The Holdovers," *iMore,* February 2, 2024, available at https://www.imore.com/music-movies-tv/killers-of-the-flower-moon-is-the-most-popular-title-on-streaming-this-week-apple-tv-plus-original-snaps-the-top-spot-from-oscars-best-picture-rival-the-holdovers.

One other notable example is Netflix's *The Irishman*, which also earned 10 academy award nominations for its merits and was watched by more than 26 million Netflix accounts within its first seven days of release. See Michael Hinman, "'The Irishman' earns 10 Oscar nominations," *The Riverdale Press,* January 17, 2020, available at https://www.riverdalepress.com/stories/the-irishman-earns-10-oscar-nominations,71013; Frank Pallotta, "Here's how many subscribers watched Netflix's 'The Irishman' in its first week," *CNN,* December 11, 2019, available at https://www.cnn.com/2019/12/10/media/the-irishman-netflix-viewership/index.html.

contribute to higher churn rates incurred by OTT services.[31] In response, to compete for viewers' attention, content distributors are incentivized to create and/or procure content and provide a wide range of content to users with near-instant access and at competitive prices, including by offering ad-supported tiers at lower prices.[32]

Many of these marketplace dynamics create benefits for consumers and industry participants. The fact that the audiovisual industry has moved from physical formats to OTT formats during recent decades is the result of innovation in the industry to adapt to new technologies and consumers' changing preferences for how they access content. The move to OTT has also helped combat digital piracy, although piracy continues to be a significant problem for the industry and is a source of competition for legal sources of audiovisual distribution.[33]

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[31] As of Q1 2024, Netflix had a monthly churn rate of two percent, Apple TV+ had eight percent churn, Amazon Prime had four percent churn, and Peacock had 8.7 percent churn. For additional churn rates for OTT services, see Scott Hurff, "Churn Rates for Streaming Services: How Sticky Are Hulu, Disney+, Netflix, and Apple TV+? (Updated Q1 2024), *Churnkey*, December 13, 2023, available at https://churnkey.co/blog/churn-rates-for-streaming-services/.

According to Parks Associates, between Q1 2020 and Q3 2022, the churn rate for OTT streaming services grew from 40 percent to 45 percent (defined as subscribers who cancelled service as a percentage of the subscriber base), largely driven by high churn rates in less popular services: "Today's streamers tend to subscribe to one or more foundational services—typically Netflix, Amazon Video, or Hulu—and then subscribe to three or more additional services each offering unique and differentiated material. Consumers hold on to the services that they use the most and jump among the others, paying for a program or season and then canceling when they are finished." See Parks Associates, "OTT streaming Trends to Watch in 2022," available at https://www.parksassociates.com/bento/shop/whitepapers/files/ParksAssoc-OTTStreamingTrends_2022-WP.pdf; Parks Associates, "Parks: Video Streaming Providers Battle 50% Churn," January 17, 2024, available at https://www.parksassociates.com/blogs/in-the-news/parks-video-streaming-providers-battle-50-churn.

[32] For example, Netflix currently offers an ad-supported tier at $6.99/month, which is less than half the price of its standard tier ($15.49/month). Similarly, Peacock offers an ad-supported tier at $7.99/month, and an ad-free tier at $13.99/month. See Netflix, "Plans and Pricing," available at https://help.netflix.com/en/node/24926; and Peacock, "Pick a Plan. Cancel Anytime," available at https://www.peacocktv.com/plans/all-monthly.

[33] U.S. Chamber of Commerce, "Impacts of Digital Piracy on the U.S. Economy," June 15, 2019, available at https://www.uschamber.com/technology/data-privacy/impacts-of-digital-piracy-on-the-u-s-economy; Brett Danaher, Michael D. Smith, and Rahul Telang, "Piracy Landscape Study: Analysis of Existing and Emerging Research Relevant to Intellectual Property Rights (IPR) Enforcement of Commercial-Scale Piracy," *USPTO Economic Working Paper No. 2020-02*, April 16, 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3577670.

Short-form audiovisual content distributors, including, e.g., TikTok, YouTube, Facebook, and Instagram, also provide significant competition for consumer attention. These services have emerged over the last decade as prominent alternatives for consumers to obtain content. According to a *Variety VIP+* special report, "Hollywood needs to wake up to social video," referring to it as a "paradigm shift."[34] In just the two years between 2022 to 2024, the sum of average hours per day spent by users watching video on the top-five social media platforms increased from 7.63 hours to 10.23 hours.[35] Andrew Wallenstein, President and Chief Media Analyst of *Variety VIP+*, explains:

> More recently, the transformation has reached a height where the explosion of short-form video on social media is now competing more directly with content viewing on streaming services. […] Scripted content, gaming and now social video are all part of the same attention economy, each vying daily for consumer eyeballs. Entertainment companies must reckon with how intellectual property can thrive in this new paradigm, an increasingly fragmented media landscape.[36]

In sum, the growth of short-form content has provided additional ways in which consumers can enjoy content and has placed competitive pressure on the more traditional content distributors.[37]

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[34] Variety VIP+, "The Race to Replace TV: A deep-dive data exploration of the new viewing trends revving up U.S. screens," Special Report, First Edition, July 2024, available at https://read-vip.variety.com/html5/reader/production/default.aspx?pubname=&edid=a535829d-aadc-4265-8ade-05912388ed23, p. 2. Social video includes all time spent with online video activities on social network platforms (excluding YouTube) via any device.

[35] Id, pp. 8-9. Figures represent the sum of average hours that a user from each social media platform spends watching videos. It does not represent the average amount of time a typical user spends per day watching videos on social media. Specifically, 10.23 hours in 2024 represents the sum of average hours per day spent watching video on top-5 social media platforms: 2.48 hours per day by TikTok users; 2.46 hours per day by Instagram users; 2.28 hours per day by Facebook users; 2.08 hours per day by YouTube users; 0.93 hours per day by Discord users.

[36] Id., p. 2.

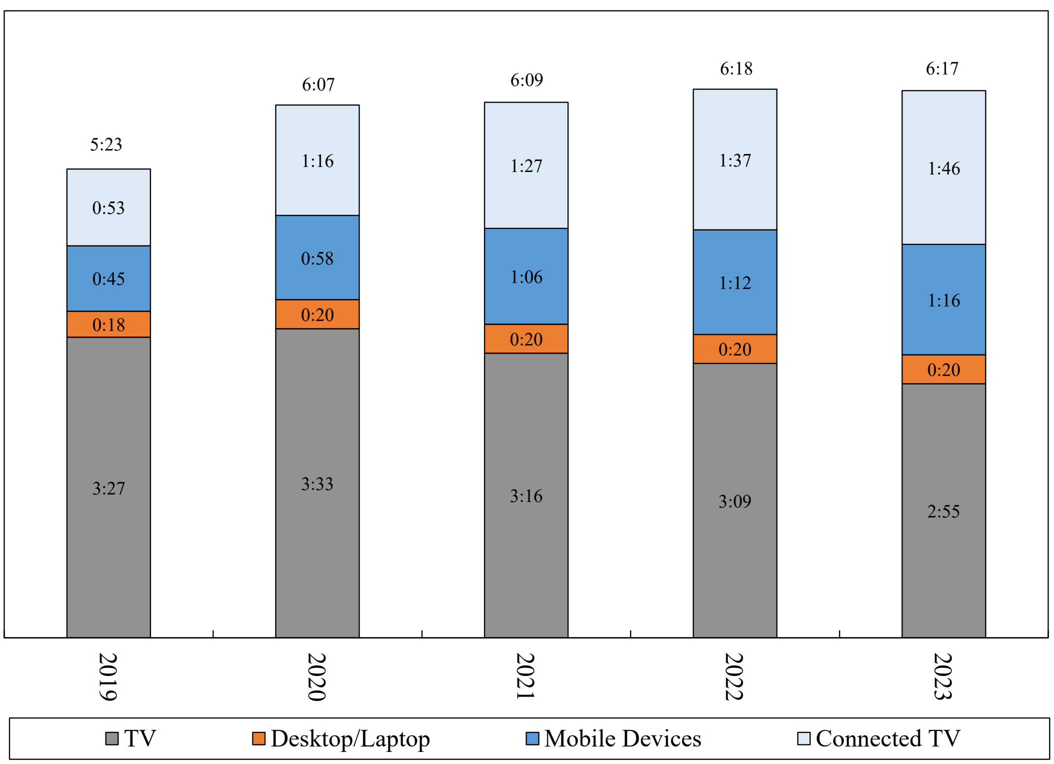
[37] See, e.g., John Koetsier, "Netflix vs TikTok: The Battle Between Long And Short," *Forbes,* May 17, 2022, available at https://www.forbes.com/sites/johnkoetsier/2022/05/17/netflix-vs-tiktok-the-battle-between-long-and-short/.

B. Entry and Innovation in the Industry Have Brought New Products and Services to Consumers

The analysis below provides empirical evidence, based on multiple data sources documenting the market dynamics in the audiovisual industry, that entry and innovation in the industry have led to a material shift in the way audiovisual content is consumed by U.S. consumers. This shift includes both the devices on which audiovisual content is consumed and the OTT services that deliver audiovisual content to consumers. The data signal a dynamic marketplace that is undergoing change and bringing new, improved products and services to consumers.

The devices on which consumers access their entertainment is changing. The consumption of audiovisual media by U.S. adults on a mobile device increased from 45 minutes in 2019 to 76 minutes in 2023, and the consumption of audiovisual media by U.S. adults on connected TVs has doubled between 2019 and 2023. See figure below.

Figure 1 – Average Time Spent Per Day With Video by U.S. Adults



Notes: Time spent with each medium includes multitasking—e.g., one hour on a mobile phone while watching TV is counted as one hour for mobile phone and one hour for TV.

Source: Estimates by eMarketer.

The shift towards consuming audiovisual content on mobile devices is also apparent from the large amounts of wireless broadband being used for streaming services. Ericsson estimates that audiovisual apps represented over 40 percent of mobile traffic volume in North America.[38] A GSMA survey shows that the share of mobile internet users who engaged in watching "free online video" on at least a monthly basis increased from approximately 55 percent to approximately 70 percent between 2019 and 2022, and the share of those who do so on at least a weekly basis increased from approximately 45 percent to approximately 60 percent over the same period.[39] Mobile service providers recognize the growing demand for streaming audiovisual content on wireless networks and offer plans that facilitate these consumption habits.[40]

Consumers increasingly obtain content from OTT/internet-based streaming and social media. Between 2021 and 2023, the average time spent per day on OTT and social video has increased from about two hours per day to 2.50 hours per day, while time spent on traditional TV has decreased from about 3.27 hours per day to three hours per day.[41] Furthermore, a survey conducted by Hub Entertainment on audiovisual consumption habits indicated that

[38] Ericsson Mobility Report, June 2023, available at https://www.ericsson.com/49dd9d/assets/local/reports-papers/mobility-report/documents/2023/ericsson-mobility-report-june-2023.pdf, pp. 16-17.

[39] GSMA, "The State of Mobile Internet Connectivity 2023," available at https://www.gsma.com/r/wp-content/uploads/2023/10/The-State-of-Mobile-Internet-Connectivity-Report-2023.pdf, p. 77.

[40] For example, T-Mobile notes that "[v]ideo is the number one way people use wireless data […]," and it offers "Binge On" to its subscribers, in which detectable video streaming is optimized for a subscriber's mobile device, allowing them to "watch up to three times more video using the same amount of high-speed data." Also, customers with qualifying plans can stream unlimited video from streaming services such as YouTube, Netflix, Hulu, Sling, and ESPN, among others, "without ever touching their high-speed data." See T-Mobile, "Unlimited video streaming with Binge On," available at https://www.t-mobile.com/tv-streaming/binge-on.

[41] Variety VIP+, "The Race to Replace TV: A deep-dive data exploration of the new viewing trends revving up U.S. screens," Special Report, First Edition, July 2024, available at https://read-vip.variety.com/html5/reader/production/default.aspx?pubname=&edid=a535829d-aadc-4265-8ade-05912388ed23, p. 7. The data is based on information from eMarketer, February 2024 Forecast, among U.S. adults 18+. Traditional TV includes all time spent watching TV live, digital video recorder (DVR) and other pre-recorded video (e.g., video downloaded from the internet but saved locally). Subscription OTT video includes all time spent watching video on subscription video on demand (SVOD) via any device. Social video includes all time spent with online video activities on social network platforms (excluding YouTube) via any device.

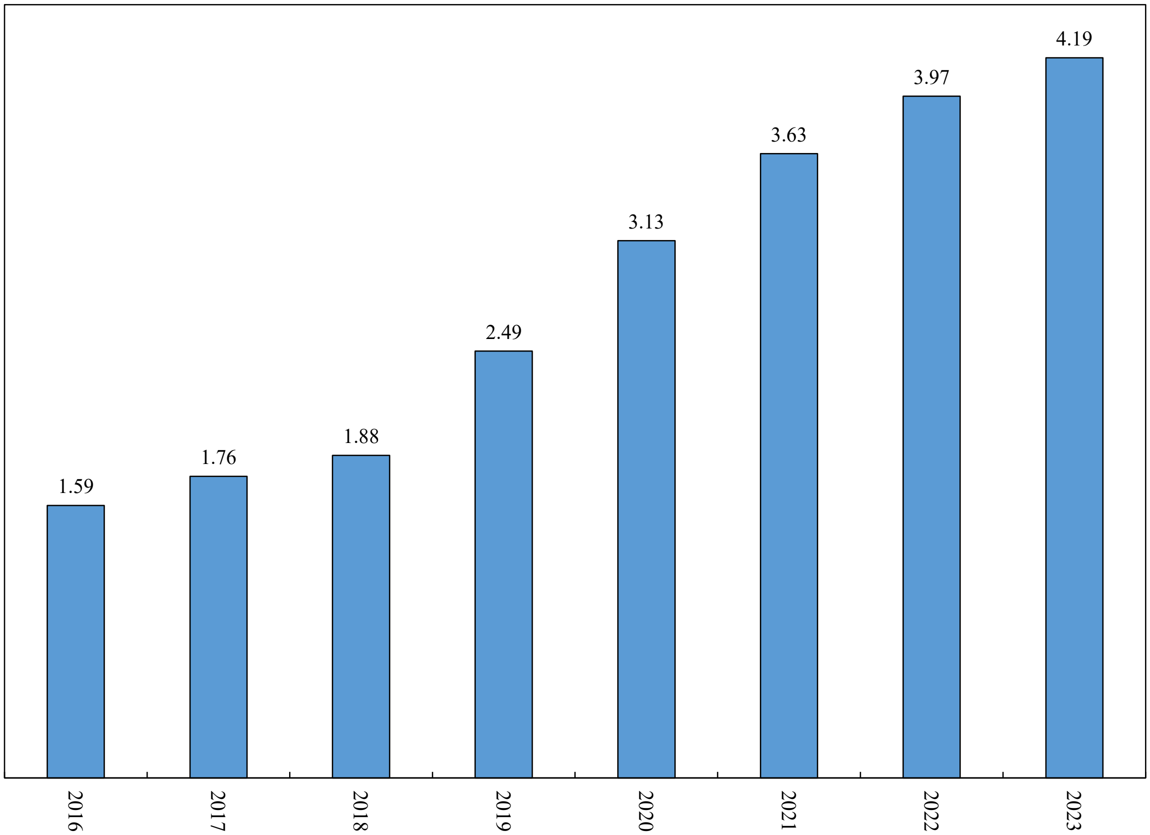
between 2022 and 2023, the share of respondents who reported spending less time watching "regular" TV shows and films due to watching non-premium online videos had increased from 55 percent to 58 percent for 13-24 year olds and from 29 percent to 36 percent for respondents ages 35 and over.[42] This is further evidence of share gains by new OTT options available in the marketplace relative to traditional distribution channels. This signals an increase in the number of ways in which consumers can access audiovisual content.

Additional evidence of a changing marketplace and consumer preferences is the continued shift towards obtaining audiovisual content from OTT services, as demonstrated by the average number of concurrent online video subscriptions per household in the United States, which grew from about 1.6 in 2016 to 4.2 in 2023.[43] See figure below.

[42] Variety VIP+, "The Race to Replace TV: A deep-dive data exploration of the new viewing trends revving up U.S. screens," Special Report, First Edition, July 2024, available at https://read-vip.variety.com/html5/reader/production/default.aspx?pubname=&edid=a535829d-aadc-4265-8ade-05912388ed23, p. 7. The original source is Hub Entertainment. The data is based on a survey fielded in December 2023 among U.S. respondents 13-74 with broadband access and who watch non-premium online video.

[43] Online video includes OTT video streaming services (e.g., Netflix and ESPN+) and vMVPDs (e.g., YouTube TV and Sling TV).

Figure 2 – Average Online Subscriptions per Household



Notes: Represents the average number of concurrent online video subscription services per online video household.

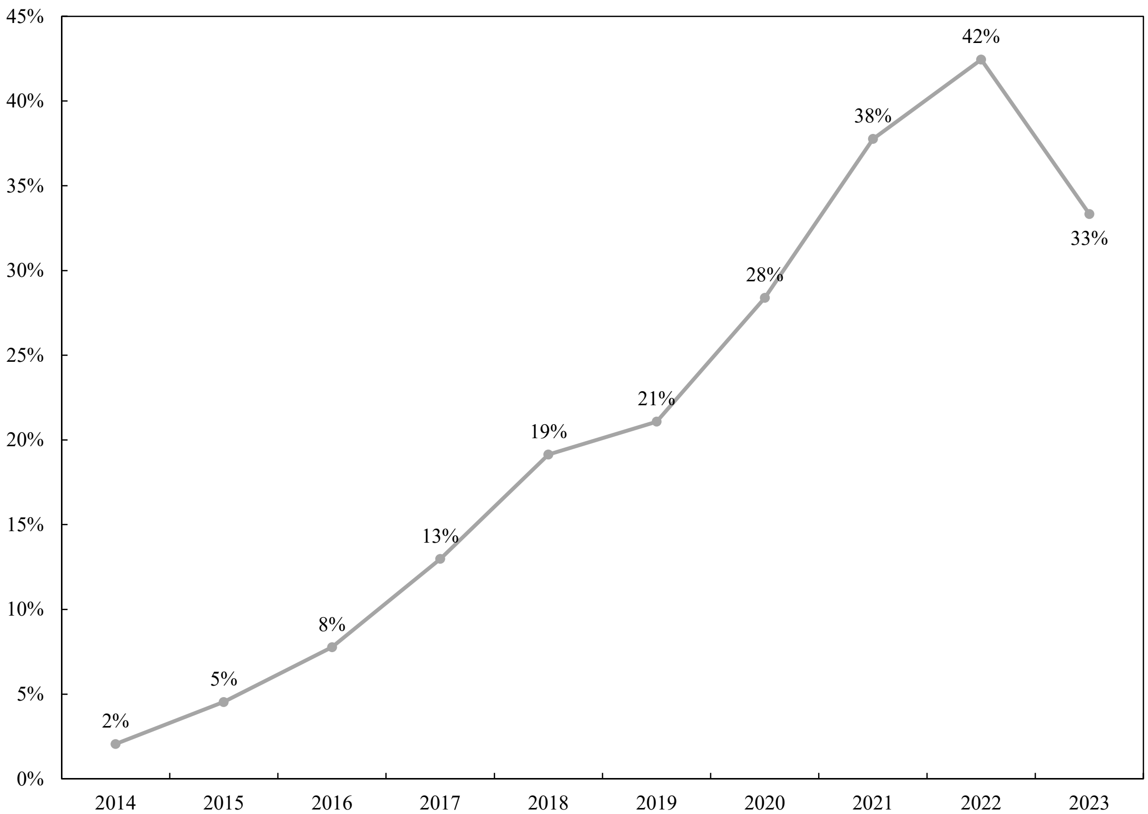
Source: Omdia.

The shift towards OTT services is also apparent from the shift towards production of TV content for OTT services, which has increased dramatically. Between 2014 and 2022, the share of TV shows released via OTT services (i.e., streaming services) increased from 2 percent to 42 percent, with some decline in the share in 2023 due to the impact of the labor strikes on scripted content.[44] Moreover, the estimated costs that streaming services—Netflix, Apple TV+, Paramount+, Peacock, Max, Disney+, Hulu, and Amazon Prime Video—incur each year to create or acquire content has increased substantially from $6.2 billion in 2014 to $43.0 billion in 2022, representing a nearly 7-fold increase. See figures below. This demonstrates the significant amount of investments in content creation and procurement by

[44] Traditional TV unscripted content release volume was steady in 2023.

the streaming services, resulting in increased amount and variety of content available to consumers.

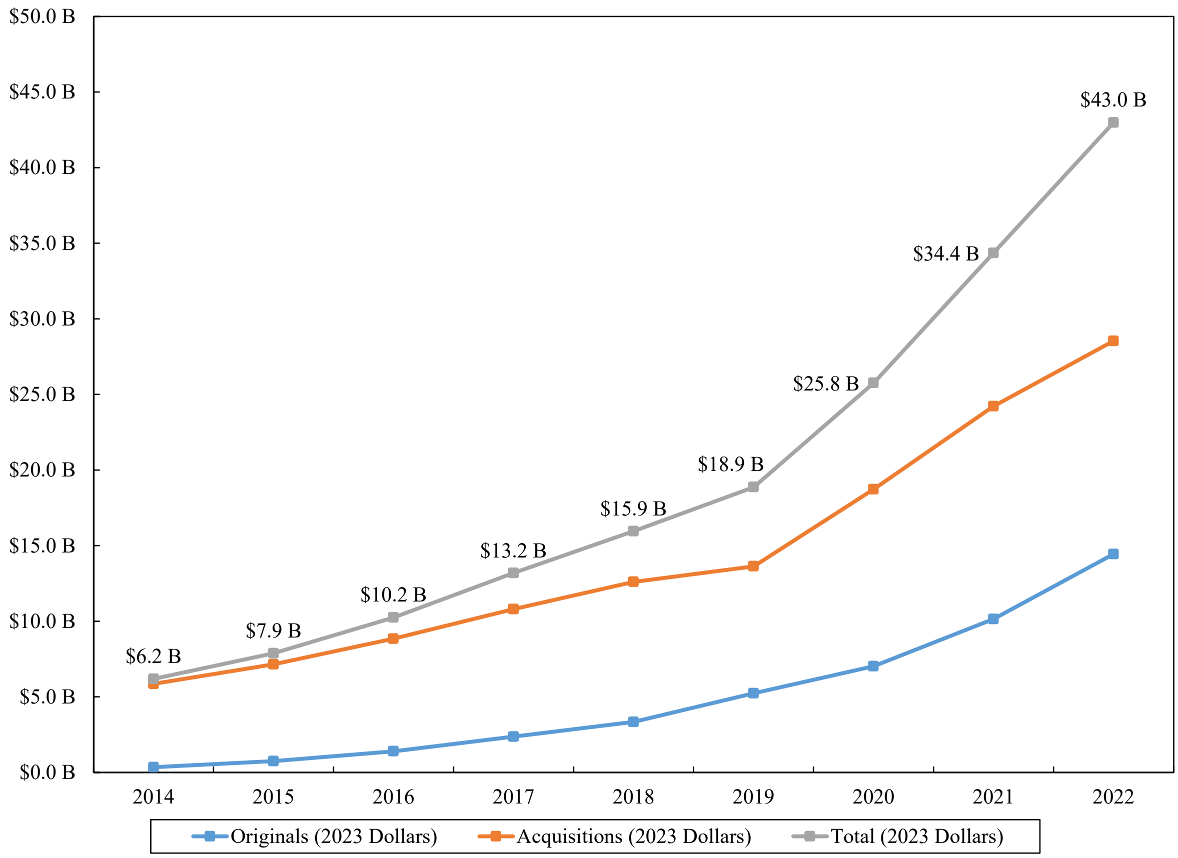
Figure 3 – OTT Digital Releases as a Share of All TV Releases



Notes: Share of digital releases is calculated by dividing the number of digital releases by the total number of traditional and digital releases.

Source: MPA.

Figure 4 – Streaming Platform Content Costs (2023 Dollars)



Notes: Analysis includes Netflix, Paramount+, Apple TV+, Peacock, HBO Max/Max, Amazon Prime Video, Disney+, and Hulu SVOD. Costs are adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

Source: S&P Capital IQ Pro; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

Finally, Nielsen reports that streaming services' share of total TV usage has increased over time. Between May 2021 and April 2024, streaming services' share of total TV usage increased from 28 percent to 38.4 percent.[45] In May 2021, Nielsen noted that only five

[45] Streaming services reported by Nielsen include Netflix, YouTube, Hulu, Amazon Prime, Disney+, Tubi, Max, Roku Channel, Peacock, Paramount+, and Pluto. See Nielsen, "Amid the fragmented TV landscape, time spent with content is the best planning data there is," January 2024, available at https://www.nielsen.com/insights/2024/amid-the-fragmented-tv-landscape-time-spent-with-content-is-the-best-planning-data-there-is/; and Nielsen, "Nielsen Launches The Media Distributor Gauge, First Convergent TV Comparison of its Kind," May 2024, available at https://www.nielsen.com/news-center/2024/nielsen-launches-the-media-distributor-gauge-first-convergent-tv-comparison-of-its-kind/.

streaming services accounted for more than one percent of total TV usage.[46] By August 2024, Nielsen reported that this figure increased to more than ten streaming services.[47] YouTube's share of total TV usage increased from 6 percent to more than 10 percent during this period, overtaking Netflix's share of 7.9 percent in August 2024 and making it the service with the largest share of streaming TV viewing in the United States.[48]

C. Additional Metrics on Output in the Audiovisual Industry

The empirical evidence on output and quality—through the volume, variety, and diversity of audiovisual content, especially on OTT services—shows that the audiovisual industry is generating more output and higher quality content over time, which is being consumed by U.S. consumers who are spending more time viewing audiovisual content. The audiovisual industry is also releasing more films over time. In this section, I present additional data on output as measured through consumer transactions at movie theaters and for physical media and through supply-side measures such as the number of titles produced.

U.S. theater admissions have declined over the last two decades, with a precipitous drop in admissions during the COVID-19 pandemic, which saw theaters close doors as a result of lockdowns.[49] See figure below. Theaters have also faced competition from new

[46] Nielsen, "Amid the fragmented TV landscape, time spent with content is the best planning data there is," January 2024, available at https://www.nielsen.com/insights/2024/amid-the-fragmented-tv-landscape-time-spent-with-content-is-the-best-planning-data-there-is/.

[47] Nielsen, "The Gauge – TV viewing trends in the U.S.," available at https://www.nielsen.com/data-center/the-gauge/.

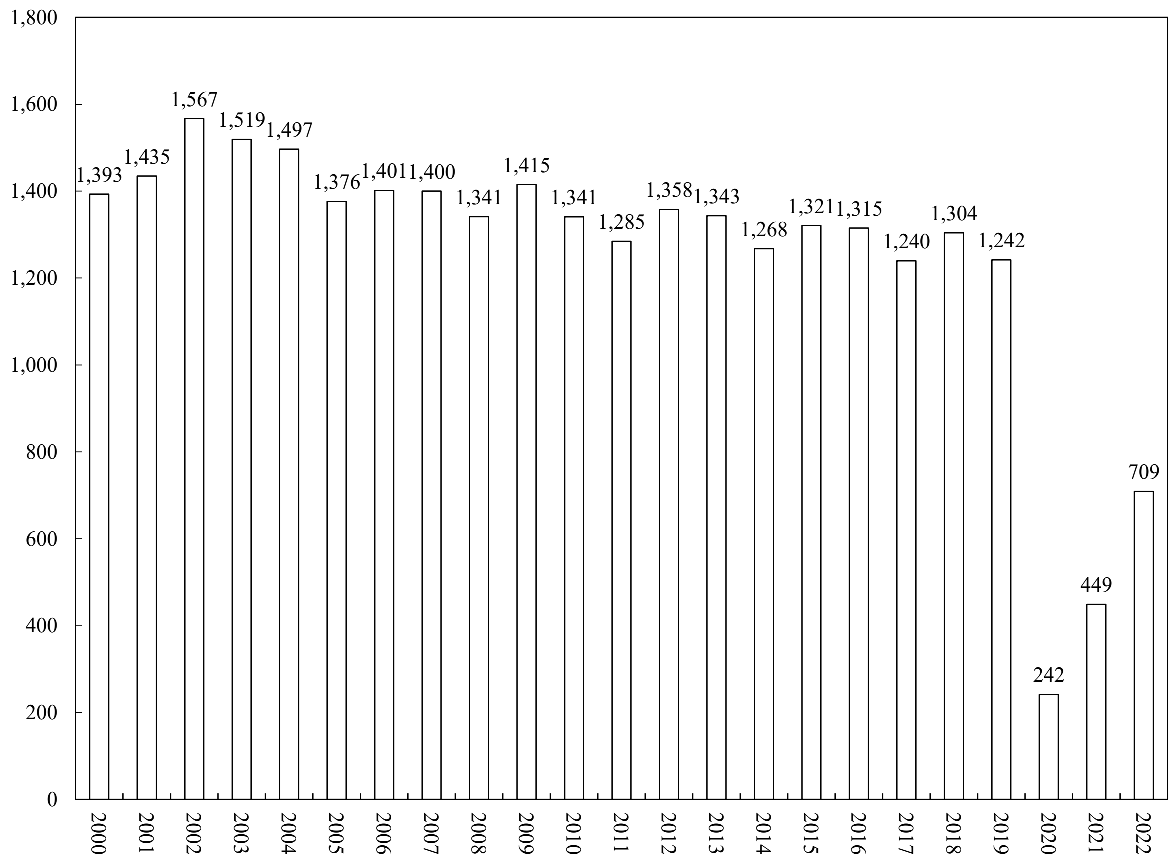
[48] Nielsen, "Amid the fragmented TV landscape, time spent with content is the best planning data there is," January 2024, available at https://www.nielsen.com/insights/2024/amid-the-fragmented-tv-landscape-time-spent-with-content-is-the-best-planning-data-there-is/; Nielsen, "Nielsen Launches The Media Distributor Gauge, First Convergent TV Comparison of its Kind," May 2024, available at https://www.nielsen.com/news-center/2024/nielsen-launches-the-media-distributor-gauge-first-convergent-tv-comparison-of-its-kind/; Nielsen, "The Guage – TV viewing trends in the U.S.," available at https://www.nielsen.com/data-center/the-gauge/.

Note that streaming TV usage does not include short-form and user-generated content, which comprises a large majority of content consumed on YouTube.

[49] Ryan Faughnder, "AMC and Regal close all U.S. theaters amid coronavirus crisis," *Los Angeles Times,* March 16, 2020, available at https://www.latimes.com/entertainment-arts/business/story/2020-03-16/as-l-a-theaters-close-due-to-coronavirus-amc-reduces-capacity-to-50.

online digital formats for consuming audiovisual content, which, as discussed previously, have increased substantially over the past two decades. This has led to a decline in the consumption of motion picture content at U.S. theaters that is offset to some degree by increasing consumption of content in other sectors of the audiovisual industry.

Figure 5 – U.S./Canada Theater Admissions (millions)

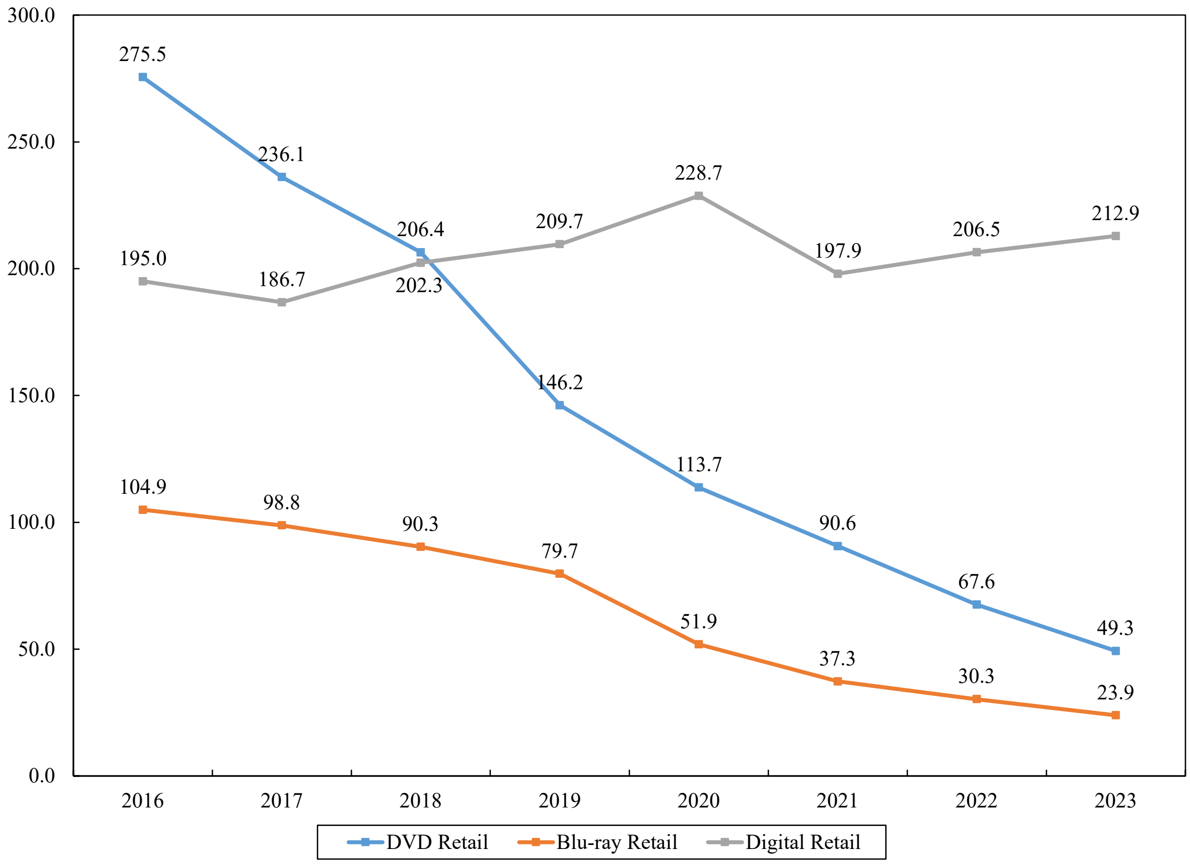


Notes: Theater admissions are calculated as Box Office divided by Average Ticket Prices.

Sources: Comscore (Box Office); National Association of Theater Owners (Average Ticket Prices).

The substitution by U.S. consumers from legacy formats to newer formats is evidenced by DVD/Blu-ray and digital forms of purchasing and renting content, such as motion pictures. Between 2016 and 2023, physical DVD and Blu-ray transactions declined, while the number of digital transactions increased. The same trends are seen in rental activity. Over time, the number of physical DVD and Blu-ray rentals has decreased, while digital rentals have increased. See figures below. Retail and rental offerings are facing competition from streaming services and other OTT service offerings.

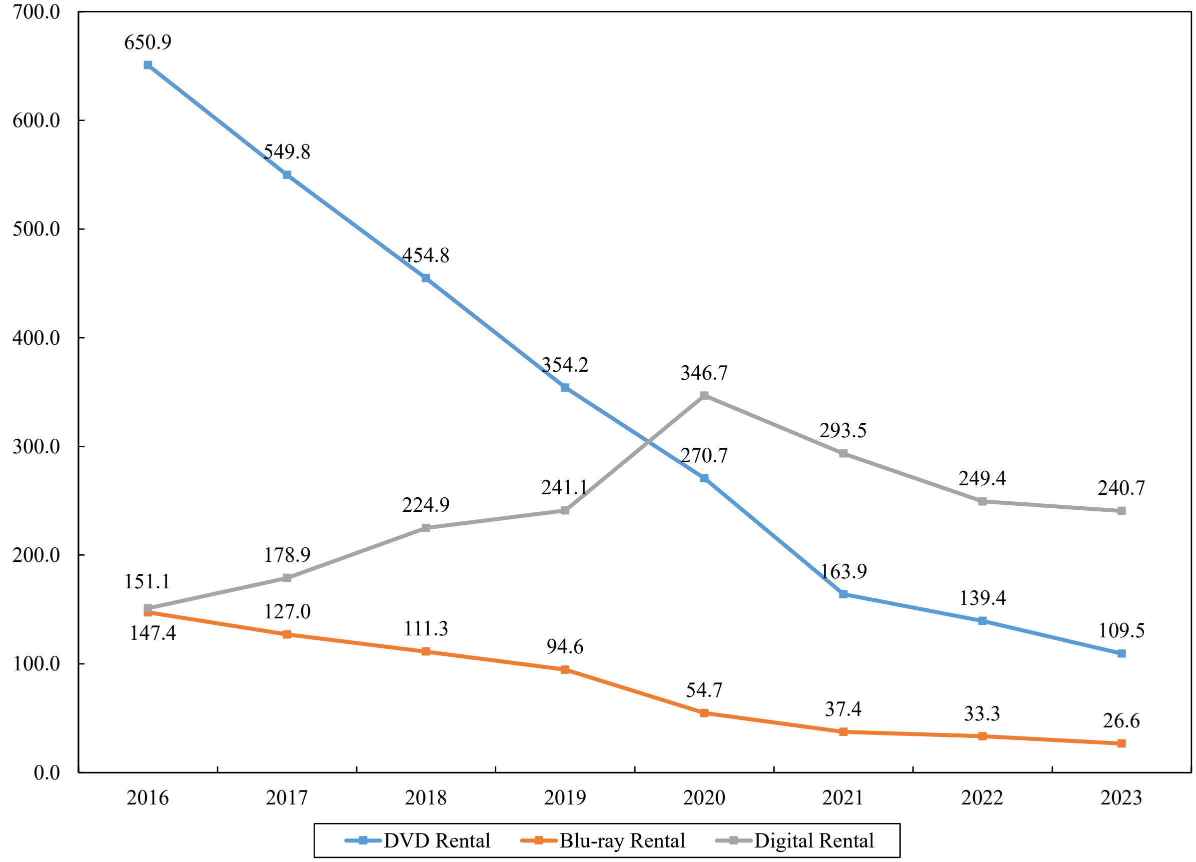
Figure 6 – Number of Movie and TV Retail Transactions (millions)



Notes: Digital retail purchase is a method of selling digital content that gives the customer "ownership." Content may be downloaded or streamed. Digital purchase is also known as "download-to-own" (DTO), "electronic sell-through" (EST) and "digital sell through." Digital transactions refer to the sum of single episodes and bundles (not episodes within bundles) sold.

Source: Omdia.

Figure 7 – Number of Movie and TV Rental Transactions (millions)



Notes: Digital rental is a method of renting digital content whereby customers choose content on an a-la-carte basis and pay to watch it for a limited period. Digital rental is also known as pay-per-view (PPV) and VOD. PPV content can be downloaded or streamed. Digital rental numbers exclude consumption within pay-TV set-top box (STB) or pay-TV VOD. Digital transactions refer to the sum of single episodes and bundles (not episodes within bundles) rented.

Source: Omdia.

As described earlier, consumers benefit from a highly dynamic marketplace that provides alternative, more convenient ways to consume audiovisual content—in particular online, or OTT, access to that content. As a result, online audiovisual consumption has grown substantially. Between 2016 and 2023, the number of online video subscriptions has quintupled from 115.5 million accounts to nearly 471 million accounts.[50] During the same

[50] Online audiovisual includes OTT video streaming services (e.g., Netflix and ESPN+) and vMVPDs (e.g., YouTube TV and Sling TV). Subscription refers to an active account to a subscription service, excluding free trials. For standalone services, this number represents active paying accounts at the end

period, the number of online movie views and transactions grew from about 10 million per year to almost 45 million per year, and the number of online series views and transactions grew from 79 million to over 390 million per year. And the number of online video households increased from approximately 73 million in 2016 to over 112 million in 2023. See figure below. The rapid reallocation of shares from traditional physical media and legacy media outlets to new technologies and new entrants is a key sign of healthy competition in this industry.[51]

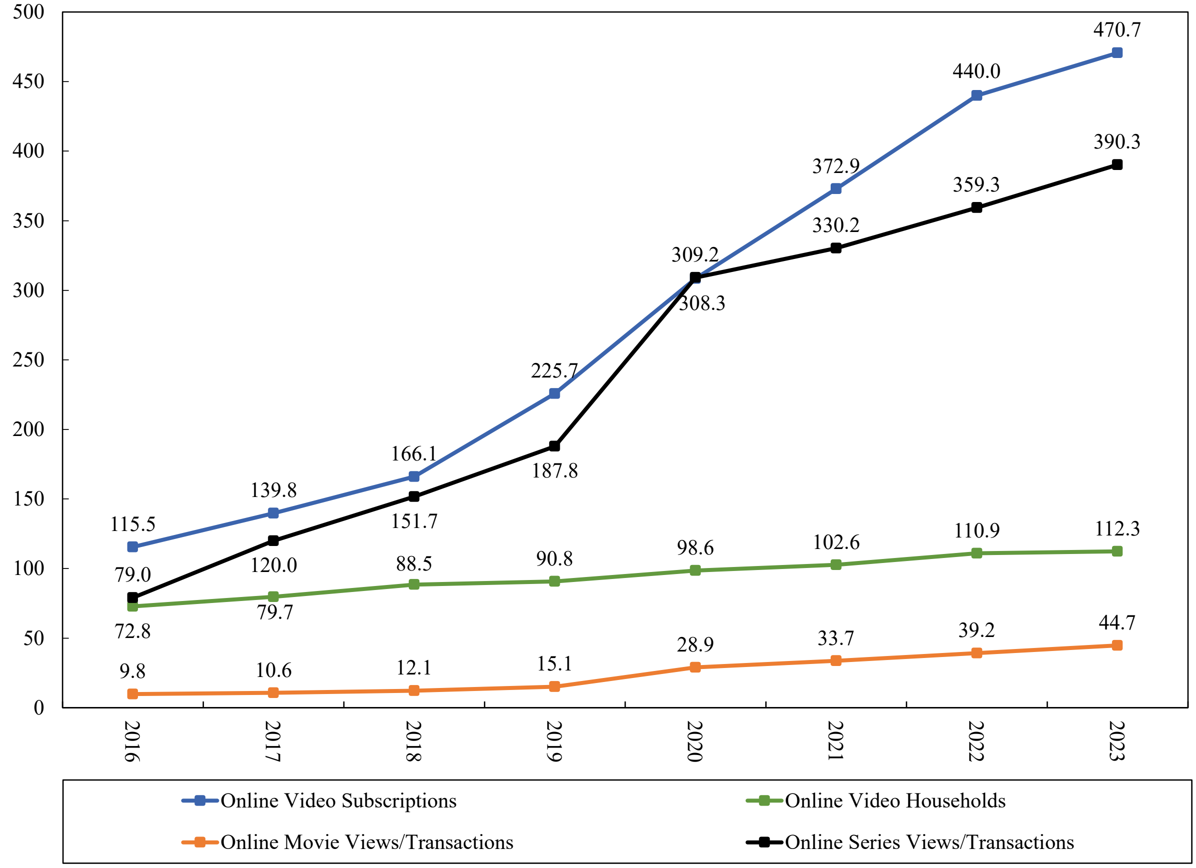
of the period. For bundled services, this number represents an account that has been used at least once in the last month of the period.

Online video households are the total number of households that subscribe and pay for one or more online video subscription services. It includes online channels and vMVPDs. It excludes advertising-based services that do not include a subscription fee.

Views/Transactions are the total transactional, ad-supported, and subscription views and transactions of series/movie content across online video subscription services. Views are calculated per month and include content delivered by near video on demand (nVOD), video on demand (VOD), internet protocol video on demand (IPVOD), and push video on demand (push-VOD). It excludes viewing of OTT-delivered content on a set-top box or connected TV.

[51] For estimates of the declines in MVPD subscribership, see Colin Dixon, "MVPD's lost 2M subs in Q1 2024. Can SVOD bundles stop the rot?" *nScreenMedia,* May 20, 2024, available at https://nscreenmedia.com/mvpd-vmvpd-q1-2024/. Between 2016 and 2024 Q1, the number of U.S. households with cable, satellite, or telco TV declined from approximately 99 million to approximately 55 million, representing a decline of 44 percent during the period. See also Nielsen, "Streaming claims largest piece of TV viewing pie in July," August 2022, available at https://www.nielsen.com/insights/2022/streaming-claims-largest-piece-of-tv-viewing-pie-in-july/. Streaming services' share of U.S. TV viewership increased from 28.3 percent to 34.8 percent between July 2021 and July 2022, while cable and broadcast shares declined within the same period.

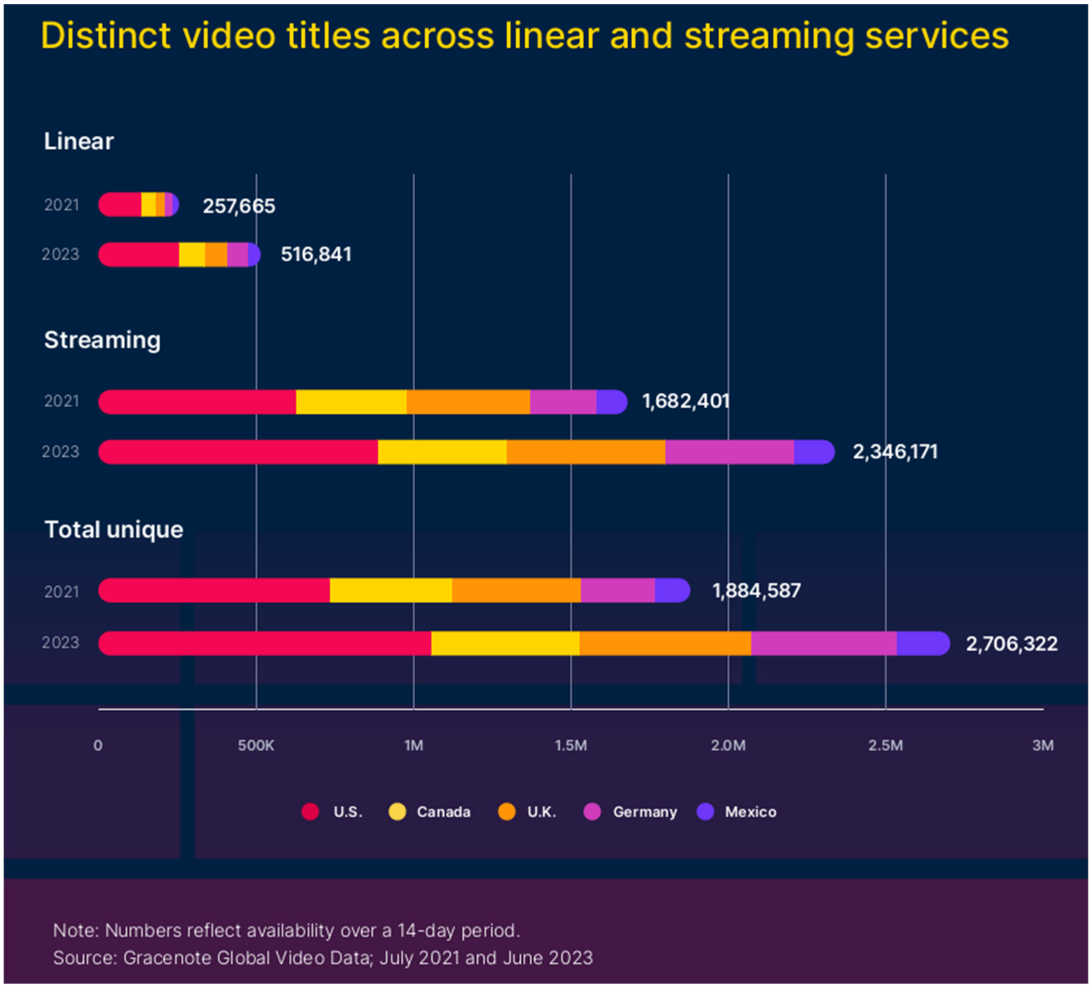
Figure 8 – Participation in Online Video (millions)



Source: Omdia.

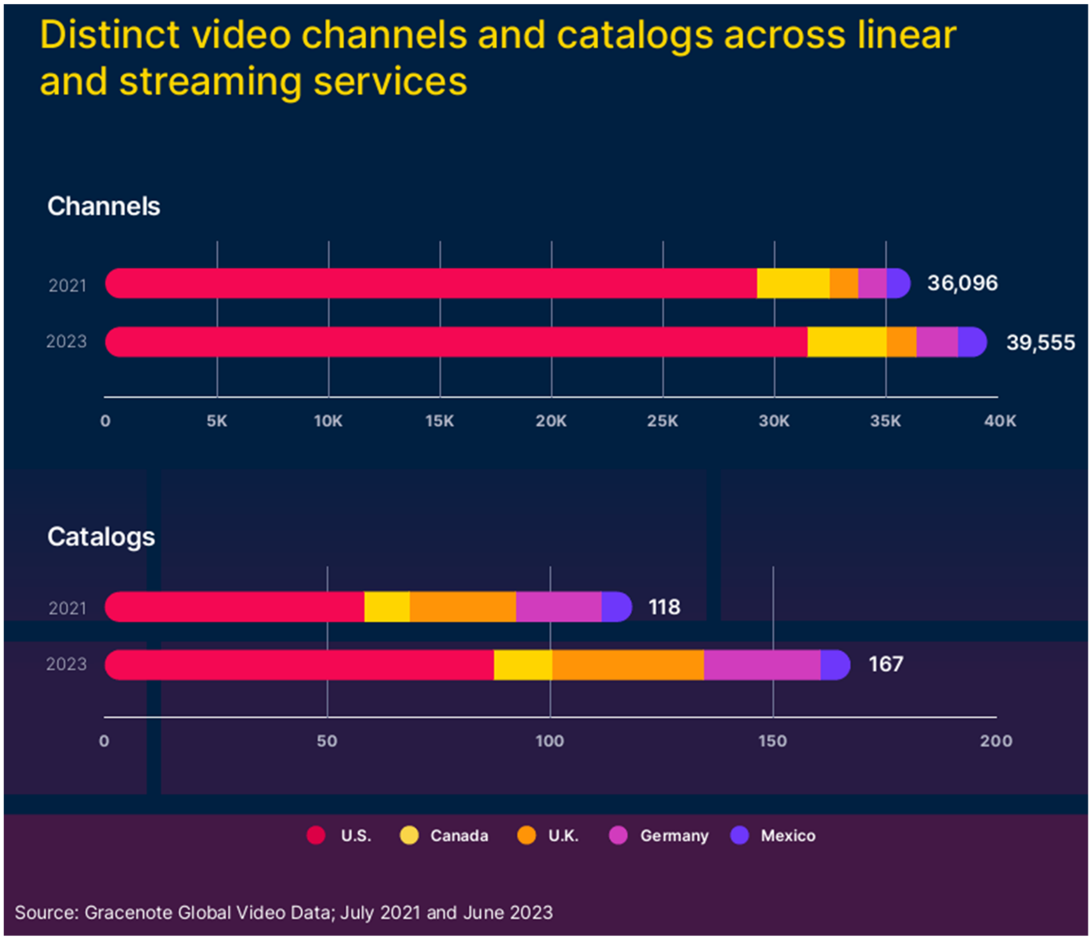
Another way to assess the choices available to consumers is by examining the amount and variety of content available to consumers in the marketplace. During just the two years between 2021 and 2023, the number of distinct audiovisual titles increased dramatically across both linear and streaming services. The number of distinct video channels and catalogs across both linear and streaming services also increased substantially between 2021 and 2023. See figures below reproduced from Nielsen.

Figure 9 – Distinct Video Titles



Source: Nielsen, "State of Play," 2023, available at https://www.nielsen.com/insights/2023/data-driven-personalization-2023-state-of-play-report/, p. 3.

Figure 10 – Distinct Video Channels and Catalogs



Source: Nielsen, "State of Play," 2023, available at https://www.nielsen.com/insights/2023/data-driven-personalization-2023-state-of-play-report/, p. 6.

Moreover, the number of OTT audiovisual content sites available in the United States has grown substantially. Between 2012 and 2024, the number of OTT audiovisual content sites available has nearly tripled from 76 to 211.[52] See figure below. These counts include a large variety of OTT sites from which consumers can access audiovisual content, such as YouTube TV, DirecTV Stream, Sling TV, fuboTV, Netflix, Hulu, Apple TV+, Amazon

[52] This represents the unique number of streaming sites with film or TV content accessible in the United States. These sites include subscription-based sites, electronic sell-through, advertising video-on-demand, and user-generated content sites (e.g., Facebook). Subscription and advertising video-on-demand sites make up the majority of total unique sites. Sites are counted by individual URLs (e.g., aetv.com, play.aetv.com, and aecrimecentral.com count as three separate sites), and are based on MPA's criteria for counting a site—the site has movies and/or TV content. The counts exclude sports-only sites, such as NFL Game Pass.

Prime Video, Disney+, Max, Paramount+, Tubi, and Peacock, as well as more niche OTT services, and video-sharing and social media sites such as YouTube, Twitch, Facebook, and TikTok. Streaming services have enhanced quality for consumers by offering 4K content,[53] HDR technology,[54] advanced sound processing (e.g., Dolby Atmos),[55] content personalization algorithms,[56] and improved user interfaces.[57]

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[53] Netflix's first 4K content became available in 2014. Since then, all Netflix original content has been produced in 4K. See Adrian Pennington, "Does Netflix's 4K-Only Rule Limit the Creativity of Its Originals?," *NAB Amplify*, July 13, 2021, available at https://amplify.nabshow.com/articles/does-netflixs-4k-only-rule-limit-the-creativity-of-its-originals/.

HBO Max (now rebranded as "Max") added 4K content in 2020. See Chris Welch, "Wonder Woman 1984 will be the first title that HBO Max streams in 4K," *The Verge*, December 1, 2020, available at https://www.theverge.com/2020/12/1/21813364/wonder-woman-1984-4k-ultra-hd-dolby-vision-atmos-announced.

Many other streaming services also offer 4K content. See, for example, Kourtnee Jackson, "Best Streaming Service for 4K Content," *CNET*, August 4, 2024, available at https://www.cnet.com/tech/services-and-software/best-streaming-services-for-4k-content/.

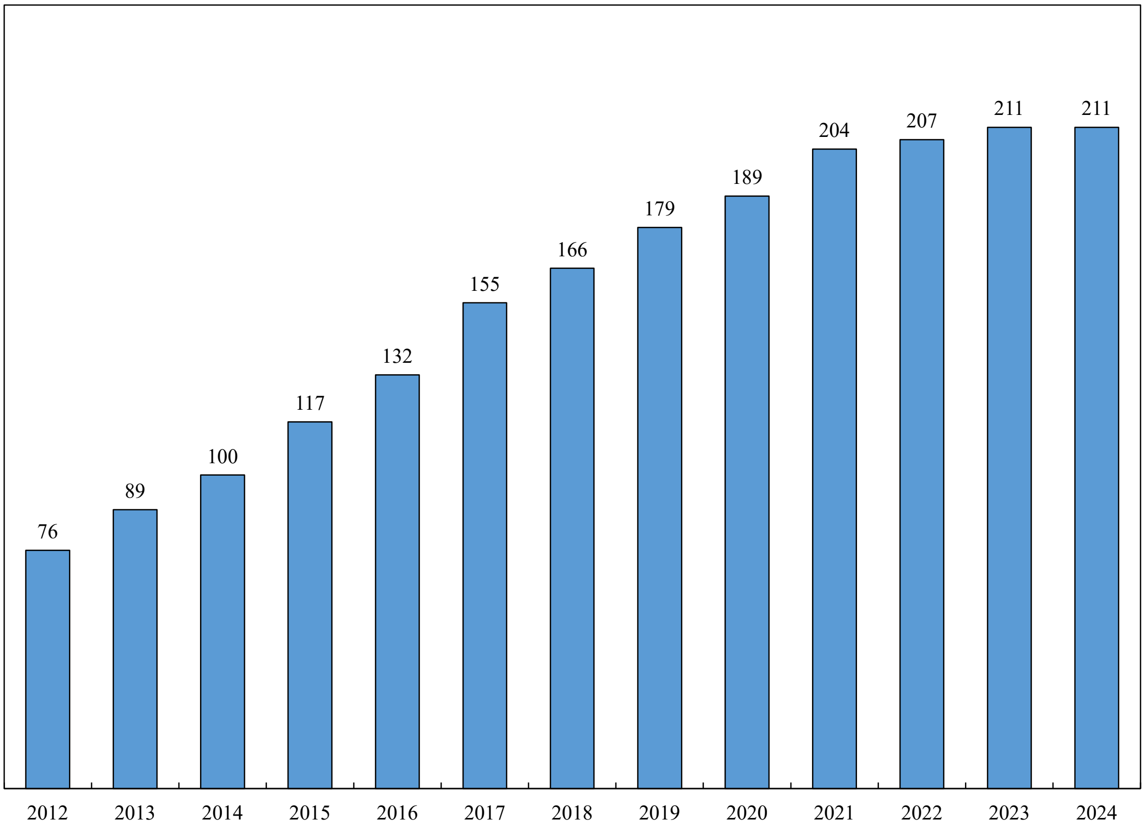
[54] See, for example, Al Griffin, "Netflix quietly rolled out an HDR upgrade for 4K TVs – here are the details," *Techradar*, December 1, 2023, available at https://www.techradar.com/televisions/netflix-quietly-rolled-out-an-hdr-upgrade-for-4k-tvs-here-are-the-details; Apple, "About 4K, HDR, HDR10+, and Dolby Vision on your Apple TV 4K," available at https://support.apple.com/en-us/102339.

[55] Dolby, "Where to watch content in Dolby Atmos," available at https://www.dolby.com/experience/home-entertainment/faqs/where-to-watch-content-in-dolby-atmos/.

[56] Netflix, "How Netflix's Recommendations System Works," available at https://help.netflix.com/en/node/100639; Hulu, "Personalization Features on Hulu," available at https://help.hulu.com/article/hulu-personalized-recommendations.

[57] Todd Spangler, "Amazon Is Giving Prime Video's User Interface a Much-Needed Redesign," *Variety*, July 18, 2022, available at https://variety.com/2022/digital/news/amazon-prime-video-redesign-user-interface-1235317952/.

Figure 11 – Number of Film/TV Unique Sites, United States



Notes: 2024 reflects data as of Q1 2024. Website counts excludes all websites with a general content focus of "Sport" or "Sports." Social media websites (Facebook, Google, TikTok, Twitch, and YouTube) are included.

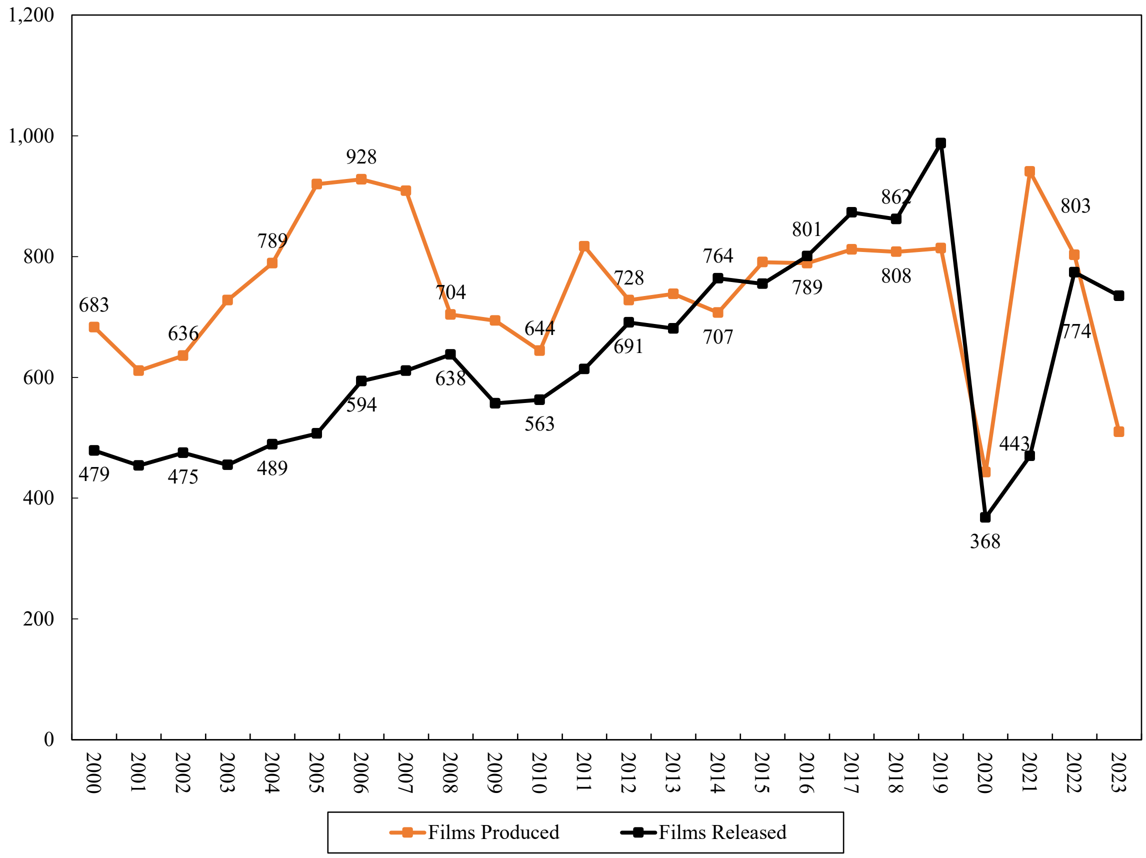
Source: Compass Lexecon and MPA analysis of Omdia data.

The number of motion picture films produced, which includes films that were intended to be released in theaters or on streaming services, increased between 2000 and 2007, but suffered during the Great Recession that started in 2008, and declined substantially during the COVID-19 pandemic.[58] Films released in the United States, which include films shown in theaters for the first time in a given year, and re-releases, generally increased from 2000 to

[58] Figures are based on data collected by MPA. Feature films entering production reflect full-length feature films in English that began production in the reported year by a U.S. production company (including co-productions). The counts include films that were made for or by an online video service, but do not include student films, documentaries, films created for straight-to-DVD or Blu-ray release.

2019, but also declined substantially during the COVID-19 pandemic.[59] There was also a marked decline in films produced and released in 2023 due to the labor strikes. See figure below.

Figure 12 – Films Produced & Released



Notes: Films released includes both new and reissued films.

Sources: Comscore; MPA.

The amount of content produced generally has increased over time. The number of scripted original series, total original series, and online exclusive films increased between

[59] Figures are based on data reported by Comscore – Box Office Essentials. It includes all titles that opened and earned any studio reported U.S./Canada box office revenue in theaters in the year. Historical data is regularly updated by Comscore. New feature films include films released domestically for the first time, while re-releases include any film released for the first time in previous years including anniversary releases and double-features. Non-feature films include Oscar shorts, TV shows, and event showings. Films produced and released are not a matched dataset. For example, films released includes international films released in the United States and films produced includes films that have not yet released in theaters, including films made for streaming services.

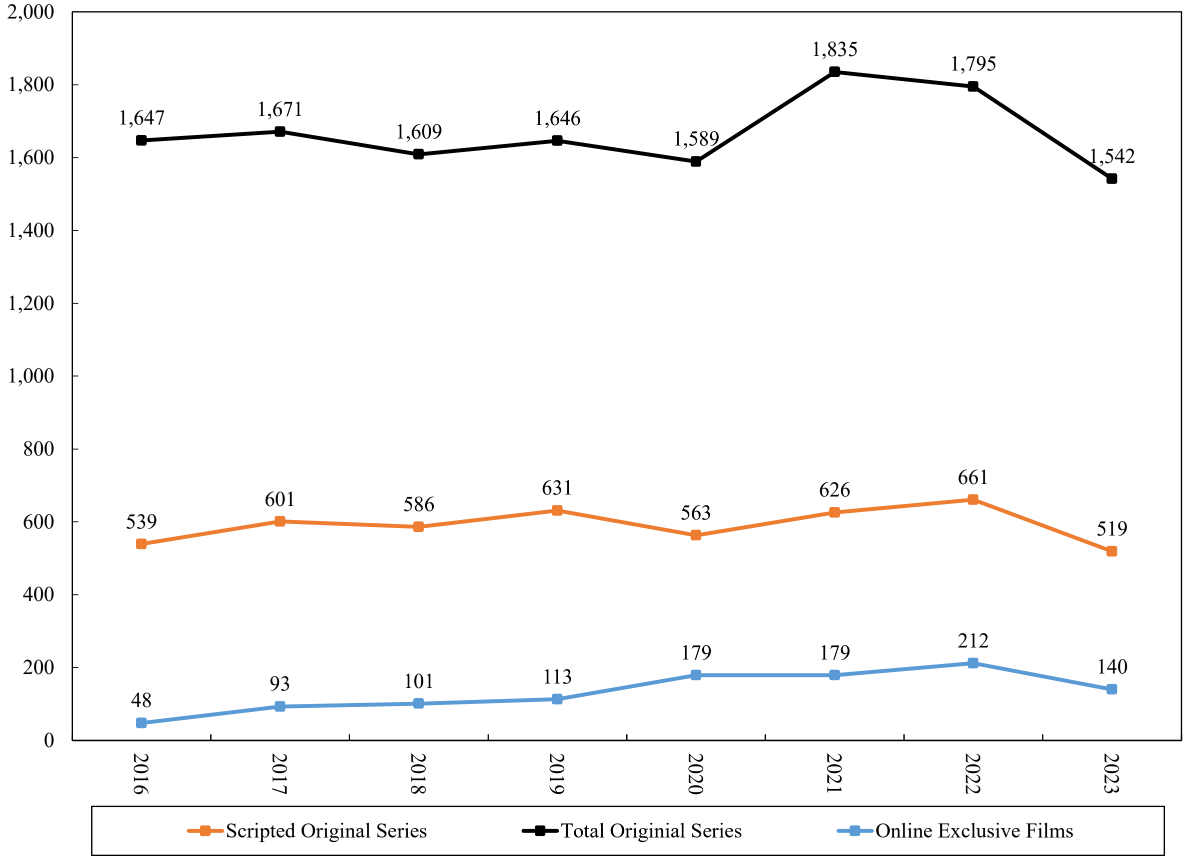
2016 and 2022.[60] However, due to the 2023 labor strikes, the number of series and online exclusive films that were produced and distributed declined. See figure below.

[60] Figures are based on data collected by MPA. Scripted original series are full-length original scripted series in the English language released in the reported year by a U.S. production company (including co-productions). These estimates cover broadcast, cable, and online outlets. They exclude library, daytime dramas, one-episode specials, non-English language/English-dubbed, children's programs, and short-form content (<15 mins.). Estimates are compiled based on a number of sources, such as MPA member studios, film offices, and third-party sources, including Ampere Analysis and Variety Insight.

Total original series are full-length original scripted and unscripted series in the English language released in the reported year by a U.S. production company (including co-productions). Compiled based on a number of sources, including MPA member studios, film offices, and third-party sources, including Ampere Analysis and Variety Insight. In addition to scripted original series, these estimates include daytime dramas, children's programs, and unscripted series including news and talk shows. Multiple seasons of a series in one year are counted only once.

Online exclusive films are full-length (greater than 70 minutes) original films that were released exclusively in the United States on the following streaming services: Amazon Prime Video, Apple TV+, Discovery+, Disney+, Hulu, Max, Netflix, Paramount+, Peacock, and Shudder. Films with any theatrical release, including limited release, are not included.

Figure 13 – Original Series and Online Films Released



Source: MPA.

Finally, there is a vast amount of short-form audiovisual content available to consumers. As described earlier, such short-form content is increasingly becoming an important aspect of the audiovisual consumption experience for consumers. Because users can generate and post their own content, the number of short-form videos released on social media platforms and OTT video-sharing sites is significantly higher than that of long-form content released through streaming services or theaters. One source estimates that about 34 million videos are posted on TikTok on a daily basis.[61] Similarly, another source estimates that there are currently 14 billion public videos available on YouTube.[62]

D. Prices in the Audiovisual Industry Are Consistent with Pricing Expected in a Dynamic and Highly Competitive Industry

Another outcome to examine in an assessment of the competitive health of an industry is pricing to consumers. In analyzing prices, it is important to account for changing quality, technology, and investment to quantify the full outcome for consumers. Economists typically use the metric of consumer welfare to balance the effects of changing prices, quality, and technology. While a full consumer welfare analysis is outside the scope of this report, the analysis presented below shows that prices in real terms in the audiovisual industry—including Blu-ray and DVD, digital transactions, streaming services, and MVPDs—are consistent with pricing expected in a dynamic and highly competitive industry. Several of the most prominent types of video content are free to consumers, including broadcast television, free ad-supported streaming services like Pluto and Tubi, and YouTube.

We begin with one area where prices have increased. Movie theater ticket prices in real terms have increased by under one percent per year between 2000 and 2022. See figure below. However, over time, the theater experience for consumers has changed with innovative viewing formats, such as 3D viewing experiences and premium large-format viewing experiences (e.g., IMAX).[63] Improved theater experiences and higher quality

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[61] Raj Vardhman and Florence Desiata, "13 Insightful Statistics on How Many Videos are Uploaded to TikTok Daily," *Tech Jury,* November 17, 2023, available at https://techjury.net/blog/how-many-videos-are-uploaded-to-tiktok-daily/.

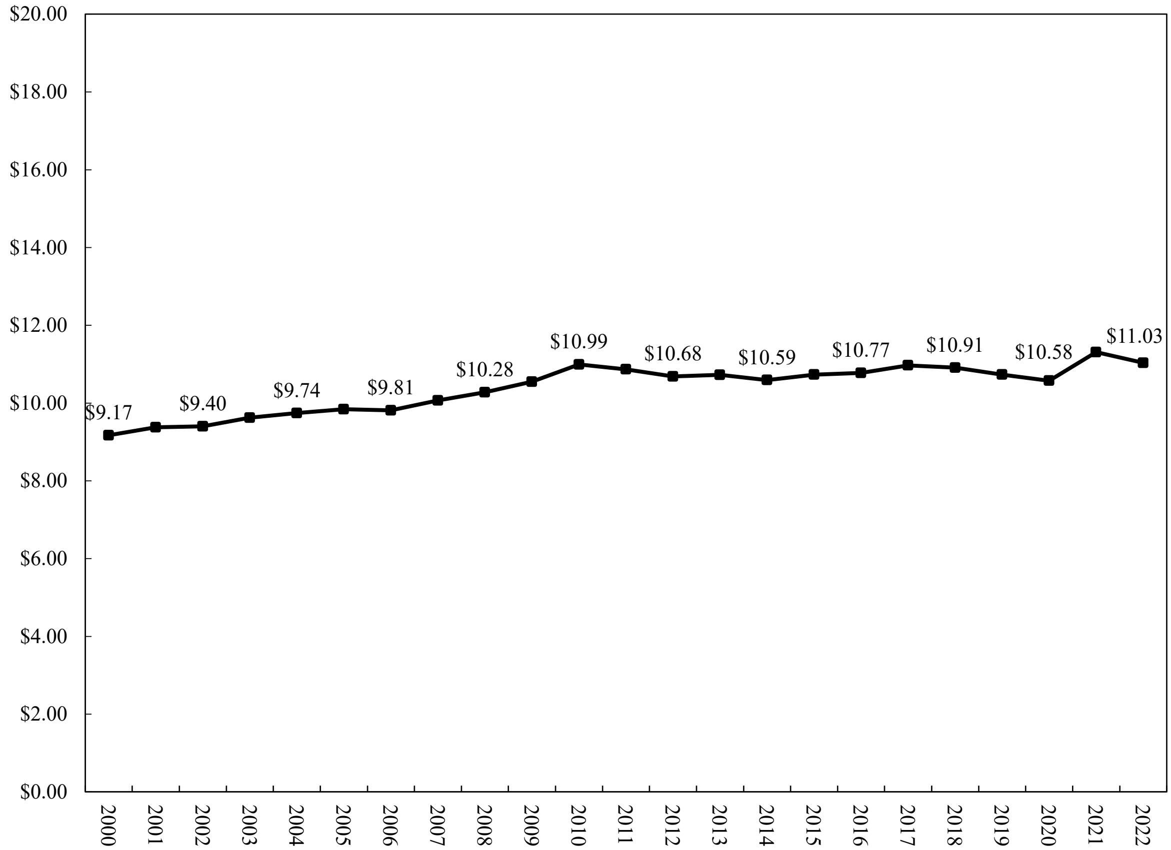
[62] Ryan McGrady, "What We Discovered on 'Deep YouTube'," *The Atlantic,* January 26, 2024, available at https://www.theatlantic.com/technology/archive/2024/01/how-many-videos-youtube-research/677250/.

[63] Filmgrail, "Cinema Experience Reimagined: Engaging the Modern Audience," December 6, 2023, available at https://filmgrail.com/blog/cinema-experience-reimagined-engaging-the-modern-audience/. See also, Daniel Loria, CinemaCon 2022: Tech Providers Innovate Beyond the Pandemic, *Box Office,* April 26, 2022, available at https://www.boxofficepro.com/innovating-beyond-the-pandemic-cinema-technology-providers-are-ready-to-meet-audience-demand-with-the-industrys-latest-innovations/; Sergio Julian Gomez, "5 technologies that will mark (or not) the future of movie theaters," *Panorama Audiovisual.com*, June 9, 2022, available at https://www.panoramaaudiovisual.com/en/2022/06/09/5-tecnologias-marcaran-futuro-salas-cine/ (discussing various technological advancements that has helped improved movie theatre experiences, such as 4DX, LED projectors, High Frame Rate scenes).

production of motion pictures should be taken into account when examining movie theater ticket prices over time. Although real theater prices have increased slightly, a full analysis of quality-adjusted theater prices would account for changing quality and declining demand due to improved at-home viewing experience from low-cost, large-screen, high-definition television sets.[64]

[64] Between January 2014 and December 2023, CPI data shows that the price of televisions decreased by almost 75 percent. (Source: Bureau of Labor Statistics, Televisions, U.S. city average, all urban, seasonally adjusted (series CUSR0000SERA01).) The trend towards large TV screens—namely one in every five produced worldwide measuring 60 inches or larger—is partly attributable to consumers "mimic[king] the cinema experience while in the comfort of [their] own home" especially when combined with the availability of multiple streaming services. See "Why TV Screens Are Going Extra Large," *Wired Insider* (originally published by *Wired UK*), available at https://www.wired.com/sponsored/story/why-tv-screens-are-going-extra-large/. Omdia reports that the weighted average size of televisions had grown to 52 inches by September 2023. See David Hsieh, "The weighted average size of shipped LCD TV displays shifted to 52 inches in September 2023," *Omdia*, November 8, 2023, available at https://omdia.tech.informa.com/blogs/2023/nov/the-weighted-average-size-of-shipped-lcd-tv-displays-shifted-to-52-inches-in-september-2023.

Figure 14 – U.S. Movie Theater Ticket Prices (2023 dollars)

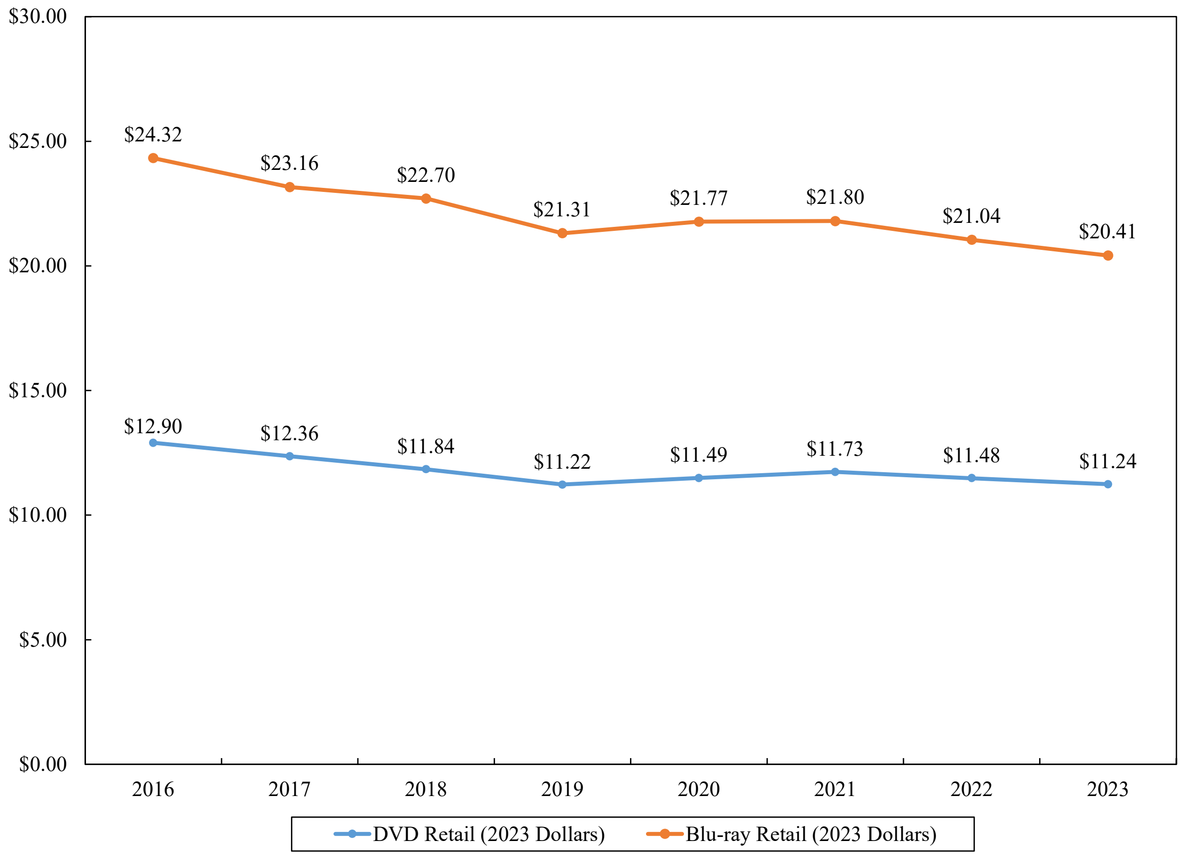


Notes: Prices adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

Sources: National Association of Theatre Owners; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

Next, consider retail prices for DVDs, Blu-ray, and digital video rentals. DVD and Blu-ray retail prices in real terms declined between 2016 and 2023. Digital video retail prices also have declined during the same period. Also, DVD and Blu-ray rental prices in real terms declined between 2016 and 2023. The real price for digital video rentals also decreased during the period. See figures below.

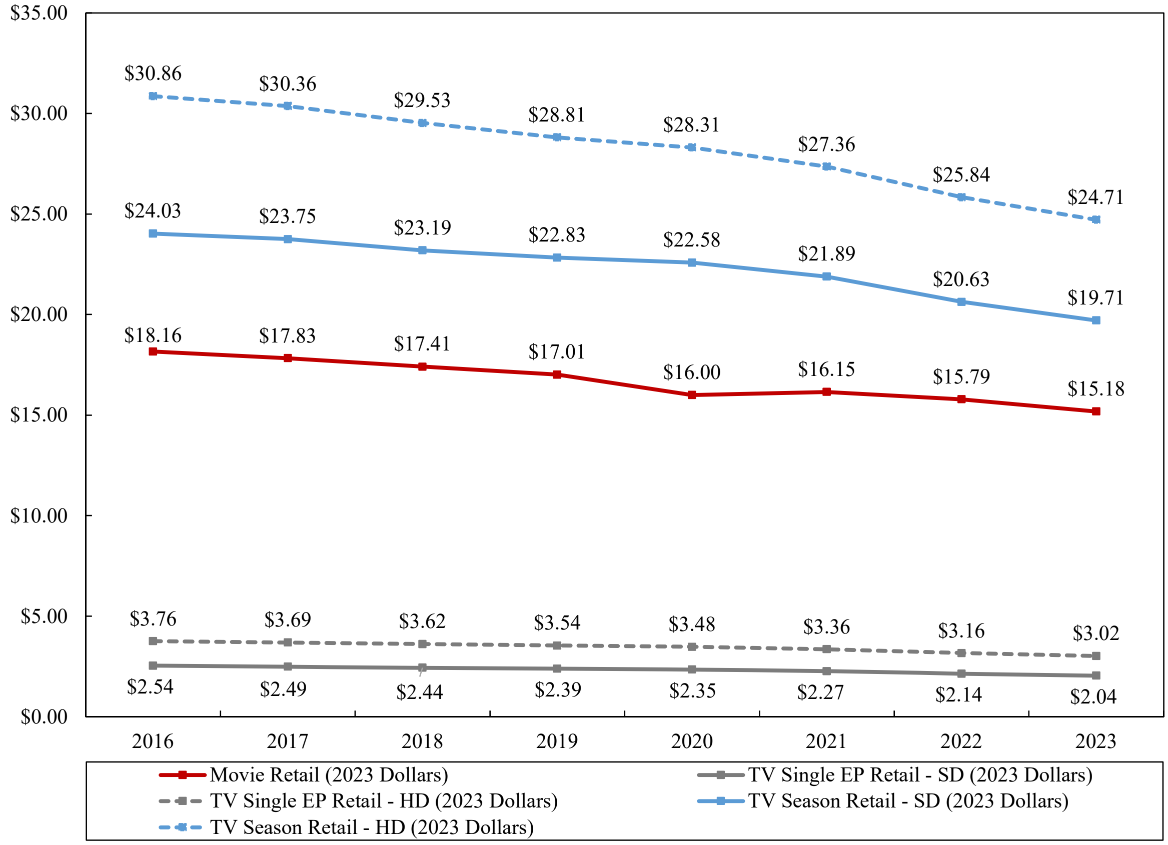
Figure 15 – Average Movie and TV Retail Prices, DVD and Blu-ray



Notes: Prices adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

Sources: Omdia; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

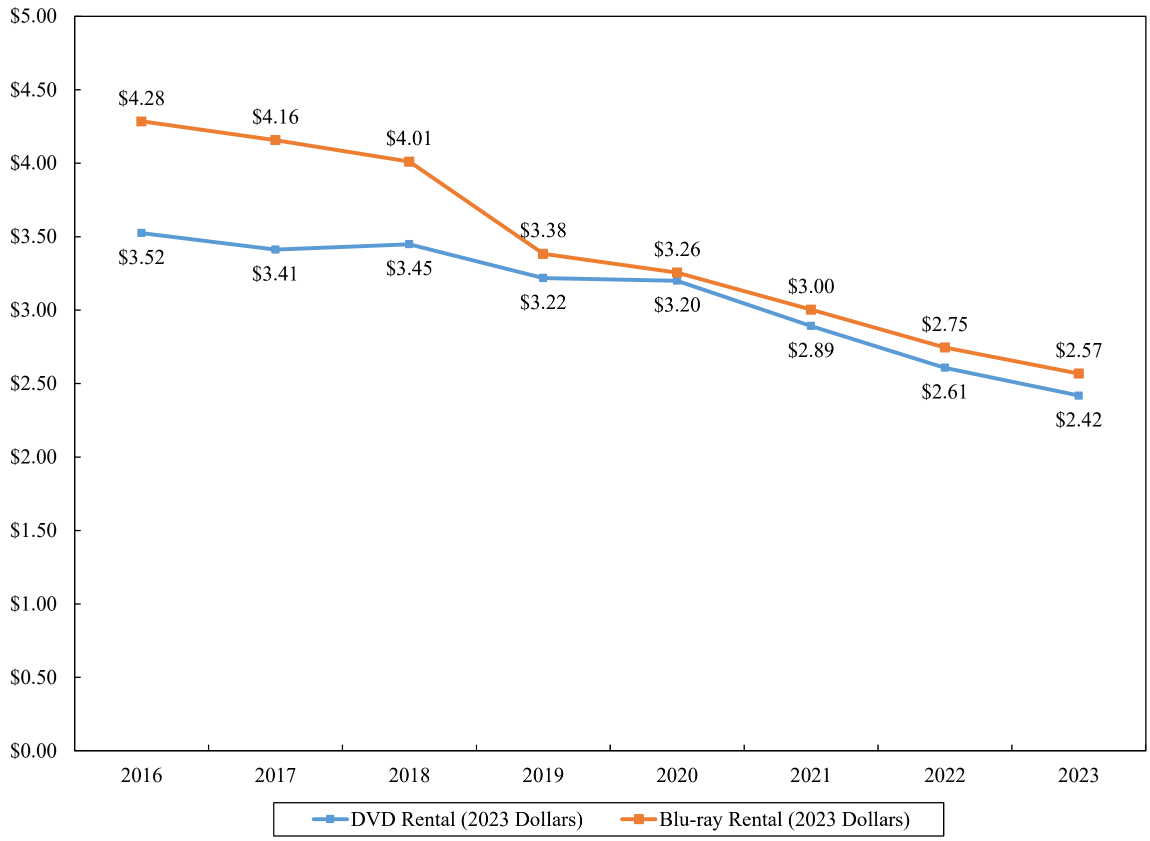
Figure 16 – Average Movie and TV Retail Prices, Digital



Notes: Prices adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

Sources: Omdia; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

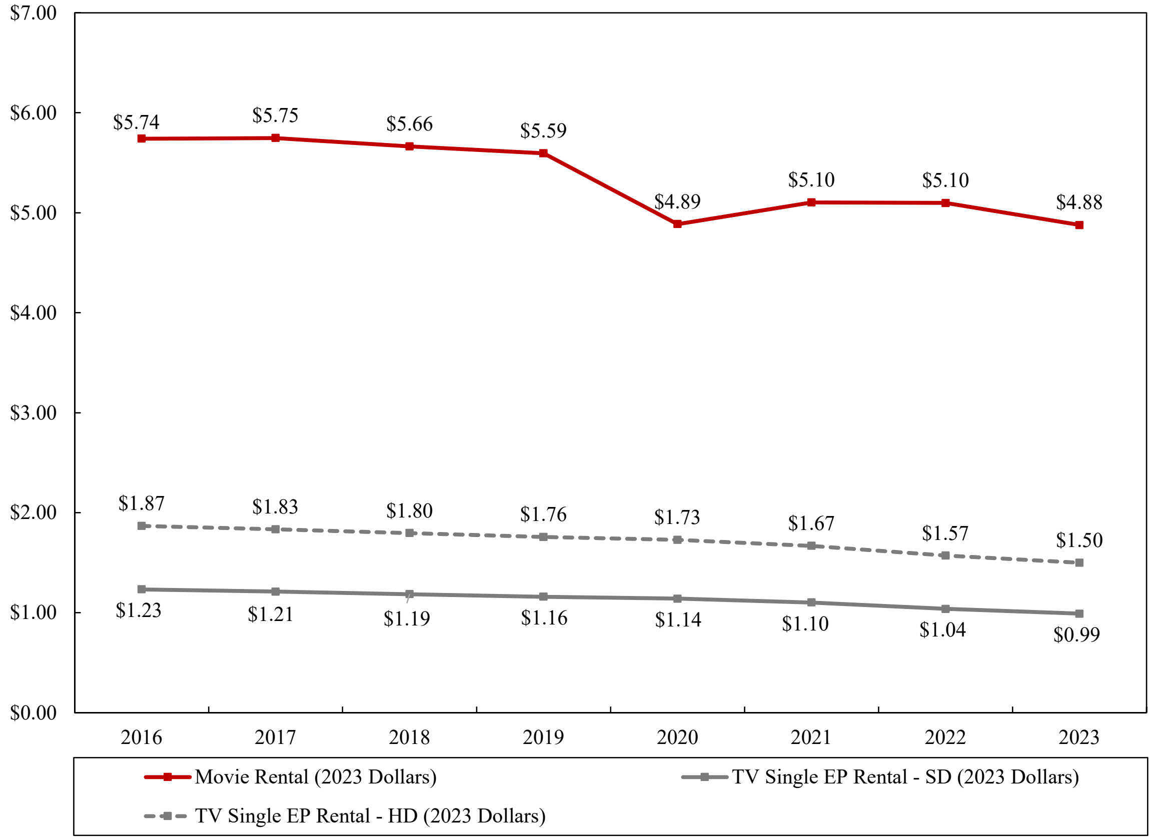
Figure 17 – Average Movie and TV Rental Prices, DVD and Blu-ray



Notes: Prices adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

Sources: Omdia; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

Figure 18 – Average Movie and TV Rental Prices, Digital



Notes: Prices adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

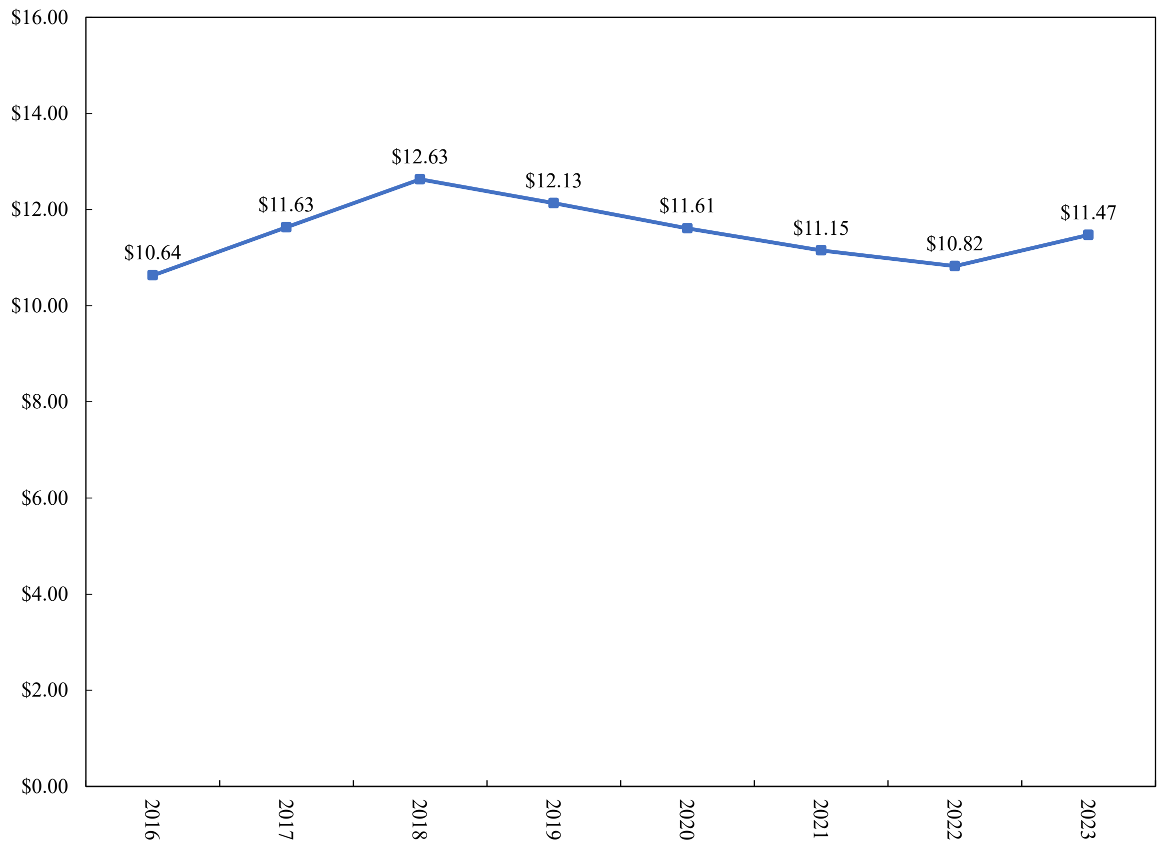
Sources: Omdia; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

Average revenue per unit (ARPU)—often used by economists as a measure of approximate effective prices paid by consumers—in real terms for online video services, which includes OTT streaming services (e.g., Netflix and ESPN+) and vMVPDs (e.g., YouTube TV and Sling TV), declined between 2018 and 2022, and increased by about one percent per year between 2016 and 2023.[65] See figure below. Service-delivery improvements, technological developments such as the rollout of 4K Ultra HD content on

[65] ARPU is the average revenue per subscriber per month, including both subscription revenues and/or advertising revenues. For example, Netflix offers various subscription plans ranging from $6.99 per month with ads, to $22.99 per month (see Netflix, "Choose the plan that's right for you," available at https://www.netflix.com/signup/planform). Netflix's ARPU would be calculated as the sum of all revenues in a month divided by the total number of subscribers across all plans in that month.

many services, and the amount and variety of content available on streaming services are improvements in quality, but are not accounted for in ARPU.[66]

Figure 19 – U.S. Online Video Average Revenue Per User (2023 dollars)



Notes: Prices adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy). Online Video ARPU is the average revenue per unit and is equivalent to the average revenue generated by each subscriber in a given period. Omdia calculates OTT video ARPU using OTT subscription revenue and average OTT subscribers during the period.

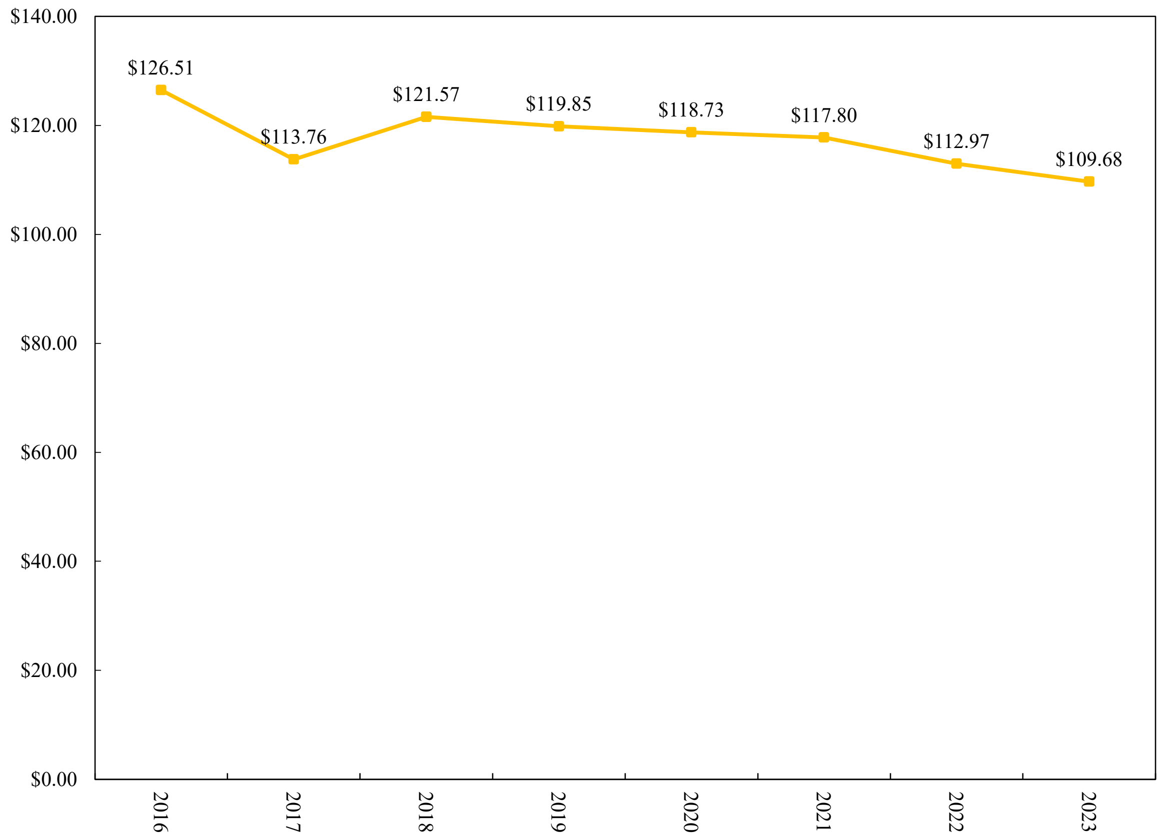
Sources: Omdia; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

ARPU in real terms for MVPDs, which includes cable companies (e.g., Comcast and CableOne), satellite (e.g., Dish and DirecTV), and IPTV (e.g., Frontier and AT&T U-Verse TV), declined by approximately two percent per year from 2016 to 2023. See figure below.

[66] As described in Section III.C above, OTT streaming services have made various advancements over the past decade, both in terms of the quality of the video and audio delivered to viewers, as well as the quality of the user interfaces of the streaming platforms, making it easier for users to quickly find content.

As shown earlier, consumers have been increasing subscriptions to OTT services and decreasing subscriptions to MVPDs which indicates a healthy competitive process for video entertainment.

Figure 20 – U.S. MVPDs Average Revenue Per User (2023 dollars)



Notes: Prices adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

Sources: Omdia; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

In conclusion, new technologies and distribution channels and services in the audiovisual industry have emerged over the past two decades in response to technological and innovation shocks to the industry. The empirical evidence documented in this section establishes that competition in the audiovisual industry, as exhibited through the reallocation of share to new technologies and services, is robust. There is substantial evidence of entry and innovation, growing output and quality, and pricing consistent with a dynamic and highly competitive industry.

IV. THE AUDIOVISUAL INDUSTRY EXHIBITS SIGNS OF A WELL-FUNCTIONING LABOR MARKET

This section presents economic analyses supporting that the audiovisual industry exhibits signs of being a well-functioning labor market, which provides benefits to workers within the industry.

As described above, there has been a shift in audiovisual content production and consumption towards new OTT distribution technologies. This shift has lowered barriers to entry for entertainment talent to reach consumer audiences. In addition, unionization in the audiovisual industry gives workers collective bargaining power to negotiate employment terms with production and streaming companies, including the members of AMPTP, the collective bargaining organization responsible for negotiating industry-wide guild and union contracts.[67] The unions have claimed great success from their recent negotiations.[68] Strong union representation contributes to favorable outcomes for workers in the audiovisual industry.

This section analyzes key metrics with respect to labor markets—employment levels and wages—to assess the health of the labor market. The empirical evidence shows stable employment levels and stable or increasing wages in the audiovisual industry, and points to an audiovisual labor market that is functioning in a healthy manner.

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[67] Alliance of Motion Picture and Television Producers, "Welcome," available at https://www.amptp.org/. As described earlier, members of AMPTP, which includes MPA's members, negotiate with more than 45 unions, operating under 64 collective-bargaining agreements.

[68] WGA, "The Campaign," available at https://www.wgacontract2023.org/the-campaign/what-we-won; Lisa Richwine and Dawn Chmielewski, "Hollywood writers guild ends strike ahead of final contract vote," *Reuters*, September 27, 2023, available at https://www.reuters.com/world/us/hollywood-writers-guild-calls-end-strike-wednesday-2023-09-27/ ("The WGA said the estimated value of the deal was $233 million per year. […] Writers appeared to have won concessions across the board, with raises over the three years of the contract, increased health and pension contributions, and AI safeguards.").

Suzy Woltmann, "Everything You Need to Know About the SAG-AFTRA + AMPTP Negotiations," *Backstage*, December 6, 2023, available at https://www.backstage.com/magazine/article/sag-aftra-strike-negotiations-explained-76246/ ("According to SAG, the new three-year deal is valued at more than $1 billion, and includes ''above-pattern' minimum compensation increases, unprecedented provisions for consent, and compensation that will protect members from the threat of AI.' The deal also comes with additional compensation for streaming shows, a boost in pension and health caps, and increased pay for background performers.").

A. Employment in the Motion Picture and Television Industry Does Not Indicate an Adverse Labor Market for Workers

Based on data from MPA, the audiovisual industry directly employed approximately 900,000 people nationwide between 2016 and 2019.[69] MPA typically categorizes and analyzes wages in the audiovisual industry under two categories: production and distribution.[70] Nationwide employment in both categories has been stable over time. See figure below.[71] The exception occurred during the COVID-19 pandemic, in which both production and distribution roles saw substantial declines in employment reflecting restrictions forcing production studios to pause production-related activity, and traditional distribution channels to shutter.[72]

---

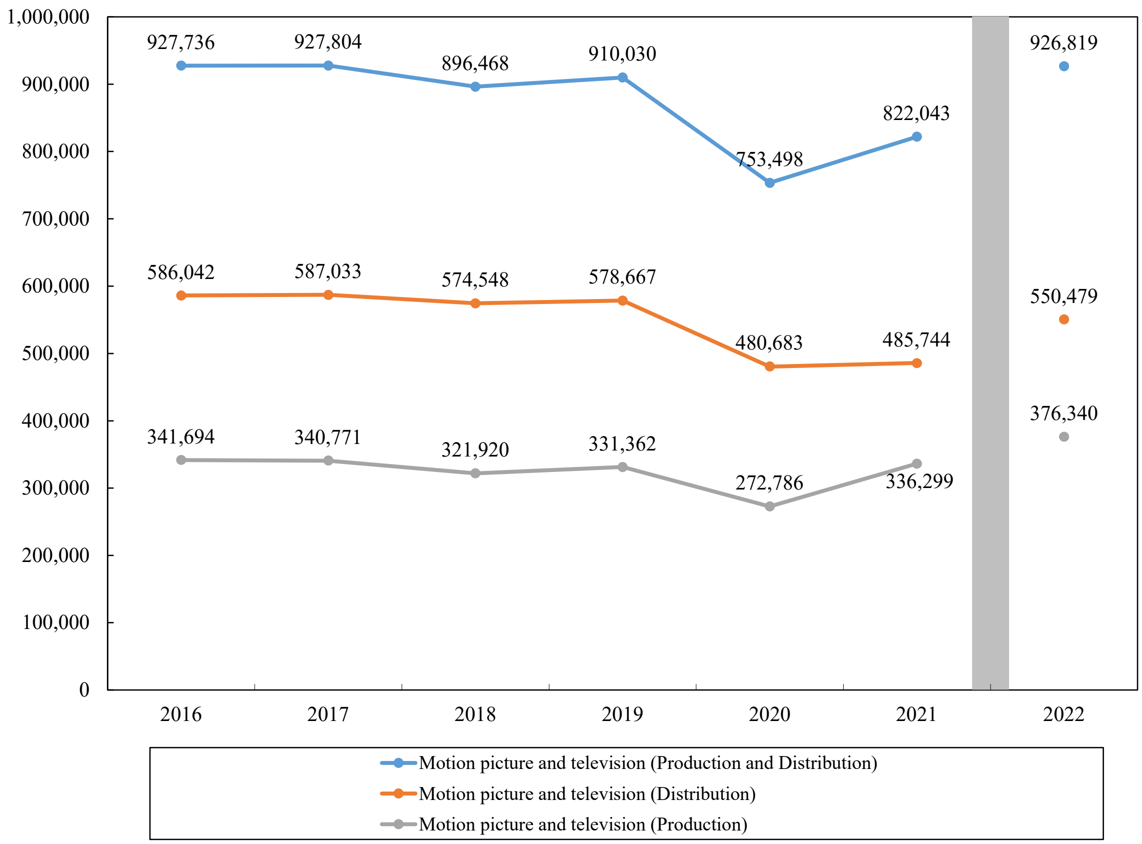
[69] MPA, "The American Motion Picture And Television Industry Creating Jobs, Trading Around The World," 2022, available at https://www.motionpictures.org/wp-content/uploads/2024/03/MPA_Economic_contribution_US_infographic-1.pdf. Direct employees are employees who directly participate in the motion picture and television industry, such as production staff, movie theater staff, and television broadcasting staff.

[70] Production-related roles are those that involve producing, marketing, and manufacturing motion pictures, television shows, and audiovisual content. Distribution-related roles are those related to distributing motion pictures, television shows, and audiovisual content to consumers. See Id. and Section II.

[71] 2022 NAICS code revisions introduced code 516210 (Media Streaming Distribution Services, Social Networks, and Other Media Networks and Content Providers), which replaced and consolidated many existing NAICS codes related to distribution. Prior to this change, MPA analysis estimated the share of each NAICS category that was related to production or distribution of motion pictures and television. This methodology underestimated distribution-related industry wages because the categories were overweighted by lower-wage roles, despite motion picture and television roles generally paying substantially more. As a result of the 2022 NAICS revisions, the new category more closely aligns with the motion picture and television roles related to distribution and is now mostly comprised of the higher-paying motion picture and television roles. Consequently, while the NAICS code revisions did not have substantial effects on employment level data, the wage data for distribution-related roles now more accurately represents wages in the industry. Comparisons between 2021 and 2022 should be avoided. See NAICS Association, "516210 - Media Streaming Distribution Services, Social Networks, and Other Media Networks and Content Providers," available at https://www.naics.com/naics-code-description/?v=2022&code=516210.

[72] Nellie Andreeva, "Los Angeles Production Grinds To A Halt Amid Covid-19 Surge; Netflix Is Latest Major Studio To Pause Filming," *Deadline*, January 4, 2021, available at https://deadline.com/2021/01/los-angeles-production-shutdown-covid-19-surge-netflix-is-latest-major-pauses-filmng-true-story-family-reunioni-1234664678.

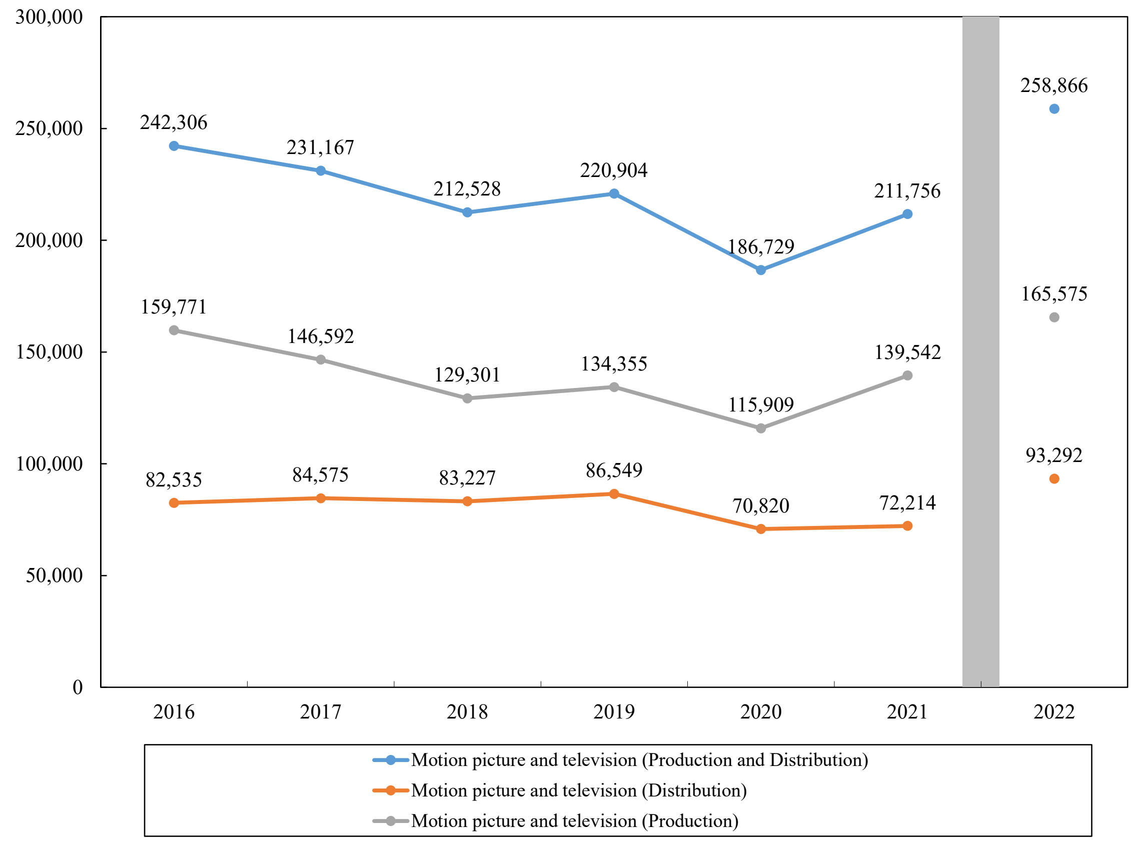
Figure 21 – Audiovisual Direct Employment, United States



Source: MPA analysis of U.S. Bureau of Labor Statistics data.

While distribution-related employment exceeds production-related employment nationwide, production-related roles employ substantially more people in California. Between 2016 and 2019, over 200,000 people were employed in the audiovisual industry in California, with over 60 percent related to production activity. Similar to the nationwide trends, the Californian audiovisual labor market saw material declines as a result of COVID-19, but has also recovered. See figure below.

Figure 22 – Audiovisual Direct Employment, California

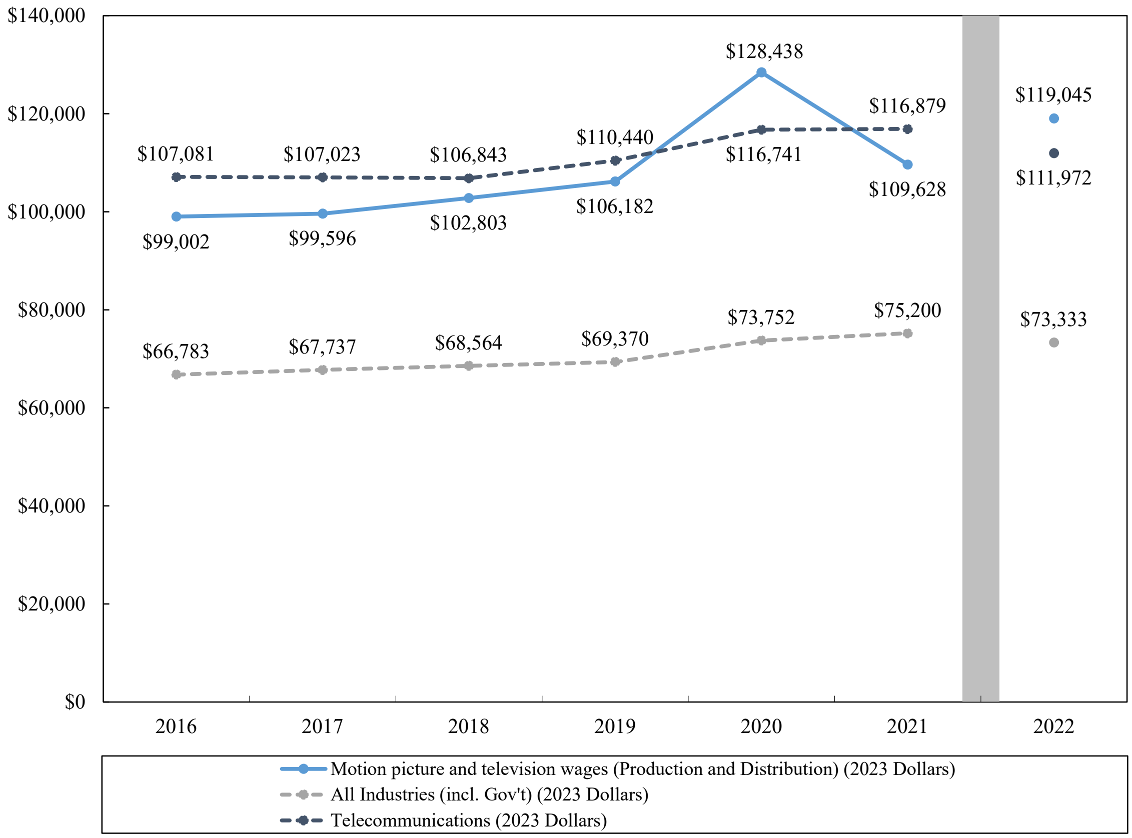


Source: MPA analysis of U.S. Bureau of Labor Statistics data.

B. Wages in the Audiovisual Industry Are Above National Average Wages

The audiovisual industry pays higher average wages than many other industries, and wages in the industry have increased over time. This appears to have coincided with the growth of OTT distribution platforms over the past decade, including the substantial increase in content spending by streaming services (see Figure 4). As shown in the figure below, average direct real wages in the U.S. audiovisual industry have exceeded average wages in the United States since at least 2016. Prior to the COVID-19 pandemic and the effects of government-mandated shutdowns on the audiovisual industry, the growth of direct real wages in the motion picture and television industry outpaced the national average across all industries. Between 2016 and 2019, national real wages in the audiovisual industry grew at an average annual rate of 2.4 percent per year, compared to 1.3 percent per year across all industries. Moreover, U.S. real wages in the audiovisual industry are in line with wages in other highly-skilled sectors with union representation, such as telecommunications.[73]

Figure 23 – Average Direct Wages By Industry, United States (2023 Dollars)



Notes: Wages are adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

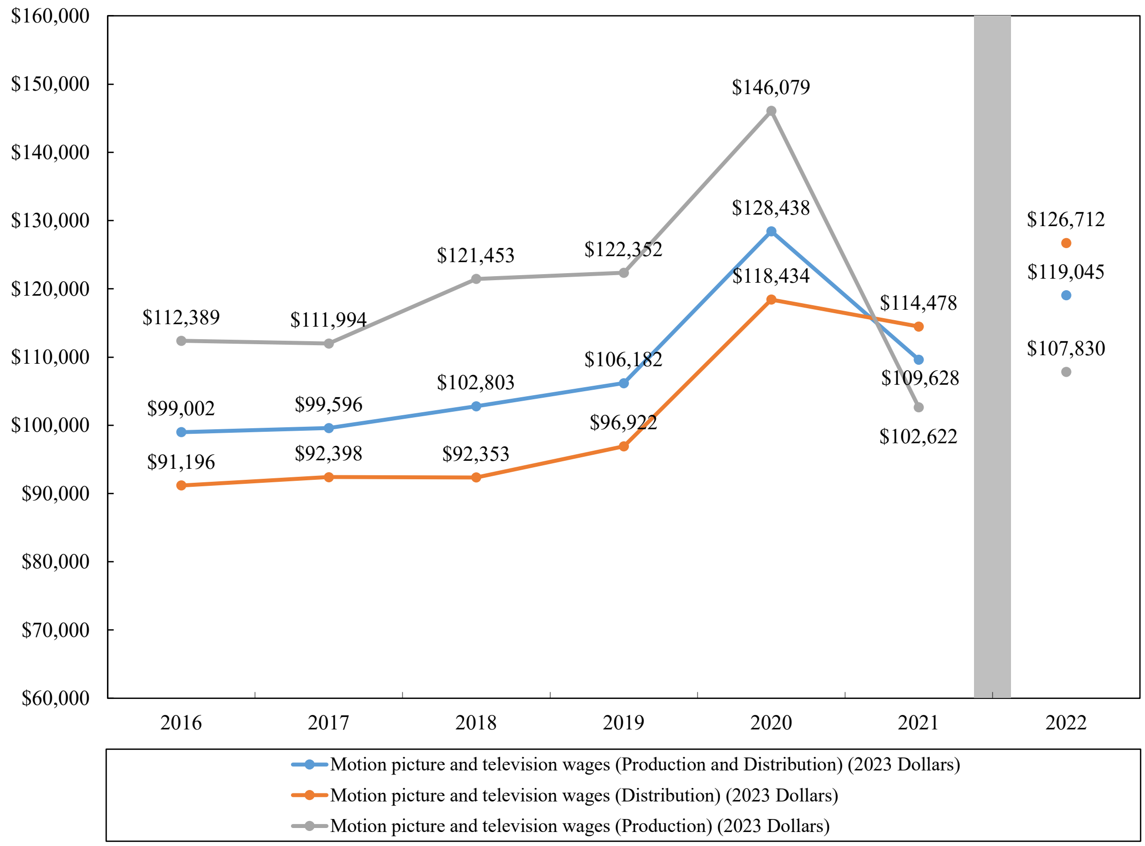
Sources: MPA analysis of U.S. Bureau of Labor Statistics data; U.S. Bureau of Labor Statistics (series ENUUS00050010 "All industries including government"; series ENUUS000505517 "Telecommunications"; and series CUUR0000SA0L1E "CPI All Items (excl. food & energy)").

The following figure provides a breakdown of U.S. audiovisual direct real wages. Setting aside the substantial volatility in real wages in 2020 and 2021 resulting from the

[73] For example, approximately 42 percent of AT&T's 149,900 employees are represented by a union. See AT&T Inc., Form 10-K for the fiscal year ended December 31, 2023, pp. 6-7, available at https://otp.tools.investis.com/clients/us/atnt2/sec/sec-show.aspx?FilingId=17303532&Cik=0000732717&Type=PDF&hasPdf=1.

effects of the COVID-19 pandemic, both distribution-related and production-related real direct wages in the audiovisual industry grew between 2016 and 2019.

Figure 24 – Breakdown of Audiovisual Direct Wages, United States (2023 Dollars)

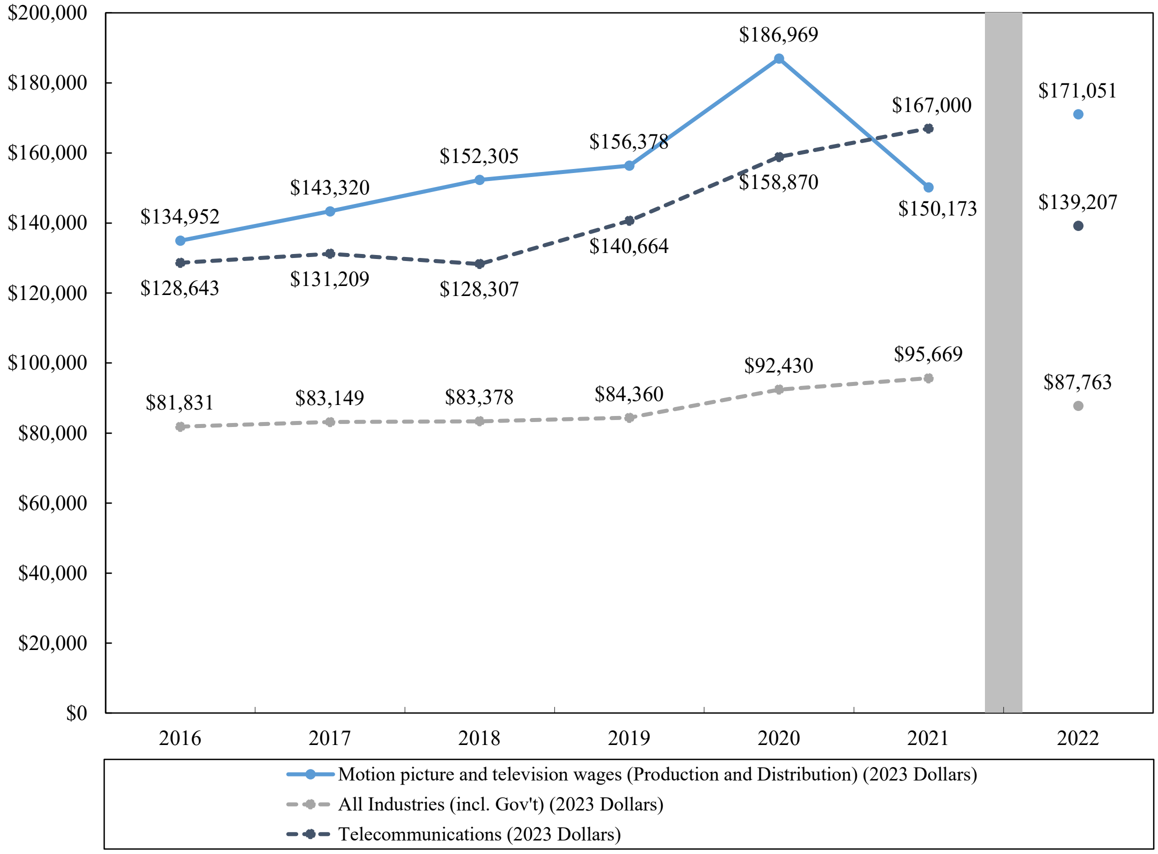


Notes: Wages are adjusted to 2023 dollars using U.S. Bureau of Labor Statistics CPI All Items (excl. food & energy).

Source: MPA analysis of U.S. Bureau of Labor Statistics data; U.S. Bureau of Labor Statistics (series CUUR0000SA0L1E).

Trends in real wages in the audiovisual industry are more pronounced in California. In 2022, audiovisual direct real wages were substantially higher than California's average real wages across all industries. Again, setting aside the effects of the COVID-19 pandemic on real wages in 2020 and 2021, between 2016 and 2019, real wages across all industries in California grew at an average of 1.0 percent per year, while real wages in the audiovisual industry grew at an average rate of 5.0 percent per year. See figure below. Moreover, California wages in the audiovisual industry are in line with wages in other highly-skilled sectors with strong union representation, such as telecommunications.

Figure 25 - Average Direct Wages By Industry, California (2023 Dollars)

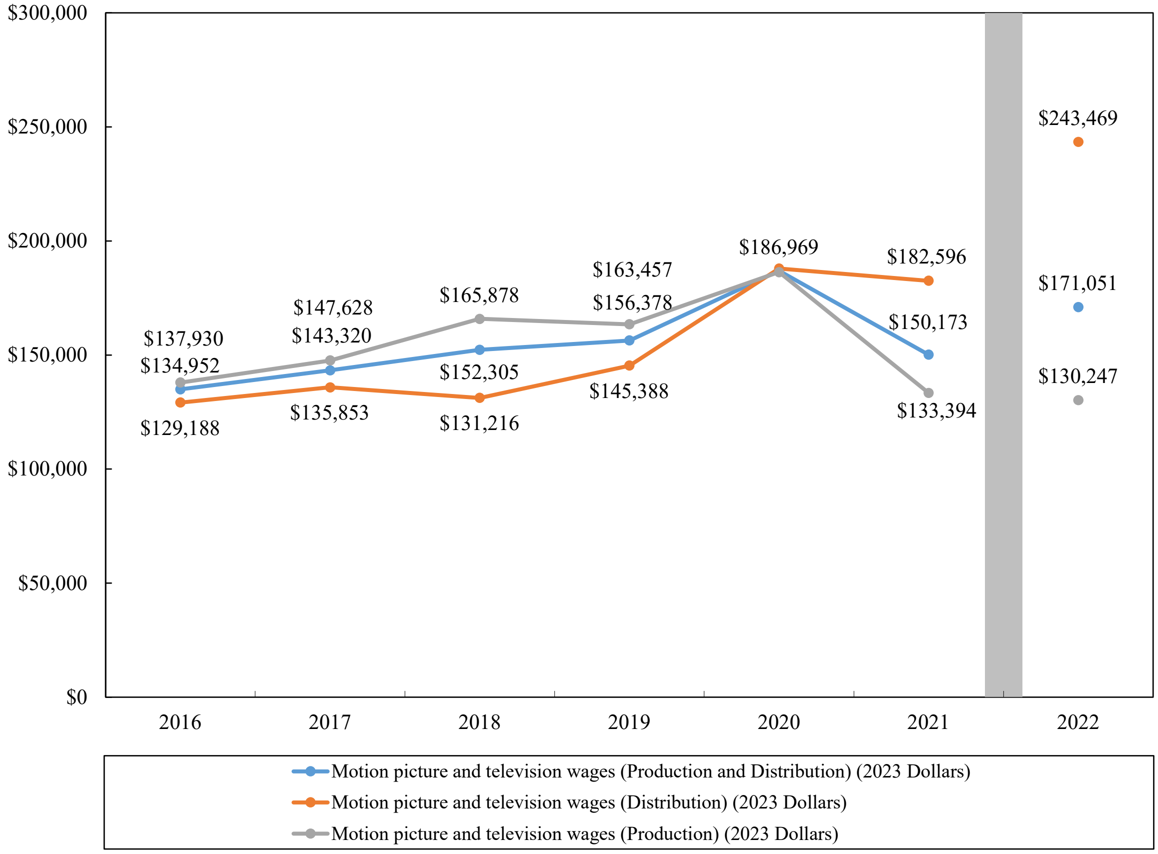


Notes: Wages are adjusted to 2023 dollars using California's CPI - All Items.

Sources: MPA analysis of U.S. Bureau of Labor Statistics data; U.S. Bureau of Labor Statistics (series ENU0600050010 "All industries including government"; series ENU06000505517 "Telecommunications"; and State of California analysis of U.S. Bureau of Labor Statistics data, https://www.dir.ca.gov/oprl/cpi/entireccpi.pdf.

The following figure provides a breakdown of audiovisual direct real wages in California. Real wages for both production-related and distribution-related workers in the audiovisual industry grew between 2016 and 2019. Trends beyond 2019 are substantially influenced by the effects of the COVID-19 pandemic. The average distribution-related real wage in California in 2022 was over $243,000, almost 2.8 times higher than the average wage across all industries in California.

Figure 26 – Breakdown of Audiovisual Direct Wages, California (2023 Dollars)



Notes: Wages are adjusted to 2023 dollars using California's CPI - All Items.

Sources: MPA analysis of U.S. Bureau of Labor Statistics data; State of California analysis of U.S. Bureau of Labor Statistics data, https://www.dir.ca.gov/oprl/cpi/entireccpi.pdf.

V. Conclusion

This report highlights signs of robust competition in the audiovisual industry that benefit consumers, and also provides insight into the competitive health of the broader industry, including the labor market. The empirical evidence supports the conclusion that the audiovisual industry is a dynamic and highly competitive industry with numerous participants providing an increasingly diverse array of content across new and innovative delivery platforms, benefitting consumers. Furthermore, the empirical evidence demonstrates that the audiovisual labor market is an important employer in California, is a well-functioning labor market, and pays wages above the average of other industries.

EXHIBIT B

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July 18, 2024

President Tim Berg
Uniform Law Commission
111 N. Wabash Avenue, Suite 1010
Chicago, IL 60602

Re: **Proposed Uniform Law on State Premerger Notification**

Dear President Berg:

I am writing on behalf of the American Bar Association, Antitrust Law Section, as the Chair-Elect. The Council of the Section, its governing body, has voted to support the proposed Uniform Law on State Premerger Notification that is being presented at the Uniform Law Commission's Annual Meeting in Boston, Massachusetts from July 19, 2024 to July 25, 2024 for final consideration. Thank you for the opportunity to have two of our members serve as American Bar Association advisers to the Drafting Committee.

Respectfully,

Steven J. Cernak

Steven J. Cernak
2023-24 Chair-elect, ABA Antitrust Law Section

Cc: Dan Robbins, Chairman ULC Drafting Committee
Emilio Varanini – via email

Sarah Huchel
Executive Director
California Law Revision Commission

August 8, 2015

Dear Executive Director Huchel:

We are writing to provide commentary on the California Law Revision Commission's Draft Language for Merger Provisions.[1] We apologize for missing the July 30 deadline and respectfully ask the Commission to nevertheless consider our submission, which is directly responsive to the Draft Language document. The "Background On Current Merger Standards and Burdens of Proof" discusses Section 7 of the federal Clayton Act's "may be substantially to lessen competition" clause, but confines its mention of Section 7's ". . . or tend to create a monopoly" prohibition to footnote 16.[2] We were honored that the Draft document references our recent article[3] on the tend-to-create-a-monopoly clause, and agree with the conclusion that this clause "has been largely ignored in the last few decades."[4] However, we were very concerned to see the Draft document go on to state that, because of this lack of use by federal enforcers and courts, "the discussion . . . will focus on 'may be substantially to lessen competition.'"[5]

Based upon our research and combined experience, we believe that this federal failure was a grave policy error, one that California should avoid rather than repeat. The well documented rise of monopolies and dominant firms over the past four decades resulted in part from failure to enforce the Clayton Act's statutory prohibition on mergers that may "tend to create a monopoly." State antitrust law reform offers an opportunity to fill the current gap. We urge the Commission to recommend that the California Legislature take steps to correct the federal error, and we offer below a straightforward, easy to implement means of doing so. We also attach our vitae to document our experience involving merger litigation and policy at the Federal Trade Commission and U.S. Department of Justice Antitrust Division, in private practice, and as academics who have published many articles on merger policy and enforcement.

The current level of merger enforcement has been inadequate to protect competition, consumers, workers and innovation.

[1] Calif. L. Revision Comm'n, Study B-750, June 16, 2025 Memorandum 2025-31, Draft Language for Merger Provisions.
[2] *Id.* at n.16 ("Because the second prong of the Clayton Act's Section 7, 'tend to create a monopoly', has been largely ignored in the last few decades, the discussion in this memo will focus on "may be substantially to lessen competition.")
[3] Robert H. Lande, John M. Newman & Rebecca Kelly Slaughter, *The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act Section 7*, 103 TEX. L. REV. 711 (2025).
[4] Study B-750, *supra* note 1.
[5] *Id.*

A robust bar on mergers that threaten to move the acquiring company appreciably toward monopoly can help to "nip monopoly power in the bud,"[6] before it can harm Californian consumers, workers, and honest businesses. Indeed, this type of concern was one of the primary policy goals that motivated Congress to pass, and later strengthen, the Clayton Act.[7] Unfortunately, recent empirical work shows that underenforcement at the federal level has allowed many mergers that resulted in higher prices, lower output, and lower levels of innovation.[8] The Study Commission rightly observed that the federal level "narrowing of enforcement has coincided with . . . the rise of dominant firms."[9] Large-scale mergers not only often cause societal harms; they also generally fail to yield any significant offsetting benefits.[10] Professor John Kwoka, who released a comprehensive and widely acclaimed meta-study on mergers in 2014, later summarized his analysis by writing that "there is, in short, no good evidence that mergers generally result in substantial and verifiable cost savings, notwithstanding claims to the contrary."[11]

We believe that the antitrust authorities' failure to enforce Clayton Act Section 7's second prong contributed significantly to the recent rise of dominant firms and the resulting societal harms. A separate federal prohibition on outright monopolization does exist in the form of Sherman Act Section 2. But once acquired, monopoly power is often quite durable,[12] litigation is lengthy and expensive, and even where plaintiffs have successfully proved a violation of that statute, remedies that effectively dissipate the illegally acquired monopoly power have been rare.[13]

The "tend to create a monopoly" clause is supposed to function as a distinct prohibition.

Since its original enactment in 1914, Clayton Act Section 7 has contained a clear, distinct ban on mergers that may "tend to create a monopoly." The statute's legislative history confirms that "tend to create a monopoly is a distinct provision with its own operative force.[14] Moreover, the rise of textualist legal analysis means that enforcers and courts should place more emphasis

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[6] *Laidlaw Acquisition Corp. v. Mayflower Grp*, 636 F. Supp. 1513, 1518 (S.D. Ind. 1986) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592–93 (1957)).
[7] *Id.*
[8] *See* JOHN E. KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 120 (2015); Orley Ashenfelter et al., *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J. L. & ECON., Aug. 2014, at S67, S73–76; Study B-750, *supra* note 1, at 19.
[9] Study B-750, *supra* note 1. at 3.
[10] *See* sources cited *supra* note 8; John Kwoka, Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice, American Antitrust Institute Working Paper, Oct. 2018; *see also* Philadelphia National Bank *at 50: An Interview with Judge Richard Posner*, 80 ANTITRUST L.J. 205, 210 (2015) (quoting then-Judge Richard Posner as concluding that "[m]ergers rarely seem to improve efficiency"); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 112 (1976) ("I would not allow a generalized defense of efficiency."); Mark Glick, Robert H. Lande & Darren Bush, *The Efficiency Rebuttal in the New Merger Guidelines: Bad Law and Bad Economics*, ANTITRUST, Summer 2024, at 20, 24 (concluding that "the weight of the evidence indicates that horizontal mergers do not reduce costs in a significant percentage of high-concentration mergers," and cases that have sufficient efficiency gains to offset a unilateral price increase "are difficult if not impossible to come by").
[11] Kwoka, *supra* note 11, at 30; *see also* John Kwoka, *Mergers, Merger Control, and Remedies: A Response to the Vita-Osinski Critique*, 82 ANTITRUST L.J. 741 (2019) (debunking low-quality arguments leveled by critics).
[12] *See* John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, at 1503–06 (2019).
[13] *See* Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 1959–60 (2020).
[14] Lande, Newman & Slaughter, *supra* note 3, at 813–14.

than ever on the plain words Congress included in the statute, including its desire to prevent mergers that "may" "tend" to create a monopoly.[15] Supreme Court endorsement of this prong is old, but is "good law" in the sense of being theoretically valid. For example, *du Pont* is quite clear: "[T]he Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may . . . tend to create a monopoly of a line of commerce."[16] Similarly, in *Penn-Olin*, the Court wrote that "[t]he requirements . . . are satisfied when a 'tendency' . . . toward monopoly in the relevant market is shown." [17]

Our research identified cases that historically put this prong to good use.[18] One example especially salient to the Commission's ongoing work is *California v. Mirant Corp.*,[19] a lawsuit filed by the State of California to unwind several electricity-generation acquisitions. According to California's complaint, after the acquisitions, the defendants had doubled—and in some cases tripled—electricity prices to Californian consumers. The defendants offered a clever argument in response: because Pacific Gas & Electric had historically controlled all electricity generation in California, the acquisitions could not have lessened "competition." But the court was able to cut through the defendants' dust by relying on the statutory tend-to-create-a-monopoly clause.[20] Regardless of whether these harmful acquisitions had lessened "competition," they had clearly moved the defendants toward holding monopoly power in their respective geographic markets.[21] As a result, California's complaint survived the defendants' motion to dismiss.

The federal antitrust enterprise has ignored this clear statutory language.

Our research led us to the reluctant conclusion, shared by this Commission, that federal antitrust law has, in practice, failed to respect Congress's intent regarding the tend-to-create-a-monopoly clause. Some federal-court opinions even selectively quote the Clayton Act so as to omit this language altogether.[22] Federal enforcement-agency guidelines have done the same thing,[23] as have speeches by prominent federal enforcers and journal articles by leading scholars.[24] We can only speculate as to why this failure occurred. Whatever the reason, the federal antitrust enterprise has indeed "largely ignored" the tend-to-create-a-monopoly clause for decades.

The "tend to create a monopoly" prohibition reflects sound policy considerations.

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[15] *See id.* at 797–808.
[16] *United States v. E.I. du Pont de Nemours & Co.*, 353 US 586, 597 (1957).
[17] *United States v. Penn-Olin Co.*, 378 U.S. 158, 171 (1964).
[18] Lande, Newman & Slaughter, *supra* note 3, at 808–13.
[19] *Calif. v. Mirant Corp.*, 266 F. Supp. 2d 1046, 1055 (N.D. Cal. 2003), *aff'd sub nom. Calif. v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004), *op. amended on denial of reh'g and aff'd*, 387 F.3d 966 (9th Cir. 2004).
[20] *Id.* at 1054–55.
[21] *Id.* ("Allegations of the ability to control prices . . . suffice to allege that an acquisition tends toward monopoly.").
[22] *E.g.*, *United States v. Jetblue Airways Corp.*, No. 23-10511-WGY, 2024 WL 162876, at *22 (D. Mass., Jan. 16, 2024); *see also FTC v. Advoc. Health Care Network*, 841 F.3d 460, 467 (7th Cir. 2016); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001).
[23] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES § 2, at 3 (2020 (identifying "the central question" as "whether a vertical merger may substantially lessen competition").
[24] *See* Lande, Newman & Slaughter, *supra* note 3, at 787–88 (collecting examples).

Antitrust economics has long recognized that the more power a firm wields, the more harm it can cause to consumers, workers and other input suppliers, and society at large.[25] Mergers and acquisitions, which consolidate multiple separate firms into one, can facilitate such harms. A relatively small firm can use a substantial acquisition to gain market power, and a relatively large firm can use even small acquisitions to increase or entrench its power. The U.S. Congress sought to address both of these problems via a sliding scale. Clayton Act Section 7's first prong focuses on the first, and its second prong focuses on the second.

	"Substantially Lessen Competition"	"Tend to Create a Monopoly"
Merged Firm Power	Easier to satisfy	Harder to satisfy
Size of Merger Effect	Harder to satisfy	Easier to satisfy

This sliding-scale approach was meant to ensure that the statute applies to both types of harmful mergers while avoiding overreach. We believe that failure to enforce the statute's second prong has upset the balance originally envisioned by Congress. To put it bluntly, federal enforcers have allowed too many harmful mergers to occur, and too many harmful monopolies to form. Based on our research and combined experience, we have identified at least ten different scenarios in which a robust tend-to-create-a-monopoly bar would help to prevent harm to Californians. A selected subset of those scenarios follows:

- Scenario 1: A merger may lessen competition appreciably, but not "substantially." For example, an already-powerful acquirer may seek to acquire a small, but viable, rival. Or the relevant market may already be so concentrated that competition is already deadened.

- Scenario 2: A powerful acquirer successfully "litigates the fix" by making open offers, nonbinding commitments, or other remedies that are only partially effective. Defendants have increasingly adopted the strategy of crafting their own preferred "fix," and at least one federal court has held that even a partial "fix" may let a harmful merger clear the substantially-lessen-competition prong.[26]

- Scenario 3: The exact amount of harm from the merger is difficult to assess or quantify. For example, qualitative evidence may indicate likely harm in a nascent market.

- Scenario 4: An acquisition is the first step in a "roll up" strategy. Private-equity firms have used this strategy to consolidate a staggering array of sectors across the United States. The first acquisition in such a strategy will not change market-concentration levels, but nonetheless moves the acquirer appreciably toward monopoly.

[25] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 911a (5th ed. 2024) ("No merger threatens to injure competition more than one that immediately changes a market from competitive to monopolized.").
[26] *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1059 (5th Cir. 2023).

- Scenario 5: A roll-up strategy involves making small, successive acquisitions. This scenario is a combination of the first and fourth scenarios described above.

- Scenario 6: An acquirer intends to remove a previously viable competitor from the market, tending to leave the remaining market under monopoly control. Private-equity firms sometimes load acquired target companies with unsustainable debt levels, sell off key assets, and the like, thereby concentrating power in the hands of remaining competitors.

- Scenario 7: An acquisition eliminates a reputational (or similar) constraint that prevented the former owner from exercising monopoly power. For example, a reputable pharmaceutical company that is not able to exercise the full force of its pricing power over a single drug due to reputational constraints may sell that drug to a less scrupulous buyer.[27]

A straightforward, simple fix could make California's merger law far more effective.

By simply splitting the two distinct prohibitions into two separate sentences, the California legislature could make clear that it is adopting the balanced, effective, sliding-scale approach long forgotten by federal enforcers. We take no position on which of the formulations identified by the Commission to date would be optimal, though we do strongly believe that California should adopt its own merger law. The beauty of our proposal is that it will work regardless of which formulation the California Legislature ultimately considers.

To illustrate, here is the current text of the federal Clayton Act Section 7, in relevant part:

> [N]o person . . . shall acquire . . . another person . . . where . . . the effect of such acquisition may be to substantially lessen competition, or to tend to create a monopoly.

Our proposal would separate this single operative sentence—which makes it too easy for enforcers and courts to elide the second prong—into two. The redrafted law would read as follows:

> [N]o person . . . shall acquire . . . another person . . . where . . . the effect of such acquisition may be to substantially lessen competition.
>
> [N]o person . . . shall acquire . . . another person . . . where . . . the effect of such acquisition may be to tend to create a monopoly.

This separation should make it clear to the enforcers and the courts that these are two distinct prohibitions, and that a merger or acquisition that violates either one should be enjoined. Since the statute would be using the same language as the Clayton Act, this would preserve the effects of a century of judicial precedent and undermine arguments that the new language violates the Clayton Act or the supremacy clause of the U.S. Constitution. The Commission

[27] Concurring Statement of J. Thomas Rosch, FTC v. Ovation Pharmas., Inc., No. 081 0156, 1 (Dec. 16, 2008).

should also add a comment which emphasizes that the "tend" clause is separate, means what its clear language says, and that the enforcers and the courts should utilize this provision whenever this would be in the public interest.

We respectfully urge the Commission to recommend that the California Legislature take this simple step to avoid repeating the mistake we (and the Commission) have identified at the federal level. The forgotten half of the Clayton Act can—and should—play an important role in state antitrust enforcement. A statute with one hand tied behind its back will allow harmful mergers to occur. Durable, entrenched monopolies will continue to form, deadening the competitive process that—unfettered—benefits consumers, workers, suppliers, and start-ups that wish to enter the fray with new ideas.

Please let us know if we can provide any additional information concerning these issues that may facilitate your analysis and deliberation. We commend the Commission for its thoughtful, thorough work on this important initiative, and we stand ready to assist in any way that may be useful to you.

Respectfully Submitted,

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EXPERIENCE

FEDERAL TRADE COMMISSION, Washington, D.C.

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As one of five Senate-confirmed leaders of the independent federal agency responsible for competition and consumer protection, advocate for the nation's consumers and workers, and endeavor to build consensus for a progressive vision. Particular focus and interests include: growing threats related to competition and the broad abuse of consumers' data; targeted merger retrospectives; corrective enforcement; comprehensive use of the Commission's statutory and rulemaking authorities; the relationship between competition and consumer protection enforcement; and improving the agency's resources and transparency.

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Chief Counsel June 2014–April 2018
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Provided strategic advice and directly engaged on behalf of the Democratic Leader with other Senators, as well as companies, stakeholders and constituents on portfolio of issues, including antitrust, privacy, consumer affairs, intellectual property, telecommunications, technology, national security, bankruptcy, nominations and oversight. Assisted Leader with caucus strategy and preparation of legislation, statements, questions, and speeches on those topics, and coordinated with relevant government agencies, including FTC, DOJ, FCC, and the White House. Managed team of attorneys, clerks, and assistants. Granted TS-SCI clearance.

Significant projects included: congressional reviews of mergers and antitrust investigations, such as American Airlines merger with U.S. Airways, AT&T attempts to acquire T-Mobile and Time Warner, Comcast acquisition of NBCU, e-books litigation, and FTC investigation into Google; elements of the "Better Deal" Democratic economic agenda, including proposals on antitrust and broadband expansion; congressional responses on net neutrality, broadband privacy, and other FCC regulations; passage into law of the Moran-Schumer BOTS Act of 2016, which provides FTC authority over deceptive ticket scalping techniques; investigation into Russion interference with the 2016 election; advocacy for FTC investigations of privacy policies for consumer products such as smart TVs or home DNA kits; patent reform, including the Schumer-Kyl business method patents provision in the America Invents Act of 2011, and negotiation of a Schumer-Cornyn compromise bill; PATRIOT Act and FISA Amendments Act reauthorizations; all Supreme Court Justice nominations 2005–2017.

SIDLEY AUSTIN, Washington, D.C.

Associate (Civil, Criminal, and Constitutional Litigation) September 2008–May 2009
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Conducted legal research, prepared memoranda, and assisted with witness preparation and document review in connection with various litigation matters, including regulatory investigation of a public accounting firm. Wrote briefs and helped craft litigation strategy for an international development organization. Researched and drafted article on mass tort class action settlements.

DAVIS POLK & WARDWELL, New York, N.Y. Summer 2006

Summer Associate. Researched legal issues in a variety of matters, including post-verdict motions in a white-collar criminal case, an internal investigation of securities fraud, and a pro bono prisoner's rights settlement.

EDUCATION

YALE LAW SCHOOL, New Haven, Connecticut. J.D. 2008.

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EMPLOYMENT

UNIVERSITY OF BALTIMORE SCHOOL OF LAW Venable Professor of Law Emeritus since Jan. 1, 2023. Venable Professor of Law 1998-2022; Professor 1995-98; Associate Professor 1991 to 1995; Assistant Professor 1987 to 1991.

Courses taught: Antitrust, Comparative Antitrust (in Summer Program in Aberdeen, Scotland in 2001 and in Haifa, Israel in 2006), Law & Economics, Law & Economics Seminar, and Torts.

AMERICAN ANTITRUST INSTITUTE. A volunteer Director of this nonprofit research and advocacy organization since 1998. Full time Senior Research Scholar 2000, 2002, and 2006.

NIHON UNIVERSITY, Tokyo, Japan. Visiting Professor, Summer 1998.

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JONES DAY. Associate, 1984-87. I specialized in antitrust law and performed other types of complex regulatory and corporate counseling and litigation.

FEDERAL TRADE COMMISSION, Bureau of Competition, Planning Office, 1978 to 1984. I analyzed antitrust policy issues and worked on complex cases. I received promotions to GM 15, six special awards and was rated "Outstanding."

EDUCATION

J.D.	HARVARD UNIVERSITY	1978
	Harvard Civil Rights-Civil Liberties Law Review.	
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TEXTBOOK

Torts: Theory And Practice, by Little, Lidsky & Lande (4th Ed 2014) (LexisNexis) (casebook)

Torts: The Civil Law of Reparation For Harm Done By Wrongful Act, by Little, Lidsky & Lande (3rd Ed 2009) (LexisNexis) (casebook)

U.S. LAW REVIEW ARTICLES

"The Merger Efficiency Defense: No Legal Basis and a Bad Idea" 70 The Antitrust Bulletin 1 (2025)

"The Efficiency Rebuttal in the New Merger Guidelines: Bad Law and Bad Economics" 38 Antitrust 20 (2024),

"Antitrust Ideas that Progressives Should Resurrect: Conglomerate Merger Legislation, No-Fault Monopolization, and Merger Incipiency," 53 University of Baltimore Law Review, 481 (2024).

"The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act § 7", 103 Texas L. Rev. (2024) (co-authored with Commissioner Rebecca Kelly Slaughter and John M. Newman)

"Textualism As An Ally of Antitrust Enforcement: Examples From Merger and Monopolization Law", 2023 Utah L. Rev. 813 (2023)

"High Tech Monopolies: Cutting The Gordian Knot With No-Fault," 168 U. Penn. Law Rev. Online 253 (2021)

"The No-Fault Approach to Monopolization: Terrific, Terrible, or Textualism?," Antitrust Magazine Online 1, August 2021

"The Sherman Act is a No-Fault Monopolization Statute: A Textualist Demonstration," 70 American U. L. Rev. 497 (2020) (co-authored with Dr. Richard O. Zerbe)

"Preventing The Curse of Bigness Through Conglomerate Merger Legislation," 52 Arizona State L. J. 75 (2020) (co-authored with Sandeep Vaheesan)

"The Merger Incipiency Doctrine and the Importance of 'Redundant' Competitors," 2018 Wisconsin L. Rev. 783 (2018) (co-authored with Peter C. Carstensen) (winner of the 2019 Antitrust Writing Award in the category of Best 2018 Horizontal Merger Article, given by the Cohen Foundation)

"Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages," 100 Iowa L. Rev. 1997 (2015) (co-authored with Dr. John M. Connor).

"Defying Conventional Wisdom: The Case For Private Antitrust Enforcement," 48 Georgia L. Rev. 1 (2013) (co-authored with Joshua P. Davis) (winner of the 2014 Antitrust Writing Award in the category of Best 2013 Academic Private Enforcement Article, given by Concurrences and George Washington University)

"Should The Internet Exempt The Media Sector From The Antitrust Laws?" 65 Florida L. Rev. 1521 (2013) (co-authored with Thomas J. Horton)

"A Traditional and Textual Analysis of the Goals of Antitrust: Efficiency, Preventing Theft From Consumers, and Consumer Choice," 81 Fordham L. Rev. 2349 (2013)

"Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement," 36 Seattle U. L. Rev. 1269 (2013) (co-authored with Joshua P. Davis)

"The Extraordinary Deterrence Of Private Antitrust Enforcement: A Reply To Werden, Hammond, and Barnett," 58 Antitrust Bull. 173 (2013) (co-authored with Joshua Davis)

"Cartels As Rational Business Strategy: Crime Pays" (co-authored with Dr. John Connor), 34 Cardozo L. Rev. 427 (2012) (co-winner of the $8,000 Cohen Foundation Award for best Antitrust & Trade Regulation Scholarship published during 2012)

"Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U. S. Antitrust Laws," 2011 B.Y.U. L. Rev. 315 (2011) (co-authored with Joshua Davis)

"New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations", 61 Alabama L. Rev. 447 (2010)

“The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency,” 84 Notre Dame L. Rev. 191 (2008) (co-authored with John B. Kirkwood)

“Benefits From Private antitrust Enforcement: An Analysis of Forty Cases,” 40 U. San Francisco L. Rev. 879 (2008) (co-authored with Joshua Davis).

“Using The ‘Consumer Choice’ Approach To Antitrust Law”, 74 Antitrust L. J. 175 (2007) (co-authored with Neil W. Averitt) (co-winner of the $8,000 Cohen Foundation Award for best Antitrust & Trade Regulation Scholarship published during 2007)

“The Size of Cartel Overcharges: Implications For U.S. and E.U. Fining Policies,” 51 Antitrust Bulletin 983 (Winter 2006-2007 issue) (co-authored with Dr. John M. Connor)

"Should Predatory Pricing Rules Immunize Exclusionary Discounts?," Utah L. Rev. 879 2006).

"Five Myths About Antitrust Damages", 40 U. San Francisco. L. Rev. 651 (2006).

"How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines," 80 Tulane L. Rev. 513 (2005) (co-authored with Dr. John Connor)

"Why Antitrust Damage Levels Should Be Raised", 16 Loy. Consumer L Rev. 329 (2004).

"Using Antitrust To Regulate Big Business," 4 The Long Term View 11 (2003)

"The Perfect Caper? Private Damages and the Microsoft Case," 69 George Washington L. Rev. 902 (2001) (co-authored with Dr. James Langenfeld)

"Consumer Choice As the Ultimate Goal of Antitrust," 62 U. Pitt. L. Rev. 503 (2001)

"Resurrecting Incipiency: From *Von's Grocery* to Consumer Choice," 68 Antitrust L.J. 875 (2001)

"The Three Types of Collusion: Fixing Prices, Rivals, and Rules," 2000 Wisc. L. Rev. 941 (2000) (co-authored with Dr. Howard Marvel)

"Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency)," 50 Hastings L.J. 959 (1999).

"Consumer Choice: The Practical Reason For Both Antitrust And Consumer Protection Law," 10 Loyola Consumer L. Rev. 44 (1998) (co-authored with Neil W. Averitt) (modification and update of the next article)

"Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law," 65 Antitrust L.J. 713 (1997) (co-authored with Neil W. Averitt) (Federal Trade Commission annual award for best trade regulation scholarship by an employee was presented to co-author Oct. 27, 1998).

"Anticonsumer Effects of Union Mergers: An Antitrust Solution," 46 Duke L. J. 197 (1996) (co-authored with Dr. Richard Zerbe)

"Reverse Engineering of Computer Software and U.S. Antitrust Law," 9 Harvard J. L. & Tech. 237 (1996) (co-authored with Sturgis Sobin)

"Beyond Chicago: Will Activist Antitrust Arise Again?" 34 Antitrust Bull. 1 (1994)

"Are Antitrust 'Treble' Damages Really Single Damages?" 54 Ohio S. L. J. 115 (1993)

"Chicago Takes It On the Chin: Imperfect Information Could Play A Crucial Role In the Post-Kodak World," 62 Antitrust L. J. 193 (1993)

"A Law & Economics Perspective on a 'Traditional' Torts Case: Insights for Classroom and Courtroom," 57 Missouri L. Rev. 399 (1992)

"When Should States Challenge Mergers: A Proposed Federal/State Balance," 35 New York Law School L. J. 1047 (1990)

"Price Effects of Horizontal Mergers," 77 Calif. L. Rev. 777 (1989) (co-authored with Dr. Alan Fisher and Dr. Frederick Johnson)

"Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust," 58 Antitrust L. J. 631 (1989)

"The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust," 33 Antitrust Bull. 429 (1988)

"Monopoly Power and Market Power In Antitrust Law," 76 Georgetown L. J. 241 (1987) (co-authored with Thomas Krattenmaker & Dr. Steven Salop)

"Do the DOJ Vertical Restraints Guidelines Provide Guidance?" 32 Antitrust Bull. 609 (1987) (co-authored with Dr. Alan Fisher and Dr. Frederick Johnson)

"The End of Antitrust - or a New Beginning?" 31 Antitrust Bull. 301 (1986) (co-authored with Joe Sims)

"Reducing Unions' Monopoly Power: Costs and Benefits," 28 J. L. & Econ. 297 (1985) (co-authored with Dr. Richard Zerbe)

"Afterword: Can a Merger Lead to Both a Monopoly and a Lower Price?" 71 Calif. L. Rev. 1697 (1983) (co-authored with Dr. Alan Fisher and Dr. Walter Vandaele)

"Efficiency Considerations in Merger Enforcement," 71 Calif. L. Rev. 1580 (1983) (co-authored with Dr. Alan Fisher)

"Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged," 34 Hastings L. J. 65 (1982) (honored in 1999 by the Hastings Law Journal as being one of their 10 most cited articles of all time)

BOOK CHAPTERS

“The Prevalence and Injuriousness of Cartels Worldwide,” Elgar Research Handbook on Cartels (Peter Whelan editor; Edward Elgar Publishing Ltd, United Kingdom) (co-authored with Dr. John Connor) (2023)

"Benefits of Private Enforcement: Empirical Background," introductory chapter to Private Enforcement of Antitrust Law in the United States: A Handbook, p. 3 (Albert A. Foer and Randy M. Stutz, Eds) (Edward Elgar, 2012)

"Benefits of Private Enforcement: Empirical Background, Chapter 1 of The International Handbook on Private Enforcement of Competition Law) (Albert A. Foer & Jonathan W. Cuneo, Eds) (Edward Elgar, 2011)

"The Chicago School's Foundation is Flawed: Antitrust Protects Consumers, Not Efficiency," in *How The Chicago School Overshot the Mark* (Oxford University Press, Robert Pitfosky, Editor, 2008) (co-authored with John. B. Kirkwood) (expanded version subsequently published in the Notre Dame Law Review).

REPRINTS, EXCERPTS AND CONDENSATIONS OF PUBLICATIONS

Liber Amicorum for Albert A. Foer, published in 2020 by Concurrences, reprinted, "Preventing The Curse of Bigness Through Conglomerate Merger Legislation," 52 Arizona State L. J. 75 (2020) (co-authored with Sandeep Vaheesan)

"The U.S. Needs Conglomerate Merger Legislation" Take Care Blog, January 1, 2019, republished in CLS Blue Sky Blog, January 2019

"Cartel Overcharges and Optimal Cartel Fines, in 3 Issues in Competition Law and Policy 2203 (ABA Section of Antitrust Law 2008) (co-authored with Dr. John M. Connor) , condensation of "How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines," 80 Tulane L. Rev. 513 (2005)

"Market Power Without A Large Market Share: The Role of Imperfect Information and Other 'Consumer Protection' Market Failures", reprinted in Consumer Legal Encounters 138 (2008, D. Naresh Kumar, Ed) (Icfia University Press, Hyderabad, India); reprint of "Market Power Without a Large Market Share", Testimony presented at joint FTC/DOJ Hearing on dominant firm issues, 2007 (available at www.ftc.gov)

"Revitalizing Section 5 of the FTC Act using Consumer Choice Analysis, Antitrust Source, Feb. 2009. http://www.abanet.org/antitrust/at-source/09/02/Feb09-Lande2-26f.pdf (online publication); reprint and expansion of Testimony given at FTC Hearing on Section 5 of the FTC Act, 2008, available at www.FTC.gov

"Collusion Over Rules," 16 Antitrust 36 (2002) (co-authored), condensation of "The Three Types of Collusion: Fixing Prices, Rivals, and Rules," 2000 Wisc. L. Rev. 941 (2000)

"Are Antitrust 'Treble' Damages Really Single Damages?" 54 Ohio S. L. J. 115 (1993), condensed in 8 Commercial Damages Rep. 238 (1993); excerpted in Andrew Gavil, An Antitrust Anthology 367-76 (1996); reprinted in 26 J. Reprints for Antitrust L. & Econ. 463 (1996)

"Price Effects of Horizontal Mergers," 77 Calif. L. Rev. 777 (1989), reprinted in 21 J. Reprints for Antitrust L. & Econ. 471 (1991), in 32 Corp. Prac. Commentator 153 (1990), and in Eleanor Fox & James Halverson, Collaborations Among Competitors: Antitrust Policy and Economics 361-402 (1992)

"The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust," 33 Antitrust Bull. 29 (1988), reprinted in Eleanor Fox & James Halverson, Collaborations Among Competitors: Antitrust Policy and Economics 105-30 (1992)

"Monopoly Power and Market Power In Antitrust Law," 76 Georgetown L. J. 241 (1987), reprinted in Harry First, Eleanor Fox & Robert Pitofsky, Revitalizing Antitrust In Its Second Century 175 (1991); excerpted in Andrew Gavil, An Antitrust Anthology 245-50 (1996); reprinted in Economic Approaches to Law (series editors: Richard A. Posner and Francesco Parisi) (Edward Elgar Pub., 2007); reprinted in Economics Of Antitrust Law (Benjamin Klein and Andrew V. Lerner, Eds.) (2008)

"Reducing Unions' Monopoly Power: Costs and Benefits," 28 J. L. & Econ. 297 (1985), reprinted in 29 Corp. Prac. Commentator 107 (1987)

Impact Evaluations of Federal Trade Commission Vertical Restraints Cases (1984 FTC Publication), reprinted in 19 J. Reprints for Antitrust L. & Econ. 1 (1986)

"Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged," 34 Hastings L. J. 65 (1982), excerpted in E. Thomas Sullivan, The Political Economy of the Sherman Act: The First One Hundred Years 71-84 (1991); in E. Thomas Sullivan & Herbert Hovenkamp, Antitrust Law, Policy And Procedure, at various page numbers in different editions; in 19 J. Reprints for Antitrust L. & Econ. 159-83 (1989); in Andrew Gavil, An Antitrust Anthology 50-53 (1996); in the Hastings Law Journal's 50th Anniversary Issue, Volume 50 (1999); and in Rosa Greaves, Competition Law at 45-129 (2003). Reprinted in The International Library of Essays in Law and Legal Theory: Competition Law (2nd Series) (Ashgate Publishing, England, 2003)

FOREIGN PUBLICATIONS

England - "The Proposed Damages Legislation: Don't Believe The Critics," 5 Journal of European Competition Law & Practice 123 (2014)

India - "Price-Fixing: Hefty penalties on big-biz cartels will provide level playing field to small businesses," The Economic Times, Aug 30, 2012 (co-authored short article with Dr. John Connor, based upon our article in the Cardozo L. Review)

Spain - "Potential Benefits From Private Competition Law Enforcement," in conference volume on Private Enforcement of Competition Laws, in 2011; translated into Spanish and published in Revista de Derecho de la Competencia (Lex Nova 2011)

England - "Consumer Choice as the Best Way to Recenter the Mission of Competition Law, in ASCOLA volume, More Common Ground for International Competition Law? (Edward Elgar 2011), p. 21.

France - “Consumer choice is where we are all going - so let’s go together", 2 Concurrences (2011) (co-authored).

England - "FTC v. Intel: Applying the 'Consumer Choice' Framework to 'Pure' Section 5 Allegations," 2 CPI Antitrust Journal 2 (2010)

England - "Of Myths and Evidence: An Analysis of 40 U.S. Cases for Countries considering a Private Right of Action for Competition Law Violations," 2 Global Comp. Lit. Rev. 126 (2009) (co-authored with Joshua Davis)

England - "The Price of Abuse: Intel and the European Commission Decision, 5 Global Competition Policy, No. 2, June 2009, online publication

India - "Market Power Without A Large Market Share: The Role of Imperfect Information and Other 'Consumer Protection' Market Failures", reprinted in Consumer Legal Encounters 138 (2008, D. Naresh Kumar, Ed) (Icfia University Press, Hyderabad, India)

China - "Consumer Choice: The Ultimate Objective of Antitrust", 28 Civil & Commercial L. Rev. (2003)

England - “Rule Fixing: An Overlooked But General Category of Collusion,” in Post-Chicago Developments in Antitrust Law 183 (2002) (Cucinotta et. al eds.) (co-authored with Dr. Howard Marvel) (condensation of article that appeared at 2000 Wisc. L. Rev. 941 (2000))

Japan - “The Evolution of United States Antitrust Law: The Past, Present, and (Possible) Future,” 16 Nihon U. Comparative L.J. 149 (1999) (co- authored with Albert A. Foer)

Peru - “Una teoría de la soberanía del consumidor: la combinación de la ley antimonopolioy de protección al consumidor,” in Politicas de Competencia y el Proceso de Reformas Económicas en América Latina at 43, published by INDECOPI, Peru (1998) (translation of speech delivered in Lima)

Japan - “Recent Trends In Merger Enforcement in the United States: The Increasing Impact of Economic Analysis,” 15 Nihon U. Comparative L.J. 73 (1998) (co-authored with Dr. James Langenfeld)

Peru - “La teoría de la política de fusiones,” in Politicas de Competencia y el Proceso de Reformas Económicas en América Latina at 141, published by INDECOPI, Peru (1998) (translation and modification of speech delivered in Lima)

Venezuela - “Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law,” condensed and revised version of article appearing at 65 Antitrust L.J. 713 (co-authored), in Temas Fundamentales De Análisis Económico Del Derecho,” published by the Venezuelan Law & Economics Ass’n at 449 (1997)

Japan - "Consumer Choice as the Unifying Goal of Antitrust and Consumer Protection Law," 14 Nihon University Comparative Law Journal 131 (1997) (condensation of article that appeared at 65 Antitrust Law Journal 713)

Brazil – Instituto Brasileiro Do Politica E Revista De Directo Do Consumidor, No. 45, 2003 (translation of "“Consumer Choice as the Unifying Goal of Antitrust and Consumer Protection Law," which originally appeared at 65 Antitrust Law Journal 713)

Brazil - "Ascensâo e queda (próxima da efficiência como reguladora do antitruste," 23 Revista de Direito Econômico 39 (1996) (Portugese translation of article appearing in 33 Antitrust Bull. 429)

England - "Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust," 58 Antitrust L.J. 631 (1989), reprinted in F.M. Scherer, Monopoly and Competition Policy: Volume 1 241 (1993)

Hong Kong - "More Lessons From Japan: End Industrywide Collective Bargaining? 4 Asian Economics J. 29 (1990) co-authored with Dr. Richard Zerbe)

ADDITIONAL PUBLICATIONS

"Who Cares Whether a Monopoly is Efficient? The Sherman Act is Supposed to Ban Them All," The Sling, https://www.thesling.org/who-cares-whether-a-monopoly-is-efficient-the-sherman-act-is-supposed-to-ban-them-all/ (Nov. 2023)

"Be Not Afraid: Textualism Is Not the Enemy of Antitrust Enforcement," The Sling (https://www.thesling.org/be-not-afraid-textualism-is-not-the-enemy-of-antitrust-enforcement/) (Dec. 2022)

"Megacorporations are Jacking up Prices 'Because They Can,' Pushing Red-hot Inflation to Historic Levels**,"** Business Insider (April 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4085650

"Ban All Big Mergers. Period." The Atlantic, Feb. 25, 2021 (co-authored with Sandeep Vaheesan)

Book review, "Antitrust: Taking on Monopoly from the Gilded Age to the Digital Age" by Senator Amy Klobuchar, The Antitrust Source 1, June 2021

Introduction to Liber Amicorum for Albert A. Foer, published in 2020 by Concurrences, co-authored with Randy Stutz.

"Can COVID-19 Get Congress to Finally Strengthen U.S. Antitrust Law?

Washington Monthly, May 21, 2020 (co-authored with Sandeep Vaheesan)

"Does Crime Pay? Cartel Penalties and Profits," Antitrust, Vol. 33, No. 2, Spring 2019 (online publication) (co-authored with John Connor)

"The U.S. Needs Conglomerate Merger Legislation" Take Care Blog, January 1, 2019, republished in CLS Blue Sky Blog, January 2019

"Who Should Conservatives Blame for Alex Jones' Ban from Social Media" Themselves." Slate Online, August 29, 2018 (co-authored with Chris Sagers)

"Comment on 'The Empirical Basis for Antitrust: Cartels, Mergers, and Remedies,'" International Journal of the Economics of Business, Vol. 24, No. 3, Sept. 2017 (co-authored with John C. Connor)

"Class Warfare: Why Antitrust Class Actions Are Essential For Compensation and Deterrence," Antitrust, Vol. 30, No. 2, Spring 2016, at 81

"A Tribute to Wendy Gerzog," Tax Notes, Jan. 25, 2016, page 468, available at www.taxnotes.com

OpEd in USA Today Weekend Edition, May 29-31, page 11A "DOJ has The Power To Crush Price Fixers." Co-authored with Judge Douglas Ginsburg, Commissioner Joshua Wright, and Albert Foer. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616775

Blog entry: "Joshua Wright: Embodying The Spirit of Bipartisanship." at http://truthonthemarket.com/?s=lande August 25, 2015

"Should Section 5 Guidelines Focus on Economic Efficiency or Consumer Choice?" 3 Competition Policy International Antitrust Chronicle 1 (May 2014).

"The Proposed Damages Directive: The Real Lessons From the United States", 3 Competition Policy International Antitrust Chronicle 2 (March 2014).

"Comparative Negligence With Joint And Several Liability: The Best of Both Worlds," 1 U. Baltimore Law Review Online 1 (Dec. 13, 2012) (co-authored with James MacAlister))

"Robert Bork's Controversial Legacy," OpEd published in 820 FTCWATCH, Dec. 2012.

"How the FTC Could Beat Google," co-authored OpEd in CPI Antitrust Chronicle, October 2012 (1), pp. 2-3

"As Antitrust Case Ends, Microsoft Is Victorious In Defeat", Baltimore Sun, May 17, 2011 (co-authored OpEd).

"The Intel and Microsoft Settlements," 770 FTC: WATCH 7, September 27, 2010

"Revitalizing Section 5 of the FTC Using 'Consumer Choice' Analysis", 8 Antitrust Source 3 (February 2009).

"Quick - Somebody Call Amnesty International! Intel Says EU Antitrust Fine Violated Human Rights," 746 FTC:WATCH 9, July 19, 2009

"Revitalizing Section 5 of the FTC Act using Consumer Choice Analysis, Testimony given at FTC Hearing on Section 5 of the FTC Act, Sept. 2008, available at www.FTC.gov

"World War 4.0: The Intel Antitrust Wars," Baltimore Sun, p. 11A, July 31, 2008

"The Microsoft-Yahoo Merger: Yes, Privacy is an Antitrust Concern," 714 FTC:WATCH 9, Feb. 25, 2008

"The Intel Case - is Europe Really Picking on Another American Company? FTC:WATCH, No. 726, p. 9, September 15, 2008

"Intel's Alleged Schemes Affected U.S. Consumers," 704 FTCWATCH, Sept. 24, 2007 (OpEd)

"Market Power Without a Large Market Share", Testimony presented at joint FTC/DOJ Hearing on dominant firm issues, March 8, 2007, available at www.ftc.gov)

"What Do Exit Polls & Flu Vaccines Have In Common," 647 FTC:WATCH 12, Feb 12, 2005 (co-authored)

"Beware Buyer Power", Legal Times, July 12, 2004

"US Admonishes Europe For Protecting Itself From Microsoft's Predation" www.antitrustinstitute.org (co-authored) March 2004 online publication

"AOL/Microsoft Settlement Could Harm Consumers," Baltimore Daily Record, July 6, 2003

"The European Union's Microsoft Case: No Time For Jingoism," 607 FTC: WATCH April 7, 2003 (co-authored)

"Media Mergers, Antitrust Law and Consumer Choice," Baltimore Daily Record, March 8, 2003.

"The FTC's Cruise Lines Decisions: Three Cheers For Transparency," FTC: WATCH, No. 599, Nov. 18, 2002 (co-authored)

"A Test For Competition," Legal Times, Sept. 20, 2002, at 59 (reprinted in other American Lawyer Media publications, sometimes with a different title)

Interview titled, "States of Flux" in L.A. Daily Journal, Verdicts & Settlements, June 21, 2002

"Commission's Request for Comments on the Use of Disgorgement in Antitrust Matters," March 29, 2002 (comments filed with the FTC on behalf of the AAI).

"Why Are We So Reluctant to 'Execute' Microsoft?" 1 Antitrust Source 1 (2001) (online publication available at antitrustsource.com)

"Has Microsoft Committed the Perfect Caper?" 564 FTC: WATCH 11 (2001) (co-authored with Dr. James Langenfeld)

"Professor Waller's Un-American Approach to Antitrust," 32 Loyola U. Chi. L.J. 137 (2000)

"Legalizing Merger to Monopoly and Higher Prices: The Canadian Competition Tribunal Gets It Wrong," 14 Antitrust 71 (2000) (co-authored)

Testimony before the Committee on Commerce, Science and Transportation, U.S. Senate, Hearing on the America Online/Time Warner Merger, March 2, 2000 (the Hearing was published on-line)

"After Microsoft Wins," 548 FTC: WATCH 14 (2000)

"Antitrust & the Media-II," 270 The Nation 5 (2000)

"Microsoft Critic Urges Break-Up," CBS Market Watch, interview by William L. Watts, November 12, 1999

"Yes, Microsoft Did Hurt Consumers" November 30, 1999, Washington Post, A-29 (co-authored with Albert A. Foer)

"Baby Bills", Parts I and II, Lawnewsnetwork.com/open court/stories, April 1 and 2, 1999 (American Lawyer Media) (co-authored with David Solomon)

"A New Foundation For Antitrust Law," Legal Times, Nov. 2, 1998 at S 40 (co--authored)

Testimony before the Committee on the Judiciary of the U.S. House of Representatives, Oversight Hearing on Merger Enforcement, Nov. 5, 1997 (the Hearing was published on-line)

"Creating Competition Policy For Transition Economies," 23 Brooklyn J. Int'l. Law 339 (1997) (Introduction to Symposium)

"From Surrogates to Stories: The Evolution of Federal Merger Policy, 11 Antitrust 5 (1997) (co-authored with Dr. James Langenfeld)

"Efficiency Considerations In Merger Enforcement." Testimony published on-line by the Federal Trade Commission (co-authored with Dr. Alan Fisher) (1995)

"Predation Theory after Liggett and American Airlines," edited transcript of remarks presented at ABA Antitrust Section Meeting, April 6, 1994, p.1

"Must Rates be 'Just' or Only 'Reasonable'? -- The Role of Equity: An Antitrust View," Competition and Regulation -- Compatible Bedfellows? 30 (1992) (ABA pub.)

"Commentary: Implications of Professor Scherer's Research for the Future of Antitrust," 29 Washburn L. J. 256 (1990)

Introductory remarks at panel discussions; "Self Regulation," 57 Antitrust L. J. 809 (1989); and "Antitrust Synthesis," 57 Antitrust L. J. 827 (1989)

"The Federal-State Rhetorical Debate: A Call for Harmony Among Antitrust Enforcers," 2 Federal Bar Ass'n. ATRS Report 3 (Summer 1989)

"A Counterrevolution in Antitrust?" in Antitrust in the 1990's, Institute of Continuing Legal Education in Georgia (1989) (program material)

"'Antitrust Law and Economics:' Responding to an Ivory Tower Critique," 57 U. Cin. L. Rev. 235 (1988) (book rev.)

"A Framework for Evaluating the Antitrust Legacy of the Reagan Administration," 35 Fed. Bar News & J. 228 (1988)

Editor, "The Cutting Edge of Antitrust: Lessons From Deregulation," (ABA Antitrust Section symposium course material) (June 13, 1988)

"Just Where does Judge Bork Stand? -- An Anti-Antitrust Activist?" Nat'l L. J., Sept. 7, 1987 at 13

"Antitrust Plaintiffs and the Future," 1 Fed. Bar Ass'n. ATRS Report 1 (Summer 1987) (co-authored)

"New Forces Chip Away at Agencies' Policy of Antitrust Abandonment," Legal Times, April 20, 1987 at 14 (co-authored with Joe Sims)

"Vertical Restraints Guidelines: A Step Forward," Legal Times, March 4, 1985 at 16 (co-authored with Joe Sims)

"Tying and Exclusive Dealing," Sixth Annual Seminar on Distribution at 53 (Law Journal Seminars Press, 1985) (co-authored with Joe Sims)

"DOJ Adds Revisionist Dollop to '82 Merger Guidelines," Legal Times, June 25, 1984 at 15 (co-authored with Joe Sims)

Impact Evaluations of Federal Trade Commission Vertical Restraints Cases (co-edited with Dr. Ronald Lafferty and John Kirkwood) (1984 FTC Pub.)

"Current Legal Standards of Predation," in Strategy Predation, and Antitrust Analysis (S. Salop ed. 1981) (co-authored with Kirkwood, Kovacic and Hurwitz) (FTC Publication)

"Peak-Load Pricing Lowers Generation Costs," 207 Electric Rev. Int'l. 66 (1980) (from Master's thesis)

"Divestiture Under Section 5 of the FTC Act," Hearing on Federal Trade Commission - Divestiture Before the Subcommittee for Consumers of the Senate Committee on Commerce, Science, and Transportation, 96th Cong., 1st Sess. 110 (1979) (co-author)

"A Cost-Benefit Analysis of Electric Peak-Load Pricing," 103 Pub. Util. Fort. 9 (1979) (from Master's thesis)

Note, "The Arab Boycott and Title VII," 12 Harv. C. R. C. L. L. Rev. 181 (1977) (student note)

DOWNLOADS OF PUBLICATIONS

Most downloaded UB faculty member on SSRN (not just law school faculty): 28,986 times.

Most downloaded UB faculty member (not just law school faculty) in the past year, 1,866, the most total citations on SSRN, 166, the most # papers, 92.

Most cited UB faculty member (not just law school faculty) on Google Scholar: 5,875 times.

Scholarly work has been downloaded 53,560 times on the UBScholarWorks system (which does not rank faculty).

Have been on SSRN list of the 15 most downloaded Antitrust scholars most years since 2008.

SELECTED U.S. PRESENTATIONS

Press commentary on the Microsoft, Intel, Google, and other antitrust cases. I have spoken with the press many hundreds of times. Some days I talked with more than 20 reporters. I have been quoted in the Wall Street Journal, New York Times, Washington Post, Chicago Tribune, L.A. Times, Business Week, USA Today, Baltimore Sun, U.S. News & World Report, and by the Associated Press. Also gave dozens of radio interviews (including National Public Radio), several press briefings, and have appeared on television in the United States, England, France, and China.

In 2022 I presented my no-fault monopolization scholarship 6 times, most of them virtually. To the Economic Liberties Foundation, The Open Markets Institute, the Committee to Support the Antitrust Laws, the Schumpeter Center at George Mason University, to invited officials at the FTC, and also to invited officials at the DOJ Antitrust Division.

American Antitrust Association. Presentations at 2013, 2012, 2011, 2009 and 2008 Conferences on Private Antitrust Enforcement; presentations at Annual Meetings in June 2015, 2008, 2007 and 2005.

SPARC (Scholarly Publication and Academic Resources Coalition) Webinar (pro-bono), Jan. 8, 2020, on permissible joint ventures to share information; 297 listeners; May 12, 2020 webinar, briefing on Antitrust issues involved in the Cengage/McGraw Hill textbook merger, 175 listeners.

U.S. House of Representatives, Energy & Commerce Committee, Subcommittee on Commerce, Manufacturing, and Trade, panel on "The FTC at 100: Views from the Academic Experts", Feb. 28, 2014

Utah Law Review, Oct. 21, 2022 symposium, "The New Roaring Twenties: The Progressive Agenda For Antitrust and Consumer Protection"

University of Pennsylvania Law Review, Oct. 11, 2019 symposium, "The Post-Chicago Antitrust Revolution"

George Washington University Law School Conference on the Goals of Antitrust, September, 2012

ABA Antitrust Section Colloquium on Privacy and Antitrust, Oct. 3, 2010, talk was titled, "Antitrust, Privacy, and Consumer Choice"

Federal Trade Commission's Workshop on Section 5 of the FTC Act as a Competition statute, Oct 17, 2008

FTC/DOJ Joint Hearing on dominant firm issues, March 8, 2007, Testimony titled, "Market Power Without a Large Market Share"

Antitrust Modernization Commission, July 28, 2005 Hearing on Civil Remedies Issues, testimony titled, "Four Myths About Antitrust Damages".

National Association of Attorneys General, Annual Antitrust Meeting, Oct. 1, 2003, concerning Illinois Brick issues

American Bar Association Annual Antitrust Meeting, April 2, 2003, panel on damages reform

American Antitrust Institute national conferences. Presentations June 12, 2001 on merger enforcement, and June 15, 2000 on collusion and on consumer choice.

The Conference Board, annual antitrust program, session on merger efficiencies. New York, March 1, 2001.

Press conference on the BP Amoco/ARCO merger (part of public interest coalition), Feb. 8, 2000.

Press Conference on Stories Related to the 10th Anniversary of the Exxon Valdez Oil Spill, talk titled "The Exxon/Mobil Merger", February 10, 1999.

"Talk of the Nation," National Public Radio, program on the Exxon/Mobil merger, Dec. 2, 1998 (131 stations).

Press Conference by American Antitrust Institute on important current antitrust cases. Briefed the Press on Coke/Pepsi, Toys-R-Us, and Master Card/Visa cases, Oct. 30, 1998.

Committee on the Judiciary of the U.S. House of Representatives, Oversight Hearing on Merger Enforcement, Nov. 5, 1997.

Association of American Law Schools, Annual Meeting, Antitrust Section panel, "Are We A Cartel: The ABA/DOJ Consent Decree," Jan. 7, 1996.

Federal Trade Commission, Hearings on Global and Innovation-Based Competition. Testimony titled, "Efficiency Considerations in Merger Enforcement," Nov. 14, 1995.

National Association of Attorneys General, Annual State Antitrust Meeting, presented "Predatory and Collusive Option Restriction," Nov. 2, 1995.

ABA Annual Meeting, Antitrust Section Program, "The Role of Antitrust Policy in Shaping the Future of the Information Technology Industry," Aug. 7, 1995.

Brazilian antitrust delegation. Presented insights from U.S. experience relevant to Brazilian competition policy, Nov. 10, 1994.

Post-Chicago Economics Conference, sponsored by the FTC, DOJ Antitrust Division, ABA Antitrust Section and Georgetown U., panel on Systems Competition and Aftermarkets, May 26, 1994.

Judicial Institute of Maryland, continuing legal education program for Judges. Presentations titled "Incorporating 'Law and Economics' into Judicial Decisionmaking," 1994, 1991, and 1989.

Association of American Law Schools, Annual Meeting, Antitrust Section panel on the implications of the Kodak decision, Jan. 7, 1993.

ABA Annual Meeting, Antitrust Section program on the 1992 Merger Guidelines. Aug. 10, 1992.

ABA Regulated Industries Section program on Competition and Regulation, session on the role of antitrust, 1992.

Testimony before Maryland Senate and House Committees, and Governor's Commission on Insurance in Maryland, at hearings on Maryland's antitrust exemption for the insurance industry. 1991, 1990 and 1989.

Public Citizen insurance conference. Presentation titled, "The Insurance Industry's Antitrust Exemption." Feb. 2, 1990.

ABA Annual Meeting, Antitrust Section program on "Challenges to the Chicago School." Presentation titled "Wealth Transfers (Not Just Efficiency) Should Guide Antitrust." Aug. 7, 1989.

National Association of Attorneys General, Antitrust Centennial Symposium. Critiqued paper by F.M. Scherer and presented my own views. May 24, 1989.

Antitrust Policy Institute, Airlie House Conference. Presentation titled "Revitalizing Section 2 of the Sherman Act," March 28, 1987.

American Economic Association, Annual Meeting, presentation titled "Ascertaining Efficiency And Price Effects of Mergers." Dec. 29, 1984.

SELECTED FOREIGN PRESENTATIONS

Italy - European University Institute, Workshop on Private Competition Enforcement, discussed the U.S. experience. Florence, Oct. 5, 2013

Belgium - Conference on Consumer Choice as the goal of Antitrust and Competition Law, Brussels, June 24, 2012

Spain - Conference on Private Competition Law Enforcement, Oct. 14, 2010, Valladolid

Spain - Presentation about "rule fixing", Madrid, October 21, 2010

Italy — LEAR Conference on Private Competition Law enforcement, Rome, June 26, 2009

Italy — Conference on Post-Chicago Antitrust at Taormina, Sicily on October 27, 2000.

Japan — Antitrust lecture series at Nihon University Law School, Tokyo, July 1998.

Japan — "Current Antitrust Issues In The United States," International Business Law Institute, Tokyo, July 31, 1998.

Peru — INDECOPI Conference, "International Seminar On Competition Policy", presentation on the relationship between competition and consumer protection law, Lima, May 28, 1998.

Great Britain — Meetings with South African government officials to advise them on competition issues, April 18-19, 1998, London.

Venezuela — Latin American Law & Economics Ass'n Conference, presented "Consumer Sovereignty" paper, Caracas, June 17, 1997.

Peru — INDECOPI Conference, "Competition Policies and the Economic Reform Process in Latin America," two presentations on implications of U.S. antitrust policy, Lima, Aug. 13, 1996.

ADDITIONAL PRESENTATIONS

American Economic Ass'n; Western Economic Ass'n; Southern Economic Ass'n; Federal Bar Ass'n (many presentations); ABA Antitrust Section (many presentations); U.S. Dept. of Justice Antitrust Division's Economic Policy Office; Eleventh National Conference On Critical Legal Studies; Hoover Institution; New York Law School; St. Mary's Law School; Impact Evaluation Society; National Ass'n of Attorneys General Annual Meeting on State Antitrust Enforcement; FTC Bureau of Economics; Antitrust Division of the Office of the Maryland Attorney General; Georgia State Bar Ass'n; The Conference Board; Morgan, Lewis & Bockius; Ass'n of American Law Schools; Committee To Support the Antitrust Laws; Loyola U. of Chicago Law School; Loyola U. Consumer Law Center, George Washington U. Law School; U. Cincinnati Dept. of Economics, Ohio State U. Dept. of Economics; Wilmer, Cutler & Pickering, Notre Dame Business School, Washington Legal Foundation.

U.S. PRO BONO

National Ass'n of Attorneys General (many antitrust projects, including Illinois Brick Task Force, insurance litigation, and 1992 and 1987 Merger Guidelines task forces); Center For The Study of Responsive Law (Ralph Nader affiliated consumer group); People For The American Way Bork Supreme Court Nomination project; World Jewish Congress; Federal Trade Commission; Antitrust Divisions of the Offices of the Maryland and Pennsylvania Attorneys General; American Antitrust Institute (hundreds of projects), SPARC, the Scholarly Publishing and Academic Resources Coalition, Economic Liberties Foundation, Research Library Association

INTERNATIONAL PRO BONO

Government antitrust enforcers from Russia, Peru, Singapore, Venezuela, and The Republic of South Africa; Brazilian antitrust delegation; World Bank Russian Antitrust Education Project; Japanese Electronic Industry Development Ass'n.; Catholic University of Venezuela Law School

OTHER PROFESSIONAL ACTIVITY

American Law Institute. Elected 1997

Association of American Law Schools, Antitrust Section. Chair, 1996-1997; Chair-Elect, 1995-96; Secretary, 1994-95; Executive Committee, 1989-92

American Bar Association Antitrust Section. Have been a Committee Chair and a member of several task forces, and helped plan a large number of programs.

Special Master in antitrust case in Federal Court; occasional paid consultant to law firms

Have been outside referee for: Oxford University Press, Research in Law & Economics; Antitrust Law Journal; International Review of Law & Economics; Encyclopedia of Law & Economics

Judge for the "Cohen Foundation Prize" for the best antitrust scholarship; awarded annually, most years since 2002

Outside article evaluator for tenure or Chair candidates at U. Houston Law School, U. Iowa College of Law, Loyola of Chicago Law School, and Howard U. School of Law

Federal Bar Association Antitrust Section. Held various committee chairs and awarded plaques for outstanding service in 1985 and 1990.

HONORS AND AWARDS

Festschrift in my honor. Festschrift conference at the University of Baltimore School of Law, March 10, 2023. The conference articles were published in Volume 53 of the University of Baltimore Law Review, titled, "The Quest For Progressive Antitrust: A Festschrift Honoring Robert H. Lande, pages 1 to 514.

Special Plaque awarded by SPARC, the Scholarly Publishing and Academic Resources Coalition, thanking me for pro bono assistance. Presented in 2019

Teacher of the Year for Transactional subjects, University of Baltimore Law School, 2019

Special Plaque awarded by the Research Library Association, thanking me for pro bono assistance. Presented in 2018.

"The Merger Incipiency Doctrine and the Importance of 'Redundant' Competitors," 2018 Wisconsin L. Rev. 783 (2018) (co-authored with Peter C. Carstensen); winner of the 2019 Antitrust Writing Award in the category of Best 2018 Horizontal Merger Article, given by the Cohen Foundation

Awarded Full Time Faculty Teacher of the Year at the University of Baltimore Law School, April 10, 2016

Winner of the 2014 Antitrust Writing Award in the category of Best Academic Private Enforcement Article, given by Concurrences and George Washington University, for "Defying Conventional Wisdom: The Case For Private Antitrust Enforcement," 48 Georgia L. Rev. 1 (2013) (co-authored with Joshua P. Davis)

Co-winner of the $8,000 2013 Cohen Foundation Award for best Antitrust & Trade Regulation Scholarship published in 2012, for "Cartels As Rational Business Strategy: Crime Pays," 34 <u>Cardozo L. Rev.</u> 427 (2012) (co-authored with Dr. John Connor),

SSRN annual list of Top 15 Antitrust downloads almost every year since 2008.

Co-winner of the $8,000 2007 Cohen Foundation Award for best Antitrust & Trade Regulation Scholarship published during 2007, for "Using The 'Consumer

Choice' Approach To Antitrust Law", 74 Antitrust L. J. 175 (2007) (co-authored with Neil W. Averitt)

University System of Maryland's Regents Award for Scholarship, 2006

Awarded the University of Baltimore Law School's first Chair, the Venable Chair, in the Fall of 1998

University of Baltimore's nominee for the University System of Maryland's Regents Award for Scholarship for 1998

Elected to the American Law Institute, 1997

The Hastings Law Journal, for its 50th Anniversary issue, reprinted the most influential scholarship published in this Journal. This included my article, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged"

Federal Trade Commission's Award for best trade regulation scholarship by an employee during 1997 was presented to my co-author, Neil Averitt, for our article, "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law," 65 Antitrust L.J. 713 (1997), presented on Oct. 27, 1998.

University of Baltimore Law School student award for Teaching Excellence, April 2000

BAR MEMBERSHIP - Washington, D.C. (1978)

JOHN M. NEWMAN

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Coral Gables, FL 33146
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ACADEMIC APPOINTMENTS

University of Memphis School of Law
Herbert Herff Chair of Excellence 2025–present

University of Miami School of Law
Professor 2021, 2023–25
Associate Professor 2019–21

University of Tokyo Law School
Lecturer Summer 2024

University of Memphis School of Law
Assistant Professor 2015–19
Visiting Assistant Professor 2014–15

Courses

Antitrust, Contracts, Contracts II, Antitrust & Big Tech, Mergers & Acquisitions, Conflict of Laws

Honors & Awards

Professor of the Year, Academic Society for Competition Law Best Junior Paper Award, SBA Annual Faculty Speaker, Farris Bobango Faculty Scholarship Award, SEALS Annual Conference Call-for-Papers Award, Frost Institute for Data Science & Computing Research Grant Award, Washington Center for Equitable Growth Research Grant Award

GOVERNMENT APPOINTMENTS

Federal Trade Commission
Deputy Director, Bureau of Competition 2021–23

U.S. Department of Justice, Antitrust Division
Trial Attorney 2011–14

CIVIL SOCIETY AFFILIATIONS

Academic Society for Competition Law
Board Member 2025–present

Antitrust Law Journal
Assistant Editor 2024–present

American Antitrust Institute
Advisory Board Member 2018–21, 2024–present

Institute for Consumer Antitrust Studies
Advisory Board Member 2020–21, 2023–present

Thurman Arnold Project at Yale
Fellow 2019–21

PUBLICATIONS

Attention Capitalism: The Law and Political Economy of Attention Markets, 78 STAN. L. REV. (forthcoming 2026).

ANTITRUST IN THE ONLINE ECONOMY: COMPETITION CASES, STATUTES, AND QUESTIONS (3d ed. 2025) (with Mark R. Patterson & Nicolo Zingales).

The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act § 7, 103 TEX. L. REV. 785 (2025) (with Robert H. Lande & Commissioner Rebecca Kelley Slaughter).

The Output–Welfare Fallacy: A Modern Antitrust Paradox, 107 IOWA L. REV. 563 (2022).

Racist Antitrust, Antiracist Antitrust, 66 ANTITRUST BULLETIN 384 (2021).

Reactionary Antitrust, *in* HERBERT HOVENKAMP: THE DEAN OF AMERICAN ANTITRUST LAW LIBER AMERICORUM (Nicolas Charbit & Sébastien Gachot eds., 2021).

Antitrust in Attention Markets: Objections and Responses, 59 SANTA CLARA L. REV. 743 (2020) (invited symposium contribution).

Expanding the Merger Narrative: A Response to Sokol, 70 FLA. L. REV. F. 179 (2020).

Antitrust in Digital Markets, 72 VAND. L. REV. 1497 (2019).

Procompetitive Justifications in Antitrust Law, 94 IND. L.J. 501 (2019).

Silicon Valley Rhetoric: Three Myths Debunked, ANTITRUST CHRON., at 26 (May 2018).

The Myth of Free, 86 GEO. WASH. L. REV. 513 (2018).

Complex Antitrust Harm in Platform Markets, ANTITRUST CHRON., at 52 (May 2017).

Essay, *The Antitrust Jurisprudence of Neil Gorsuch*, 45 FLA. ST. U. L. REV. 225 (2017).

Antitrust in Zero-Price Markets: Applications, 94 WASH. U. L. REV. 49 (2016).

Antitrust in Zero-Price Markets: Foundations, 164 U. PA. L. REV. 149 (2015).

Copyright Freeconomics, 66 VAND. L. REV. 1409 (2013).

Personal Jurisdiction and Choice of Law in the Cloud, 73 MD. L. REV. 313 (2013) (with Damon C. Andrews).

Anticompetitive Product Design in the New Economy, 39 FLA. ST. U. L. REV. 681 (2012).

Note, *Raising the Bar and the Public Interest: On Prior Restraints, "Traditional Contours," and Constitutionalizing Preliminary Injunctions in Copyright Law*, 10 VA. SPORTS & ENT. L.J. 323 (2011).

Note, *Holden Caulfield Grows Up:* Salinger v. Colting*, the Promotion-of-Progress Requirement, and Market Failure in a Derivative-Works Regime*, 96 IOWA L. REV. 737 (2011).

Amicus Briefs

Br. of Y Combinator, LLC as *Amicus Curiae* in Support of Plaintiffs, *United States v. Google LLC*, No. 1:20-cv-03010-APM (D.D.C. May 9, 2025) (lead drafter).

Br. of *Amici Curiae* Professors of Law and Economics and the American Antitrust Institute in Support of Appellee Epic Games, Inc., *Epic Games, Inc. v. Google LLC*, Nos. 24-6256 & 24-6274 (9th Cir. 2025) (lead drafter).

Op-Eds and Blog Posts

Five Common Misconceptions About the Big Tech Antitrust Trials, TECH POLICY PRESS, May 12, 2025.

Taking Stock of the New Anti-Monopoly Movement, LAW & POLITICAL ECONOMY BLOG, Feb. 5, 2024.

The FTC Just Blocked Four Mergers in a Month. Here's How Its Latest Win Fits Into the Broader Campaign to Revive Antitrust, THE SLING, Jan. 15, 2024.

Seven Reactions to Biden's Executive Order on Artificial Intelligence, LAW & POLITICAL ECONOMY BLOG, Dec. 4, 2023 (contributor).

Generative AI Raises Competition Concerns, FTC TECHNOLOGY BLOG, June 29, 2023 (with FTC colleagues).

Contract Terms That Impede Competition Investigations, FTC COMPETITION MATTERS, June 16, 2023 (with FTC colleague).

In FTC v. Facebook*, FTC Lost the First Round, But Could Win the Fight*, PROMARKET, July 20, 2021.

Morale at the DOJ's Antitrust Division Has Plummeted. Here's How to Fix It, PROMARKET, Mar. 17, 2021.

Today's Antitrust Regulators Should Rein in the Tech Giants, THE ATLANTIC, Jan. 30, 2021 (with Rebecca Haw Allensworth).

Cooperation, Competition, and COVID-19, TRUTH ON THE MKT., Apr. 15, 2020.

The U.S. Forgot What Antitrust Is For, THE ATLANTIC, Sept. 11, 2019.

Monopoly Money: The Hotel Industry Doesn't Want You to See the Competition's Prices Online, USA TODAY, Apr. 17, 2019.

What Democratic Contenders Are Missing in the Race to Revive Antitrust, THE ATLANTIC, Apr. 1, 2019.

Why Iowans Should Care About Antitrust Enforcement, DES MOINES REGISTER, June 11, 2018.

Will President Trump Take a Jobs-First Approach to Bayer–Monsanto Deal?, CLEVELAND PLAIN DEALER, Feb. 5, 2017.

US Antitrust Regulators May Be Giving Free Apps a Free Pass, THE CONVERSATION, Aug. 30, 2016.

Why Amazon's Work Practices Matter, CLEVELAND PLAIN DEALER, Aug. 23, 2015.

Fairer Ways to Stop the Lawyer Brain Drain, DES MOINES REGISTER, Aug. 26, 2014.

Working Papers

"Antitrust in Attention Markets: Definition, Power, Harm," https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3745839.

SELECTED LECTURES, PRESENTATIONS, AND COMMENTARY

Academic Society for Competition Law, "Out-of-Market Effects in Monopolization Cases" (June 26, 2025).

GW Competition & Innovation Lab, panel on "Interoperability: U.S. and European Perspectives Compared" (May 15, 2025).

The George Washington University Competition Law Center and Crowell & Moring, Sixth Annual Antitrust and Tech Conference, panel on "Will Section 2 Enforcement Effectively Address Tech Monopolization?" (May 13, 2025).

American Bar Association, Antitrust Law Section & Intellectual Property Section, Panel on "IP and Digital Platform Remedies" (May 5, 2025).

U.S. Department of Justice Antitrust Division, Roundtable with Assistant Attorney General on Unfair Labor Market Practices (Apr. 4, 2025).

Harvard Law School Antitrust Association, Q&A on the Recent Past and Future of Antitrust Enforcement (Mar. 26, 2025).

University of Southern California Gould School of Law & Brigham Young University Law School, Winter Antitrust Conference, Panel on "Are Tech Mergers Different? Implications for the Startup Ecosystem" (Mar. 12, 2025).

New York University School of Law & Hausfeld, Microsoft @ 25: Impact, Influence, and Legacy, Panel on "The Development of Monopolization Law" (Feb. 21, 2025).

University of Miami Law Review Symposium, Panel on "Artificial Intelligence and Anticompetitive Behavior" (Feb. 14, 2025).

University of Miami School of Law, Counseling Creators Conference, Panel on "The TikTok Ban: Legal Concerns and Strategies for Creator Diversification" (Feb. 14, 2025).

Global Competition Review Live, Law Leaders Global 2025, Panel on "Trend Towards Consolidation and Serial Acquisitions: When Are Many Acquisitions Too Many?" (Jan. 31, 2025).

O'Melveny & Myers, Fireside Chat with Antitrust Group (Jan. 29, 2025).

U.S. Senate Judiciary Committee, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, Hearings to Examine a Bipartisan Path Forward for Antitrust Enforcement and Reform (Dec. 17, 2024) (live testimony).

University College London & FGB Direito Rio, Algorithmic Dreams Meet Competition Law and Regulation, "Algorithmic Collusion: State of the Art" (Nov. 23, 2024).

Third BRICS + Digital Competition Forum, Panel on "Concentration of Economic Power in the Era of AI" (Nov. 22, 2024).

American Bar Association, 2024 Antitrust Fall Forum, "Hot Topics in the Next Administration" (Nov. 14, 2024).

Keystone, The DMA and the Media Sector: Building Bridges (Oct. 9, 2024).

The Capitol Forum, Antitrust Trial of the Century: Google AdTech and Possible Remedy Options, "A History of Law and Business Related to Breakups" (Sept. 5, 2024).

University of Tokyo, 68th Annual Comparative Law and Politics Symposium, "The New Anti-Monopoly Movement: A Progress Report" (Aug. 2, 2024).

California Law Review Commission, Invited Expert Comments on Mergers and Technology Platforms (June 20, 2024).

American Bar Association, Section on Antitrust Law, "*United States v. Apple*: Reactions and Analysis" (May 29, 2024).

Loyola University Chicago School of Law, Institute for Consumer Antitrust Studies, 24th Annual Antitrust Colloquium (commentator) (Apr. 26, 2024).

Emory Corporate Governance & Accountability Review, Keynote Address, "The New Antitrust Revolution: How Far Have We Come, and How Far Will We Go?" (Apr. 3, 2024).

The Capitol Forum, "Conference Call with John Newman" (Mar. 12, 2024).

The Capitol Forum & Cristina Caffarra, Antitrust, Regulation, and the Next World Order, "Antitrust as Agent for Change" (Jan. 31, 2024).

Miami Law Class Action & Complex Litigation Forum, "Antitrust Class Action Trends" (Jan. 26, 2024).

University College of London, Jevons Institute Colloquium (roundtable) (Nov. 28, 2023).

Utah Project on Antitrust & Consumer Protection, "The New Merger Guidelines: Controlling Case Law and New Economics" (multiple panels) (Oct. 27, 2023).

California Lawyers Ass'n, Golden State Antitrust and Unfair Competition Law Institute, Panel on "The Implications of Artificial Intelligence and Competition Law" (Oct. 26, 2023).

Kyoto University, "Proactive Competition Enforcement for 21st Century Problems" (Oct. 18, 2023).

Foro de Cooperación Económica de Asia Pacífico, Virtual Series on Policies and Tools for Improving Digital Economy and Competition in Digital Markets (Aug. 30, 2023).

Keystone, Antitrust, Regulation & the Political Economy, Panel on "Expanding the Antitrust Agenda: Do We Need New Law, or Just New Posture?" (March 3, 2023).

NYU School of Law & Hausfeld, Antitrust and 21st Century Bigness: Dealing with Tech Platforms in a Globalized World, Panel on "Are Big Tech Acquisitions Different?" (Feb. 23, 2023).

Global Competition Review Live, Law Leaders Global, Panel on "Is Big Bad?" (Feb. 2, 2023).

AALS Annual Meeting, Section on Antitrust and Economic Regulation, Panel on "New Threats to Antitrust Enforcement" (Jan. 7, 2023).

European Commission, Digital Mergers Workshop, Panel on Digital Merger Enforcement (Dec. 13, 2022).

Temple Law Review, Symposium on the Sovereign Identity Crisis: State, Self, and Collective in a Digital Age, Panel on "Sovereignty, Communities, and Collectives" (Nov. 17, 2022).

Centre for Economic Policy Research, A "Global Whack-a-Mole Monopolization Machine?" Ecosystem Theories in Digital Platform Mergers (Oct. 25, 2022).

Athena Competition Law & Policy Forum, Global Regulation of Digital Ecosystems: Ex Ante vs. Ex Post Approaches, "Beyond *Ex Ante* vs. *Ex Post*: Regulatory Synthesis" (June 29, 2022).

OECD, Competition Committee, Market Power in the Digital Economy and Competition Policy, "Digital Market Power" (June 22, 2022).

University of California (Irvine) School of Law, Antitrust & Race Conference, "Antiracist Antitrust, Racist Antitrust" (May 20, 2022).

London School of Economics Law School, "Into the Future of Competition Law and Regulation" (May 12, 2022).

American Bar Association, Antitrust Spring Meeting, "High-Tech Enforcement Update" (Apr. 6, 2022).

International Competition Network, Merger Workshop, Panel Discussion, "Digitization of the Economy from the Antitrust Perspective" (Mar. 31, 2022).

University of Memphis Cecil C. Humphreys School of Law, Annual Law Review Symposium, "Antitrust in the (New) New Economy" (Mar. 4, 2022).

University of California (Irvine) School of Law, Antitrust Roundtable, "The Output–Welfare Fallacy: A Modern Antitrust Paradox" (Oct. 29, 2021).

American Bar Association, Section on Antitrust, Panel Discussion, "The Notorious B.I.G. Tech Platforms" (Oct. 6, 2021).

University of Tokyo, Summer Course on Antitrust: Introduction, Agreements, and Issues Involving Big Tech (July 29, 2021).

Kyoto University, "Paying Attention: The Competition Law & Economics of Attention Markets" (July 15, 2021).

Academic Society for Competition Law Fifteenth Annual Conference, "The Output–Welfare Fallacy" (July 1, 2021).

Ethics & Public Policy Forum, Big Tech Symposium, "Antitrust Law and Big Tech" (June 29, 2021).

Yale Law School, Law & Political Economy Project, Anti-Monopoly and Regulated Industries Academy, Panel Discussion (June 22, 2021).

Brooklyn Law School, Antitrust & Big Tech Panel Discussion (Feb. 25, 2012).

Vanderbilt University Law School, Antitrust Law for Big Tech (Feb. 19, 2021).

University of Kentucky Rosenberg College of Law, Inframarginalism & Internet Conference, "Regulating Attention Markets" (Feb. 19, 2021).

Brazilian Institute for Competition and Innovation, 3rd International Conference on Competition and Innovation, "Antitrust in Attention Markets" (Dec. 10, 2020).

Yale Law School, Information Society Project & Thurman Arnold Project, Big Tech and Antitrust Conference, "Antitrust in Attention Markets" (Oct. 4, 2020).

Yale Law School, Information Society Project & Thurman Arnold Project, Speaker Series, "The Output–Welfare Fallacy" (Sept. 12, 2020).

Competition Policy International, Antitrust Policy Roundtable (July 17, 2020).

American Bar Association, Antitrust Law Section, Spring Meeting, "Free Lunch?!? Antitrust Economics in Zero-Price Markets" (June 4, 2020).

U.S. House of Representatives, Subcommittee on Antitrust, Commercial, and Administrative Law, Solicited Comments Regarding Competition in Digital Markets (Apr. 1, 2020) (cited in final Subcommittee majority report).

University of California (Berkeley) School of Law, Annual Consumer Law Scholars Conference, "Antitrust in Attention Markets" (Mar. 5, 2020).

New York University School of Law & Hausfeld LLP, Conference on Antitrust and 21st Century Bigness (Feb. 28, 2020).

University of Pennsylvania School of Law, Journal of Business Law Antitrust Symposium, "The Output–Welfare Fallacy" (Feb. 8, 2020).

New York University School of Law & ABA, Next Generation of Antitrust, Data Privacy and Data Protection Scholars Conference, "Antitrust in Attention Markets" (Jan. 31, 2020).

Universidade Federal do Rio de Janeiro & CRESSE, II Rio International Workshop on Advances in Competition Policy Analysis, "The Output–Welfare Fallacy" (Dec. 6, 2019).

American Antitrust Institute, 13th Annual Private Antitrust Enforcement Conference, "Can Private Litigation Address Digital Dominance?" (Nov. 12, 2019) (moderator).

University of California (Irvine) School of Law, Antitrust Roundtable, "Antitrust in Attention Markets" (Nov. 8, 2019).

European University Institute, Florence Competition Programme, Conference on Hipster Antitrust, "*Microsoft*: New Lessons from an Old Case" (Oct. 25, 2019).

University of Pennsylvania Law Review, Symposium on The Post-Chicago Antitrust Revolution, "How Should We (Re)Design Antirust Law?" (Oct. 12, 2019).

University of Melbourne Law School, Digital Citizens Conference, "Attention Scarcity, Technology, and the Law" (July 24, 2019).

L'Université d'Aix-Marseille, Academic Society for Competition Law Fourteenth Annual Conference, "Attention and the Law" (June 27, 2019).

American Bar Association, Section of Antitrust Law, "Zero-Price: The Antitrust Economics of Free" (Apr. 23, 2019).

Peking University & University College London, Beijing Conference on Competition, Governance and Regulation of the Internet Economy, "Data Mergers" (Apr. 17, 2019).

High Tech Law Institute & Institute for Information Law and Policy, Internet Law Works-in-Progress Conference, "Attention and the Law" (Mar. 2, 2019).

Santa Clara University School of Law, Symposium on Antitrust and Silicon Valley, "Antitrust in Attention Markets: Objections and Responses" (Mar. 1, 2019).

AALS Annual Meeting, Antitrust and Economic Regulation Section Program, "Antitrust and Two-Sided Markets" (Jan. 5, 2019).

University of California (Irvine) School of Law, Antitrust Roundtable, "Analyzing Procompetitive Justifications" (Nov. 16, 2018).

U.S. Federal Trade Commission, Hearings on Competition and Consumer Protection in the 21st Century, "Antitrust in Attention Markets" (Oct. 17, 2018).

New York University School of Law, ASCOLA, & Institute for Consumer Antitrust Studies, 13th Annual Conference, "Are Digital Markets Different?" (June 22, 2018) (paper received ASCOLA Best Junior Paper Award).

George Mason University Law School, 3rd Annual Digital Information Policy Scholars Conference, "Are Digital Markets Different?" (Apr. 27, 2018).

Loyola University (Chicago) School of Law, 18th Annual Antitrust Colloquium, "Procompetitive Justifications in Antitrust Law" (Apr. 20, 2018).

University of California (Irvine) School of Law, "Are Digital Markets Different?" (Apr. 13, 2018).

American Antitrust Institute, Digital Platforms Roundtable, "Defining Digital Platform Markets" (Washington, DC) (Mar. 22, 2018).

New York University School of Law & ABA, Next Generation of Antitrust Scholars Conference, "Procompetitive Justifications" (Jan. 26, 2018).

TED^{X} Talk, "Free: The World's Most Dangerous Price" (Jan. 6, 2018).

The Capitol Forum & CQ, 4th Annual Tech, Media, and Telecom Competition Conference, "Are Tech Mergers Different?" (Dec. 13, 2017).

Midwestern Law & Economics Association Annual Meeting, "Procompetitive Justifications" (Oct. 21, 2017).

SEALS Annual Conference Call-for-Papers Winners Luncheon, "The Myth of Free" (Aug. 1, 2017) (paper received SEALS Call-for-Papers Award).

Federal Bar Association & University of Memphis Sports and Entertainment Law Society, "Bracketing Amateurism: Will the Madness March On?" (Apr. 4, 2017).

FedEx Institute of Technology Emerging Innovations Series, "Blockchains: Legal and Economic Issues" (Oct. 20, 2016).

George Washington Institute of Public Policy & The Capitol Forum, "Dominant Platforms Under the Microscope: Policy Approaches in the US and EU" (Sept. 19, 2016).

U.S. Senate Policy Staff Working Group, "Competition and Monopoly in Digital Markets" (Sept. 16, 2016).

Fordham University School of Law, "The Myth of Free" (Sept. 15, 2016).

University of Arkansas School of Law, SEALS Faculty Exchange, "The Myth of Free" (Mar. 29, 2016).

Peking University School of Transnational Law, Public Lecture, "Antitrust Law in Zero-Price Markets" (Nov. 25, 2014).

GUEST SPEAKING, ACADEMIC INSTITUTIONS

Invited guest speaker for classes at University of Michigan Law School, Loyola University Chicago School of Law, St. Louis University School of Law, University of Florida Levin College of Law, George Mason University Antonin Scalia Law School, University of Memphis School of Law, University of Trento Department of Economics & Management, and Vanderbilt University Law School.

MEDIA COVERAGE

Quoted in Ben Remaly, *FTC Claims Diverging Market from EU in Mars/Kellanova Clearance*, GLOBAL COMPETITION REV., June 26, 2025.

Quoted in Kurt Wagner & Riley Griffin, *Zuckerberg Is Personally Recruiting New 'Superintelligence' AI Team at Meta*, BLOOMBERG, June 10, 2025.

Quoted in Ben Remaly, *FTC Promises Greater Openness to Merger Settlements*, GLOBAL COMPETITION REV., June 2, 2025.

Quoted in Tim Higgins, *What Is Big Tech Trying to Hide?*, WALL ST. J., May 17, 2025.

Quoted in Cecilia Kang, *The 2006 Zuckerberg Quote at the Center of Meta's Antitrust Trial*, N.Y. TIMES, May 9, 2025.

Quoted in Ben Remaly, *Apple Receives Criminal Referral*, GLOBAL COMPETITION REV., May 1, 2025.

Quoted in David McCabe, *Why the A.I. Race Could Be Upended by a Judge's Decision on Google*, N.Y. TIMES, May 1, 2025.

Quoted in Hailey Fuchs & Mia McCarthy, *It Was Supposed to Be a Tax and Border Bill. It Could Also Hand Trump Vast New Executive Powers*, POLITICO, Apr. 29, 2025.

Interview, *Is Big Tech Too Big?*, COST OF LIVING WITH PAUL HAAVARDSRUD, CBC, Apr. 25, 2025.

Interview, *Episode 22: FTC v. Meta*, THE SLINGSHOT, Apr. 22, 2025.

Quoted in John Ruwitch, *The Justice Department Is About to Make Its Case for a Google Breakup. Here's What to Know*, NPR, Apr. 20, 2025.

Quoted in David Dayen, *Google Is a Monopolist . . . Again*, AM. PROSPECT, Apr. 18, 2025.

Quoted in Kelly Lienhard, *FTC Opens Censorship Probe*, GLOBAL COMPETITION REV., Feb. 20, 2025.

Quoted in *Nippon Steel's Acquisition of U.S. Steel: What Will Trump Do? We Ask Experts*, THE NIKKEI, Jan. 18, 2025.

Quoted in Ben Remaly, *DOJ Accuses KKR of Brazen HSR Violations*, GLOBAL COMPETITION REV., Jan. 14, 2025.

Quoted in Anna Langlois & Ben Remaly, *Photographers Alarmed by Getty/Shutterstock Merger*, GLOBAL COMPETITION REV., Jan. 10, 2025.

Quoted in Santul Nerkar, *U.S. Steel, Its Merger Blocked, Faces Stark Alternatives*, N.Y. TIMES, Jan. 9, 2025.

Quoted in Rishi Kant & Aditya Soni, *Getty Images, Shutterstock Gear Up for AI Challenge with $3.7 Billion Merger*, REUTERS, Jan. 7, 2025.

Quoted in Haisten Willis, *Trump FTC Pick Andrew Ferguson Will Bring 'Substantive Change' After Lina Khan*, WASH. EXAMINER, Dec. 12, 2024.

Quoted in Claire Kelloway, *Trump's Antitrust Enforcers Could Kill Unfinished Cases. Will They?*, FOOD & POWER, Nov. 14, 2024.

Quoted in Peter Coy, *For Economists, Defending Big Business Can Be Big Business*, N.Y. TIMES, Sept. 20, 2024.

Quoted in Kendra Barnett, *What We Know About Google's Upcoming AdTech Antitrust Trial—And How It Might Play Out*, THE DRUM, Sept. 6, 2024.

Quoted in Josh Sisco & Marcia Brown, *Feds Take Grocery Merger to Court Amid 2024 Fight Over High Food Prices*, POLITICO, Aug. 26, 2024.

Quoted in Miles Klee, *Musk's Twitter 'Boycott' Lawsuit Is a 'Hideous Joke'*, ROLLING STONE, Aug. 7, 2024.

Quoted in Matt Stoller, *Governing in the Political Twilight Zone*, BIG, July 3, 2024.

Quoted in Emily Peck & Felix Salmon, *Antitrust's New Wave*, AXIOS, Apr. 29, 2024.

Quoted in Dave Michaels, *Business Groups Race to Block FTC's Ban on Noncompete Agreements*, WALL ST. J., Apr. 24, 2024.

Quoted in Makena Kelly & Vittoria Elliott, *The US Claims Apple Has a Stranglehold on the Future*, WIRED, Mar. 21, 2024.

Quoted in Kif Leswing, *Apple Faces Years of Distractions After DOJ Antitrust Suit*, CNBC, Mar. 22, 2024.

Quoted in Nathaniel Meyersohn, *Birkin Bags Are Too Hard to Buy, Shoppers Allege in Antitrust Lawsuit*, CNN, Mar. 21, 2024.

Quoted in Claire Kelloway, *FTC Sues to Block Kroger–Albertsons Merger; USDA Finalizes Anti-Discrimination and Anti-Retaliation Rule*, FOOD & POWER, Mar. 7, 2024.

Quoted in David Koenig & Michelle Chapman, *JetBlue and Spirit Are Ending Their $3.8 Billion Merger Plan After a Federal Judge Blocked the Deal*, WASH. POST, Mar. 4, 2024.

Quoted in Danielle Kaye, *Kroger–Albertsons Suit Wields Antitrust To Protect Union Workers*, BLOOMBERG LAW, February 29, 2024.

Quoted in Katie Arcieri, *JetBlue–Spirit Deal Collapse Signals End of Airline Merger Era*, BLOOMBERG LAW, Jan. 19, 2024.

Quoted in Alexis Keenan & Daniel Howley, *Apple Could Have a New Problem: Uncle Sam*, YAHOO! FINANCE, Jan. 15, 2024.

Interview, *Antitrust Lawsuit Accuses Amazon of Harming Consumers and Small Businesses*, PBS NEWSHOUR, Sept. 27, 2023.

Interview, *FTC and 17 States File Sweeping Antitrust Suit Against Amazon*, CBS NEWS, Sept. 26, 2023.

Quoted in Khushita Vasant & Chris May, *US FTC's Newman Advocates for Strong Anti-Dominance Principles Rather Than Simple Theories to Fix Competition Problems*, MLEX, Mar. 2, 2023.

Quoted in Serafina Smith, *US FTC Will Bring More 'Potential Competition' Cases Like Meta–Within, Senior Official Says*, MLEX, Feb. 24, 2023.

Quoted in Karen Weise & David McCabe, *Microsoft Gambles on 'Nice Guy' Strategy to Close Activision Deal*, N.Y. TIMES, Dec. 22, 2022.

Quoted in Megan Bobrowsky, *FTC Drops Mark Zuckerberg from Antitrust Lawsuit: Agreement Prevents Meta CEO from Purchasing VR Company in Personal Capacity*, WALL ST. J., Aug. 24, 2022.

Quoted in David McCabe & Mike Isaac, *F.T.C. Sues to Block Meta's Virtual Reality Deal as It Confronts Big Tech*, N.Y. TIMES, July 27, 2022.

Quoted in Cat Zakrzewski & Naomi Nix, *Federal Trade Commission Sues to Block Meta's Acquisition of VR Company*, WASH. POST, July 27, 2022.

Quoted in Lauren Feiner, *FTC Sues to Block Facebook Owner Meta from Buying VR Fitness App Maker*, CNBC, July 27, 2022.

Quoted in Tae Kim, *FTC Sues to Block Meta from Buying Popular VR Company*, BARRON'S, July 27, 2022.

Quoted in Barbara Grzincinc, *FTC's Lawsuit Can Put the Brakes on N.J. Hospital Merger – 3rd Cir.*, REUTERS, Mar. 23, 2022.

Quoted in David McLaughlin, *Apple Ruling Poses Hurdles for Biden's Vow to Tackle Tech Giants*, BLOOMBERG, Sept. 11, 2021.

Quoted in Stephen Nellis, *Apple Must Ease App Store Rules, U.S. Judge Orders*, REUTERS, Sept. 10, 2021.

Quoted in Luca Bertuzzi, *Nvidia Requests Commission's Clearance on Acquisition of Arm*, EURACTIV, Sept. 9, 2021.

Quoted in *Coordination Out Loud*, CAPITOL FORUM, Sept. 2, 2021.

Interviewed in Ben Remaly, *Has Antitrust Become Too Focused on Output?*, GLOBAL COMPETITION REV., Aug. 24, 2021.

Quoted in Diane Bartz & Nandita Bose, *FTC Says Facebook 'Bought and Buried' Rivals in Renewed Antitrust Fight*, REUTERS, Aug. 19, 2021.

Discussed in Sean-Michael Pigeon, *The Legal Case Against Big Tech*, NAT'L REV., July 2, 2021.

Quoted in David McLaughlin & Sarah Frier, *Apple's Tim Cook Faces Judge with Stakes Beyond $142 Billion of Apps*, BLOOMBERG, May 21, 2021.

Quoted in Jacob Gershman & Tim Higgins, *In Epic Games v. Apple Trial, an Unorthodox Judge Presides*, WALL ST. J., May 12, 2021.

Quoted in Leah Nylen, *The Epic Court Battle That Could Upend Apple's Future*, POLITICO, May 3, 2021.

Quoted in Yumiko Oshima, *U.S. Department of Justice Investigates Visa for Antitrust Violation*, NIKKEI, Apr. 1, 2021.

Quoted in Ben Remaly, *North Dakota Bill Targets Exclusivity of Apple and Google's App Stores*, GLOBAL COMPETITION REV., Feb. 16, 2021.

Quoted in Shwanika Narayan & Roland Li, *Internet Crackdown on Trump, Supporters Spreads from AWS to Twilio, Stripe and Others*, S.F. CHRON., JAN. 11, 2021.

Quoted in Louis Navellier, *Facebook Stock Is Still a Buy, Despite Antitrust Lawsuits*, MARKETS INSIDER, Jan. 8, 2021.

Quoted in Leah Nylen, *Behind Washington's One-Eighty on Facebook: A Rethink of Monopoly Power*, POLITICO, Dec. 13, 2020.

Interview, Ahtra Elnahasar, *Government Antitrust Lawsuits Pose Threat to Facebook's Internet Dominance*, SINCLAIR BROAD. GRP. (aired on numerous network affiliates), Dec. 10, 2020.

Quoted in David McLaughlin & Ben Brody, *Facebook Breakup Seen as Real Risk in Landmark Antitrust Cases*, BLOOMBERG, Dec. 10, 2020.

Quoted in Emily Birnbaum, *How the Facebook Case Will Test the Limits of Antitrust Law*, PROTOCOL, Dec. 9, 2020.

Quoted in Victoria Graham, *DOJ Suit Over Visa, Plaid Deal Sounds A Lot Like A Monopoly Case*, BLOOMBERG LAW, Nov. 10, 2020.

Quoted in Danny Fortson, *Washington Should Dig In For A Long War With Google*, SUNDAY TIMES (London), Oct. 25, 2020.

Quoted in Bobby Allyn, *Google Paid Apple Billions To Dominate Search On Iphones, Justice Department Says*, NPR, Oct. 22, 2020.

Quoted in Will Oremus, *The Key Questions That Will Decide Whether Google Is A Monopoly*, ONEZERO, Oct. 22, 2021.

Quoted in Kiran Stacey et al., *Google Antitrust Case Backed By Rare Washington Consensus*, FINANCIAL TIMES, Oct. 21, 2021.

Quoted in Gerrit De Vynck & David McLaughlin, *U.S. Case Against Google Mimics Lawsuit That Weakened Microsoft*, BLOOMBERG, Oct. 20, 2020.

Quoted in Emily Birnbaum, *The DOJ Sues Google For Monopoly Practices—And Says There's More To Come*, PROTOCOL, Oct. 20, 2020.

Quoted in David McLaughlin, *Washington's One–Two Antitrust Punch Is About To Smack Big Tech*, BLOOMBERG, Oct. 13, 2020.

Interview, *Here's Why Some Experts Are Calling For A Breakup of Big Tech After The House Antitrust Report*, CNBC AFTER HOURS, Oct. 8, 2020.

Quoted in *Apple vs. Fortnite, Two Focal Points*, NIKKEI, Aug. 26, 2020.

Quoted in Peter Blumberg & Victoria Graham, *Apple–Fortnite Judge Backed iPhone Maker In A Similar 2013 Case*, BLOOMBERG, Aug. 19, 2020.

Quoted in Stephen Nellis, *In Lawsuit, 'Fortnite' Maker To Test Idea Of iPhone As Market Unto Itself*, REUTERS, Aug. 14, 2020.

Quoted in Emily Birnbaum, *How Epic Could Actually Win Its Cases Against Apple And Google*, PROTOCOL, Aug. 14, 2020.

Quoted in Christopher Reynolds, *Competition Bureau Launches Probe Of Amazon*, YAHOO! FINANCE, Aug. 14, 2020.

Quoted in Emily Birnbaum, *What Is Microsoft Getting Itself Into?*, PROTOCOL, Aug. 3, 2020.

Quoted in Kirk Victor, *Whistleblower Sets Off New Alarms About Political Meddling At DOJ*, FTCWATCH, July 13, 2020.

Quoted in Victoria Graham, *Concerns Over Vertical Mergers Remain Absent Share Tests*, BLOOMBERG LAW, July 6, 2020.

Quoted in Victoria Graham, *Distressed Deals Ripe For "Failing Firm" Antitrust Exemption*, BLOOMBERG LAW, Apr. 28, 2020.

Quoted in Ben Remaly, *Experts Weigh In On Adequacy Of Antitrust Laws In Response To House Probe*, GLOBAL COMPETITION REV., Apr. 22, 2020.

Quoted in Spencer Parts, *Observers Question Role Of Amex In Sabre/Farelogix*, GLOBAL COMPETITION REV., Apr. 14, 2020.

Quoted in *Intuit Bid for Credit Karma Triggers Antitrust Worries*, PYMNTS, Mar. 2, 2020.

Quoted in Paul Kiel & Justin Elliott, *TurboTax's Bid To Buy Free Tax Prep Competitor Might Violate Antitrust Law, Experts Say*, PROPUBLICA, Feb. 28, 2020.

Interview, *Balance of Power*, BLOOMBERG RADIO, Feb. 13, 2020.

Quoted in Victoria Graham, *Sprint, T-Mobile Merger Win Could Bolster Struggling Firm Defense*, BLOOMBERG LAW, Feb. 12, 2020.

Quoted in Leah Nylen, *Regulators Demand Info On Past Deals By Amazon, Apple, Facebook, Google And Microsoft*, POLITICO, Feb. 11, 2020.

Interview, *Justifying Antitrust Law*, IPSE DIXIT, Feb. 4, 2020.

Quoted in Victoria Graham, *New U.S. Vertical Merger Rules Fall Flat For Antitrust Advocates*, BLOOMBERG LAW, Jan. 16, 2020.

Quoted in Nihal Krishan, *Big Tech Investigation Focused On Abuse Of Data, DOJ Antitrust Chief Says*, WASH. EXAMINER, Nov. 26, 2019.

Quoted in Emily Birnbaum, *Democratic Divisions Emerge Over Tackling Big Tech*, THE HILL, Oct. 17, 2019.

Quoted in Victoria Graham, *Ohio Rethinks State Antitrust Laws To Confront Facebook, Google*, BLOOMBERG LAW, Oct. 17, 2019.

Quoted in Tamsin McMahon, *Investigators Face Hurdles In Building Antitrust Case Against Big Tech*, GLOBE & MAIL, Sept. 22, 2019.

Quoted in Emily Birnbaum, *State Probes of Google, Facebook To Test Century-Old Antitrust Laws*, THE HILL, Sept. 14, 2019.

Quoted in Victoria Graham, *U.S. Goes To Arbitration Playbook To Block Novelis–Aleris Merger*, BLOOMBERG LAW, Sept. 6, 2019.

Interview, *How US Antitrust Law Works, And What It Means for Big Tech*, CNBC, Aug. 16, 2019.

Interview, *Too Much Attention?*, COMPETITION LORE, July 26, 2019.

Quoted in John Duries, *Executive Salary Move Could Pay Off*, THE AUSTRALIAN, July 25, 2019.

Quoted in Victoria Graham, *Senate Tech Disclosure Bill Unlikely To Prompt An Antitrust Breakup*, BLOOMBERG LAW, June 26, 2019.

Quoted in Emily Birnbaum, *New Lawsuit Poses Major Threat To T-Mobile, Sprint Merger*, THE HILL, June 12, 2019.

Quoted in Jon Reid, *States Flex Antitrust Muscle In T-Mobile–Sprint Merger Fight*, BLOOMBERG LAW, June 12, 2019.

Interview, *There's Evidence Some Big Tech Companies Committed Violations: Former DOJ Attorney*, CNBC, June 11, 2019.

Quoted in Victoria Graham, *DOJ Staff Resistance Of Sprint, T-Mobile Isn't Deal Killer*, BLOOMBERG LAW, Apr. 18, 2019.

Discussant, *Germany's Competition Agency Cracks Down On Facebook: But Is Antitrust The Right Tool For The Job?*, FORBES, Mar. 18, 2019.

Quoted in Ben Kochman, *Why Unwinding Facebook's Messaging Mergers Is A Tall Order*, LAW360, Mar. 13, 2019.

Quoted in Joe Williams, *DC Judge Flexes Antitrust Authority In Another Sting To Justice Department*, WASH. EXAMINER, Dec. 14, 2018.

Quoted in Alexandra Wilts & Shrey Verma, *Pandora/Siriusxm: Review Of CRB Analysis Shows Limited Substitutability Between Companies' Offerings*, REORG M&A, Oct. 4, 2018.

Quoted in Ryan Lynch & Alexandra Wilts, *Termination Fee Language Under Microscope As August 8 End Date Approaches*, EVENT DRIVEN, July 27, 2018.

Interview, *Ohio v. American Express Conference Call*, THE CAPITOL FORUM, June 28, 2018.

Quoted in Eleanor Tyler, *AmEx SCOTUS Win Could Thwart Antitrust Cases Against Tech*, BLOOMBERG LAW, June 26, 2018.

Quoted in Joe Williams, *AT&T's Victory In Time Warner Merger Clears Way For Deal Bonanza*, WASH. EXAMINER, June 12, 2018.

Quoted in Eleanor Tyler, *Impax's Generic Drugs Case Poses Big Questions For Trump FTC*, BLOOMBERG LAW, May 24, 2018.

Quoted in *Justice Department Taking A Harder Look At Media Deals*, INSIDERADIO, Mar. 2, 2018.

Quoted in Cecilia Kang & Sydney Ember, *Sinclair Deal With Tribune Hits Complications In Washington*, N.Y. TIMES, Feb. 27, 2018.

Quoted in Cecilia Kang, *AT&T Is Said To Want Antitrust Official On Witness List For Trial*, N.Y. TIMES, Feb. 14, 2018.

Quoted in William McConnell, *Gorsuch Hearing Opens With Grassley Treatise*, THESTREET, Mar. 20, 2017.

Quoted in Natalie Walters, *Users 'Pay Something' To Use Facebook*, THESTREET, Sept. 23, 2016.

Interview, Closing Bell, *Does Facebook Have A Transparency Issue?*, CNBC, Sept. 23, 2016.

Quoted in Hal Hodson, *Do We Need To Rein In Facebook And Google's Power?*, NEW SCI., Sept. 3, 2016.

Interview, 91.3 KUAF (NPR affiliate), Mar. 31, 2016.

Interview, 101.9 CFUV, Victoria, British Columbia, Aug. 19, 2015.

Quoted in Christie Smythe, *American Express Loses Antitrust Suit Over Merchant Rules*, BLOOMBERG, Feb. 19, 2015.

OTHER PROFESSIONAL ENGAGEMENTS

Vega Economics, Berkeley, CA
Litigation expert

- Supplied expert declaration for antitrust-related securities litigation. 2025

Javerbaum Wurgaft, Newark, NJ 2018–20
Consulting Expert

- Supplied litigation-strategy consulting services regarding civil antitrust matter.

Gerson Lehrman Group, London, UK 2017–18
Counsel

- Advised financial-services clients regarding antitrust and regulatory risk.

D.C. Bar Advocacy & Justice Clinic, Washington, DC 2012–14
Pro Bono Counsel

- Obtained $52,000 judgment on tenant's counterclaim against landlord.
- Achieved advantageous outcome in ADR for low-income tenant facing eviction.

Professor Herbert Hovenkamp, Iowa City, IA 2010–11
Research Assistant

- Drafted memoranda summarizing research on antitrust issues to facilitate revisions and updates of leading antitrust-law treatise.

U.S. Department of Justice, Washington, DC 2010
Summer Law Intern (SLIP)

- Assisted investigations of patent-related conduct by agrochemical firm and of proposed merger involving food-production markets.

Professor Christina Bohannan, Iowa City, IA 2009–10
Research Assistant

- Researched and reported on copyright and conflict-of-laws issues relating to works by Matisse and Chagall (University Museum permanent collection).

EDUCATION

University of Iowa College of Law 2011
J.D., with highest distinction (GPA: 4.00)
Honors: Outstanding Scholastic Achievement Award, Order of the Coif,

Dean's Award, Faculty Award, Jurisprudence Award,
College of Law Merit Scholar (full three-year scholarship)
Activities: Managing Editor, *Iowa Law Review*; Pro Bono Society

Iowa State University of Science & Technology 2007
B.A., Political Science (Minor: English)
Honors: Honors Program, National Merit Scholar (full four-year scholarship)
Activities: Senator, Government of the Student Body; Journalist, *Iowa State Daily*

SERVICE

Faculty Service, University of Memphis School of Law

Curriculum Committee	2025–26
Orientation Instructor (Critical Reading, Case Briefing, Post-Class Reflection)	2025

Faculty Service, University of Miami School of Law

Chair, Appointments Committee	2024–25
Curriculum Committee	2023–24
Chair, Appointments Committee	2021
Dean Search Committee	2021
Interim Director; Business of Innovation, Law & Technology Concentration	2021
Interim Dean Selection Committee	2021
Intellectual Life Committee	2020–21
Appointments & Laterals Committee	2019–20
Advisor, Social Justice & Public Interest Concentration	2019–21
Advisor, Business of Innovation, Law & Technology Concentration	2019–21
Faculty Note Advisor, multiple journals	2019–present

Faculty Service, University of Memphis School of Law

Dean's Advisory Committee (elected by faculty)	2018–19
Honors & Awards Committee (elected by faculty)	2018–19
Innovation Committee	2018–19
Curriculum Committee	2018–19
Best *Law Review* Note Selection Committee, Faculty Representative	2016–19
Faculty Note Advisor, *Law Review*	2015–19
Faculty Recruitment Committee	2017–18
Orientation Instructor (Critical Reading, Case Briefing, Post-Class Reflection)	2017–18
Ad Hoc ABA Standards Committee	2016–18
Ad Hoc Summer Orientation Committee	2017
Ad Hoc Strategic Academic Planning Committee	2016–17
Admissions Committee	2015–17

Fellowship Advisor, American Antitrust Institute Public Service Fellowship 2025

Instructor, University of Miami Summer Legal Academy 2021

Advisory Board Member, Anti-Monopoly Fund Call for Proposals	2021
Referee, *Journal of Competition Law and Economics* (Oxford Univ. Press)	2019
Referee, *Journal of Antitrust Enforcement* (Oxford Univ. Press)	2018, 2019
Barrister, Leo Bearman, Sr. Inn of Court	2017–19
Mentor, City of Memphis Americorps VISTA	2015–16

The Honorable Xochitl Carrion, Chairperson
and Honorable Commissioners and Executive Director Reilly
California Law Revision Commission
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The undersigned are members of the Mergers and Acquisitions Working Group that supplied comments to the CLRC in the memorandum dated May 28, 2024. We write now in response to the CLRC request for feedback regarding staff recommendations for draft legislation addressing mergers. Professor John Kwoka, also a member of the Mergers and Acquisitions Working Group, has decided not to join these comments and to submit separate comments.

The memorandum supplied by the Mergers and Acquisitions Working Group noted that neither the Cartwright Act nor California Unfair Competition Law specifically addresses mergers and acquisitions. Nonetheless, under the Clayton Act, the state can challenge a merger or acquisition that harms competition in California through the doctrine of *parens patrie*. However, this process has limitations. The state would have to file objections in federal court, follow federal rules and procedures, require party consent or federal cooperation to obtain confidential information, and may face constraints to obtain monetary damages. Moreover, there is no provision for notification of mergers or acquisitions that fall below Hart-Scott-Rodino thresholds yet might have significant impacts on California consumers.

The Working Group generally supported the enactment of a state statute to cover mergers and acquisitions and pre-merger notification consistent with the recommendations of the Uniform Law Commission for a uniform state Antitrust Pre-Merger Notification Act. The Working Group did not make specific recommendations regarding the content of a state merger statute.

The CLRC staff outlined three options for a state merger statute. Option One would largely mirror the Clayton Act, retaining the operative standard of substantial harm to competition but adding monopsony to clarify enforcement of transactions that might increase buyer market power. Option Two would formalize market share concentration presumptions advanced in *United States v. Philadelphia National Bank*. Option Three would add specific language regarding concentration thresholds in the most recent version of the federal Merger Guidelines. We thank the CLRC staff for their hard work presenting these three options.

The undersigned support Option One. We make this recommendation not because we believe that merger enforcement is currently ideal. We acknowledge that federal enforcement has allowed some mergers and acquisitions to occur that have harmed consumers. However, we believe that the standard of substantial harm to competition in the Clayton Act is sufficiently flexible to allow for stricter enforcement without new legislation. There have been decades of both lax and aggressive federal enforcement of mergers and acquisitions, with no change in the statutory language of the Clayton Act.[1]

Moreover, we believe that consistency with federal merger law is of primary importance. Neither consumers nor businesses benefit from a fragmented collection of statutes regarding acceptable mergers and acquisitions. For this reason, we believe that it is essential that a California statute regarding mergers and acquisitions includes a provision to adopt amendments that might occur to the Clayton Act or other operable federal antitrust law.

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[1] Indeed, as Justice Kagan has articulated regarding the Supreme Court's antitrust jurisprudence, "We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and ... to reverse antitrust precedents that misperceived a practice's competitive consequences." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 461 (2015).

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August 14, 2025

Xochitl Carrion, Chairperson
and Honorable Commissioners
California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
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Re: Antitrust Law – Study B-750 – Comment On Behalf Of The California Chamber Of Commerce

Dear Chairperson Carrion and Commissioners:

Mergers and acquisitions are critical aspects – and indicators – of a healthy economy. Mergers enable companies to access new markets, expand their customer base and diversify their offerings. Mergers also allow companies to acquire and invest in new technologies, products or services that may not thrive without sufficient funding and fostering. Frequently, mergers allow for increased production volumes and economies of scale that reduce costs and inefficiencies, all of which can inure to the benefit of consumers and workers as better, but cheaper, products and services are developed and employment opportunities expand.

But the CLRC Staff's June 16, 2025 Memorandum 2025-31 providing options for a California merger law (the "Merger Memo") seems premised on a view that merger enforcement policy has failed to protect competition in California and that anticompetitive mergers are approved – perhaps routinely – either because they are not challenged or when they are challenged, the challenges fail in court. No evidence, however, has been provided to support these views. A generalized concern about potential increases in industry concentration or about perceived shortcomings in merger enforcement policy is understandable, but it is no substitute for rigorous analysis of current policy or the costs and benefits of changes to that policy. Indeed, California should not take the unprecedented step of creating its own merger regime simply because "[p]eople think it is too hard to block a merger these days," as was advocated at the Commission's June 2025 Meeting.[1]

In any event, the proposals set forth in the Merger Memo are unlikely to make merger reviews in California more accurate or less expensive than those in the federal system. To the contrary, the proposals come with a huge price tag and, for the most part, rely on lax presumptions that do not call for a robust examination of the likely anticompetitive and

[1] June 2025 Meeting at 5:23:21.

procompetitive aspects of contemplated mergers. California has the most innovative technology sector on the planet, a critical innovation ecosystem in life sciences, the largest manufacturing base in the country and numerous vibrant industries that have thrived due, in larger part, to mergers and acquisitions evaluated under existing federal law. There is no question that federal merger law should be rigorously enforced, but "departing" from federal merger law is a mistake.

The CLRC Staff's June 19, 2025 Memorandum 2025-32 addressing potential approaches for a misuse of market power law (the "Market Power Misuse Memo") is also problematic. The proposals in the Market Power Misuse Memo deem common business practices to be presumptively unlawful if performed by hundreds of different types of companies that fall within the proposals' arbitrary thresholds without ever asking if these companies actually possess or wield market power. Not only will these proposals increase costs and stifle competition, they may drive some of the world's most successful companies out of California.

The California Chamber of Commerce ("CalChamber"),[2] and its more than 14,000 members, 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.

Potential Merger Law Provisions

The Merger Memo provides four options for a merger provision to be included in the Cartwright Act. As set forth below, all four options are problematic and bad for California, for several reasons. Some of the problems relate to a California-specific merger provision generally, and others relate to the specific options presented in the Merger Memo.

Option One for a potential Cartwright Act merger provision uses a substantive test based on Section 7 of the Clayton Act, the primary merger control provision under federal law:

> No person shall acquire … stock or other share capital, or … the whole or any part of the assets of another person where the effect of such … may be substantially to lessen competition, or to tend to create a monopoly or monopsony in any line of commerce or in any activity affecting commerce in any section of the state.[3]

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[2] CalChamber is being advised on this matter by Dr. Henry Kahwaty and Brad Noffsker, economists with BRG.

[3] Merger Memo, pp. 3 – 4.

Option Two adds two provisions to Option One and is based on the presumption "that highly concentrated markets are inherently uncompetitive."[4] One of these provisions creates a presumption of illegality for a merger resulting in a firm with an "undue" share of the market and resulting in a significant increase in market concentration:

> A merger that may produce 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 shall be deemed to substantially lessen competition in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive [effect]. This section is intended to codify the holding in *United States v. Philadelphia National Bank* (1963) 374 U.S. 321.[5]

The second provision in Option Two indirectly specifies the criteria for an undue post-transaction market share and increase in concentration by referring to the Merger Guidelines jointly issued by the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") in 2023 (the "2023 Merger Guidelines").[6] The 2023 Merger Guidelines are not law, but are a description of current enforcement policy at the DOJ and FTC.[7]

Market concentration is measured in the 2023 Merger Guidelines via the Herfindahl-Hirschman Index ("HHI"), which is defined to be the sum of the squares of the market shares of the firms in the market.[8] Option Two adopts the 2023 Merger Guidelines presumption of illegality when a proposed transaction results in an HHI above 1,800 and the increase in the HHI due to the transaction would be at least 100, or if the market share of the merged firm would be greater than 30% and the increase in the HHI would be more than 100.[9]

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[4] Merger Memo, p. 5.

[5] Merger Memo, pp. 5 – 6 (footnote omitted).

[6] The provision is, "In interpreting this section, the 2023 Merger Guidelines … shall be considered persuasive authority and understood to complement and be harmonized with this section." Merger Memo, p. 6.

[7] See, for example, *FTC v. Tapestry, Inc.*, 755 F. Supp. 3d 386, 412 n.3 (S.D.N.Y. 2024). ("In this opinion, the Court considers statements in the 2023 Merger Guidelines to the extent that the Court finds them persuasive – recognizing, of course, that the Guidelines are nonbinding."). The Merger Memo states, "The Merger Guidelines provide direction to the market about the federal agencies' enforcement priorities." Merger Memo, p. 5, fn. 32.

[8] For example, if there are four firms in a market that have shares of 40%, 30%, 20%, and 10%, the HHI for this market would be $(40)^2 + (30)^2 + (20)^2 + (10)^2$ = 1,600 + 900 + 400 + 100 = 3,000.

[9] 2023 Merger Guidelines, Guideline 1.

Option Three actually codifies Guideline 1 of the 2023 Merger Guidelines[10] into the merger provision by directly incorporating its HHI- and market share-based "Threshold for Structural Presumption:"

> A merger shall be presumed to substantially lessen competition or tend to create a monopoly or monopsony if it results in:
> (1) A market with a Herfindahl-Hirschman Index ("HHI") greater than 1,800 or more and a change in HHI greater than 100 points; or
> (2) A person with a market share over thirty percent of the market and a change in HHI greater than 100 points.[11]

Option Three also provides a standard to rebut the presumption of illegality:

> [D]emonstrating by a preponderance of the evidence that there are no likely anticompetitive effects of the transaction or that the anticompetitive effects are de minimis and that any potential anticompetitive effects are clearly outweighed by the distinct procompetitive benefits of the transaction in the same relevant market.[12]

Option Four introduces a new standard designed to present a more fundamental break from federal antitrust law. It uses the structure of Option One but changes the standard from prohibiting mergers whose effect "may be substantially to lessen competition" to "may be to create an appreciable risk of lessening competition more than a de minimis amount."[13] This standard is not used by antitrust regulators anywhere in the world and is taken from a proposed federal law[14] that was introduced into Congress several times, but never passed.

The Costs of Enforcing a Merger Provision Will Be Substantial.

Substantial State resources will be required to enforce a California merger provision. The DOJ and FTC expend considerable resources reviewing the mergers and acquisitions that are automatically reportable to the DOJ and FTC under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR"). As set forth in **Table 1**, HSR filings are significant every year.

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[10] Merger Memo, p. 8.

[11] Merger Memo, pp. 7 – 8.

[12] Merger Memo, p. 8.

[13] Merger memo, pp. 10 - 11.

[14] This is the proposed Competition and Antitrust Law Enforcement Reform Act (CALERA) that was introduced by Sen. Klobuchar.

Table 1
Annual Number of HSR Filings

Fiscal Year	Count of Filings
2021	3,520
2022	3,152
2023	1,805
2024	2,079
2025 YTD	1,519

Note: 2025 YTD is October 2024 – June 2025.

Sources: Hart-Scott-Rodino Annual Report Fiscal Year 2023, available at https://www.ftc.gov/system/files/ftc_gov/pdf/fy2023hsrreport.pdf; Premerger Notification Program HSR Transactions by Month, available at https://www.ftc.gov/enforcement/premerger-notification-program.

In addition to transactions reported under the HSR Act, the DOJ and FTC can investigate and take enforcement actions against transactions that were not reportable. While there are transactions that do not impact California directly (e.g., a hospital merger in Georgia or a grocery store acquisition in New England), given the size and scope of the California economy, many transactions have a California component, and the California AG will be required to review hundreds, if not thousands, of transactions annually for compliance with any California merger law. The resources necessary to accomplish this feat will be substantial, likely requiring hundreds of professional staff.

Increased costs, however, go far beyond just a review of merger filings. California will also need to staff up large teams to investigate and challenge mergers and acquisitions. The DOJ and FTC staff these types of investigations with large teams of attorneys and economists. California will need to do the same at great cost given the time, expense and mixed results that come with robust merger enforcement. Data provided by the DOJ indicates that between 2021 and 2024, 26 mergers were investigated by the DOJ, but abandoned by the parties during the investigation, 13 were settled during the investigation, three were abandoned and two were settled after a complaint was filed, and seven were litigated by DOJ, of which four were won by DOJ and three were lost.[15] Similar data for 2021 to 2023 from the FTC indicate that 21 mergers were settled pre-complaint, ten were abandoned post-complaint, two were litigated that the FTC won, and two were litigated that the FTC lost.[16]

Another type of cost is difficult to measure, but very real: The mergers that are never consummated due to a fear of government enforcement actions. While some of these

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[15] Antitrust Division Workload Statistics FY 2015 – 2024, available at https://www.justice.gov/archives/opa/media/1385471/dl. Data are based on fiscal years.

[16] Hart-Scott-Rodino Annual Report Fiscal Year 2021, available at https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf; Hart-Scott-

transactions may be problematic, there is another set that may be procompetitive, but never see the light of day. An overly restrictive merger enforcement policy based on the kind of market share and market concentration presumptions proposed in the Merger Memo and not on a transaction's merits would likely deter some beneficial, procompetitive mergers.

A California Merger Provision Should Not Be Tied to the 2023 Merger Guidelines.

The 2023 Merger Guidelines are the most recent summary of federal merger enforcement policy. Seven different versions came before it, starting in 1968, and each has dramatically different policy positions.[17]

One of the largest changes in these merger policy guidance documents over time has been to move past market structure and focus on the reasons why a transaction might harm competition. The 1968 Guidelines, for example, state that the DOJ attaches "primary importance to the market shares of the merging firms" and describes two situations when a more detailed analysis of competition is needed: when a "disruptive" firm is acquired and when an acquired firm has a small share, but "unusual competitive potential" (e.g., an entrant with a patent on a significantly improved product). By comparison, the 1992 Guidelines shifted the focus to the nature of competition and the effects of a merger on how firms compete, meaning a competitive analysis was front and center when evaluating mergers. The various iterations of the guidelines issued between 1982 and 2010 represented a steady progression of refining merger analysis. But the 2023 Merger Guidelines provided a sharp break from that steady progression by placing more significance on market structure, harkening back to the 1968 Guidelines.

Another change over time has been the definition of a "highly concentrated market" and the threshold for competitive concerns in such a market. In the 1982 Guidelines, these were an HHI of 1,800 with an increase of 50; in the 2010 Guidelines, 2,500 and 100; and in the 2023 Merger Guidelines, 1,800 and 100.[18]

Rodino Annual Report Fiscal Year 2022, available at https://www.ftc.gov/system/files/ftc_gov/pdf/fy2022hsrreportcorrected.pdf; Hart-Scott-Rodino Annual Report Fiscal Year 2023, available at https://www.ftc.gov/system/files/ftc_gov/pdf/fy2023hsrreport.pdf; Federal Trade Commission Accomplishments June 2021–January 2025, available at https://www.ftc.gov/system/files/ftc_gov/pdf/ftc-enforcement-actions-accomps-doc-appendix.pdf.

[17] Prior versions of the various merger guideline documents are available at https://www.justice.gov/archives/atr/guidelines-and-policy-statements. We refer to these by year, e.g., the "1992 Guidelines."

[18] 1982 Guidelines, § 1.A.1; 2010 Guidelines, p. 19; 2023 Merger Guidelines, Guideline 1. By comparison, the European Commission Merger Guidelines use 2,000 and 150 ("Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of

Given these changes over time, there is no reason to expect that the merger guidelines will remain static going forward. Rather, the Commission should anticipate that the guidelines will continue to change over time. While California would start with its merger enforcement program being closely tied to the 2023 Merger Guidelines, tying California law to a specific guidance document risks California law being out-of-date when prevailing thought changes and the guidelines are substantially revised again. While the Merger Memo states that California could update its law in response to future changes in the federal guidelines,[19] frequent changes in California merger law would increase uncertainty, business costs and compliance risks. Furthermore, any future guidelines changes might not be consistent with the California merger provision, and though the Legislature can update any Cartwright Act merger provision, if necessary, the approval of any such legislation may not be swift and is not guaranteed.

Option One Is Likely to Lead to Confusion and Inconsistent Results.

While Option One is expressly based on the text of Section 7 of the Clayton Act, the use of well-known and understood language may still cause confusion and inconsistent results. The chief reason is that merger challenges under Option One may be heard in California state courts, which have little, or no, antitrust experience. Given this lack of experience, state courts may interpret and apply merger standards differently than federal courts or even other state courts. Indeed, even the Merger Memo notes that "[m]erely adding language that provides the ability to challenge mergers in state courts is a significant change to California's antitrust law."[20] These concerns are, of course, compounded by the fact that the Commission is also considering broad language that may disassociate California antitrust law from decades of federal precedent. What is more, Option One is simply not necessary given the success California's AG, and private enforcers, have had using federal law to challenge mergers and acquisitions.

The Market Share and Market Concentration Presumptions Endorsed in Options Two and Three Will Not Improve the Accuracy of Merger Enforcement or Make it More Cost Effective.

Legal presumptions are generally used to improve judicial decision-making or reduce costs. The market share and market concentration presumptions in Options Two and Three, however, will not achieve either.

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concentrations between undertakings (2004/C 31/03), ¶ 20, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02).

[19] Merger memo, p. 10 ("Further, some may argue that in referencing a specific version of a federal guidance document that updates frequently, California will inevitably fall out of step with federal practices. This could disrupt the market, causing confusion and additional expense for companies maintaining compliance with multiple regulatory schemes. This can be addressed by acknowledging California is free to amend its law to conform with new Guidelines." (footnote omitted)).

[20] Merger Memo, p. 4.

Merger enforcement has become more refined over the years as economic thinking and enforcement experience has advanced. In addition, merger enforcement has benefited from an explosion in the data available for analysis and from advances in the techniques used to analyze competition and volumes of business documents. Taken together, these advancements have improved and sharpened merger enforcement, enabling the DOJ and FTC to focus on challenging potentially anticompetitive transactions while not disrupting transactions that are unlikely to be anticompetitive – thereby reducing both false positives and false negatives.

But antitrust enforcement decision-making based on market share and market concentration presumptions are, by comparison, a blunt instrument. While the HHI is a straight-forward arithmetic calculation, it cannot capture the richness of the data and the information in documents available to an agency involved in a merger investigation. Merger analysis is a fact-intensive exercise, and no simple market structure presumption can adequately evaluate the nuances present in specific markets across the economy. Indeed, reducing important antitrust decisions to simple mathematical calculations risks chilling the vibrancy of the California economy because it would treat industries as diverse as tech, entertainment, healthcare, agriculture, biotech, manufacturing and tourism, among others, in a one-size-fits all manner. Creating a merger review regime that bases important decisions on back-of-the-envelope calculations is not a productive way to develop California law.

In fact, many transactions that have been investigated by the DOJ and FTC were not challenged even though their market structure characteristics exceeded the 2023 Merger Guidelines' presumptions. Challenging these transactions based on presumptions, as Options Two and Three suggest, would likely lead to false positives because, after a thorough investigation of the markets, competitors, and other information, the decision was made by the DOJ or FTC to not to initiate a challenge to these transactions in these markets.

A study of FTC horizontal merger investigations between 1996 and 2011 indicates that the FTC has often decided not to take enforcement actions involving mergers in markets that produce post-merger HHIs above the thresholds set forth in Options Two and Three. **Table 2** shows 1,204 FTC investigations in which HHI values were above 1,800 with increases above 100, which would be condemned under Options Two and Three. But the data shows that the FTC did not challenge transactions in 209 of these markets. This indicates that transactions exceeding the thresholds in Option Two and Three do not always translate into likely competitive effects after fuller assessments.

Table 2
FTC Enforcement Decisions in Markets with HHI values above 1,800 and HHI Increases above 100
1996 - 2011

Change in HHI	100-199	200-299	300-499	500-799	800-1199	1200-2499	2500+	Total
Enforced	21	33	78	145	147	278	293	995
Closed	16	24	36	49	39	38	7	209
Total	**37**	**57**	**114**	**194**	**186**	**316**	**300**	**1,204**

Note: An FTC investigation into a market is "enforced" if relief is sought and is "closed" if relief is not sought. See p. 2 of Horizontal Merger Investigation Data, fiscal years 1996 – 2011.

Source: Federal Trade Commission Horizontal Merger Investigation Data, fiscal years 1996 – 2011, p. 8, available at https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011/130104horizontalmergerreport.pdf.

Nor will relying on presumptions reduce merger enforcement costs. Dechert LLP has compiled and published data on merger enforcement investigations and litigation since 2011.[21] This data indicates that the average duration of significant U.S. merger investigations was 11.3 months in 2024, essentially unchanged from the average durations in 2020 (11.4 months), 2021 (11.4 months), and 2022 (11.8 months). The average durations in 2023 and 2024 look like those from prior years, as set forth in **Figure 1**.

Figure 1
Merger Investigation Duration

This data suggests that use of the 2023 Merger Guidelines, which included market structure presumptions like those proposed in Options Two and Three, did not result in

[21] Dechert, LLP, DAMITT 2024 Annual Report: Merger Enforcement at Low Tide on Both Sides of the Atlantic, but 2025 may Bring a Sea Change," January 30, 2025, available at https://www.dechert.com/knowledge/publication/2025/1/damitt-2024-annual-report.html.

significantly shorter merger investigations.[22] That is, the 2023 Merger Guidelines' focus on presumptions of illegality did not significantly reduce the time it takes to reach merger enforcement decisions and therefore likely did not have a significant effect on the costs of those merger investigations. Thus, we cannot expect that the presumptions in Options Two and Three will reduce California's costs for running a broad-based merger review and enforcement program.

In fact, the market share and market concentration presumptions in Options Two and Three could increase costs by increasing the importance of market definition in merger enforcement. In that the outcomes of a merger investigation may depend on market structure computations, like HHI and market share, they are inherently based on market definition. This fact will make market definition analysis itself more important, contentious, difficult, time-consuming and expensive.

Option Three Does Not Properly Account For Merger Efficiencies.

Though the Merger Memo places great emphasis on the 2023 Merger Guidelines, it diverges from them in its treatment of efficiencies under Option Three.

Mergers are generally recognized as having the potential to promote economic efficiency to the benefit of consumers, workers, businesses and the overall economy. The 2023 Merger Guidelines instruct that if adverse effects are anticipated from a transaction, the analysis must then focus on how any efficiencies may offset these anticipated adverse effects.

But this is not the standard used in Option Three. To the contrary, Part (d) of Option Three states:

> A defendant may rebut the presumption … by demonstrating by a preponderance of the evidence ***that there are no likely anticompetitive effects of the transaction or that the anticompetitive effects are de minimis*** and that any potential anticompetitive effects are clearly outweighed by the distinct procompetitive benefits of the transaction in the same relevant market.[23]

This limits the evaluation of efficiencies to mergers where anticompetitive effects are absent or *de minimis*. Thus, even if a proposed transaction would result in large and verifiable efficiencies sufficient to prevent the transaction from harming competition, Option Three would not take these efficiencies into account. Put another way, the merger efficiencies

[22] Dechert, LLP also provides data on the average time to litigate a merger case. These data are not reported here because the time to litigate is highly dependent on whether the litigation ended after a preliminary injunction hearing or a complete trial on the merits.

[23] Merger Memo, p. 8 (emphasis added).

analysis standard in Option Three would block a merger that raises small (but not *de minimis*) competitive harms in one market even if there were large and certain efficiencies or benefits created in other markets that could not otherwise be achieved. Such a standard is not in the best interest of California consumers, workers or the overall economy.

Option Four Is Altogether Different And Far Too Lax.

Option Four is a completely new standard that is intended to reduce the burden of proof necessary to challenge and halt a merger. This is explicit in the Merger Memo, which states that with Option Four the "volume and strength of evidence required to prove possible anticompetitive harms would be lower, which would make it easier for the state to address anticompetitive mergers."[24] This is undoubtedly true, but the use of a less rigorous standard also makes it more likely that enforcement errors are made and that economically beneficial transactions are blocked. In addition, as recognized in the Merger Memo, "[c]hanging a familiar standard comes with substantial risks…."[25] Moreover, Option Four, like all of the other merger options, is not limited to actions brought by the State, but instead allows private plaintiffs to file suit to hold up and block mergers, which is a practice that is regularly abused even under the federal standards. Adopting the kind of "appreciable risk" standard announced in Option Four has never been done and California should not be a testing ground for this type of law.

Potential Misuse of Market Power Provisions

The Market Power Misuse Memo offers two potential provisions related to the misuse of market power. Both are misguided. One establishes a presumption that certain conduct is a violation of law if it is engaged in by an entity with "substantial market power." The other states that this same conduct by an entity with "substantial market power" may be illegal if the purpose or effect of the conduct is likely to harm competition in more than a *de minimis* way. The list of conduct includes eight items. They are:

(1) Leveraging substantial market power in one market into a separate market;

(2) Bundling, tying, using loyalty rebates, or refusing to interoperate;

(3) Denying use of essential facilities or resources;

(4) Refusing to deal;

(5) Engaging in predatory pricing tactics such as pricing below costs;

[24] Merger Memo, p. 12 (citing to Memorandum 2025-11, p. 12).

[25] Merger Memo, p. 12.

(6) Imposing exclusivity as a condition of doing business;

(7) Self-preferencing; or

(8) Acquiring, directly or indirectly, the whole or any part of the stock, or other share capital of another person.[26]

The Market Power Misuse Memo declares that the possession of substantial market power could be established by direct or indirect evidence, and an entity would be presumed to have substantial market power if either of the following is true:

(1) The entity has a market share of thirty percent or more of a relevant market; or

(2) The entity has assets, net annual sales, or a market capitalization greater than $500,000,000,000.[27]

There are several issues with these proposals, however. In particular, the conduct deemed presumptively unlawful includes broad and common business conduct, the $500 billion and 30% market share tests are arbitrary and capture a large number of firms and the proposals will increase costs and may drive some of the most successful companies out of California.

The proposed conduct prohibitions are broad and far reaching. For instance, consider item number 8 banning "[a]cquiring, directly or indirectly, the whole or any part of the stock, or other share capital of another person." This is a broad prohibition on any merger or acquisition by any firm that meets the market capitalization or market share tests. Yet this prohibition is not limited to transactions in a market or markets in which the entity has substantial market power – or any amount of market power. It is instead a prohibition against all transactions by these types of firms even in markets where they have a low share or no presence at all.

For instance, suppose a pharmaceutical company is only one of two firms that produces a drug that treats a certain condition and that each firm has a 50% share of the market for therapies to treat that condition. This pharmaceutical company would be prohibited from acquiring a company that makes a drug that treats a different condition, even if the acquirer does not itself offer a drug to treat that other condition.

The self-preferencing ban is similarly broad. Consider an automobile manufacturer with more than $500 billion in assets or market capitalization, of which there are several. If that manufacturer uses its financing arm to promote financing consumer purchases of new or used cars it would be engaging in self-preferencing that would be presumptively illegal even if that market is competitive.

[26] Misuse of Market Power Memo, pp. 3 – 4 (footnotes omitted).

[27] Misuse of Market Power Memo, pp. 4 – 5 (footnote omitted). The $500,000,000,000 threshold is to be adjusted for inflation over time based on the Consumer Price Index.

Another concern is the fact that the $500 billion and 30% market share thresholds capture numerous firms. Over 100 firms with business in the United States have in excess of $500 billion in assets, annual net sales or market capitalization. This list includes at least five domestic banks, multiple foreign banking groups, investment banks, various pharmaceutical companies, retailers, oil companies and a number of tech companies. Still many other companies are near the $500 billion threshold and are likely to cross it as they continue to grow. All these entities would be presumptively blocked from making any acquisitions and could be unable to engage in common conduct such as exclusive dealing, bundling products or offering loyalty discounts due simply to their size.

The 30% market share threshold also covers a number of companies, some quite small. While a 30% share of a particular market can be viewed as healthy, it does not necessarily mean that these companies are of a particular size, are profitable or are able to wield market power. Indeed, oligopolies, which are markets that have a small number of competitors, but can be intensively competitive, frequently have companies with over 30% of the market, but each are constrained from meaningfully exercising market power because of the presence of the other similarly-sized competitors. Likewise, startups, while being very small, may possess over 30% of a market simply because they are among the first to launch into that space.

Moreover, these thresholds are completely arbitrary. The Market Power Misuse Memo states that the 30% market share threshold is a compromise between certain aspects of California law, the European Union dominance threshold and figures used in other antitrust reform proposals, such as CALERA.[28] The $500 billion tests are apparently a "compromise" between thresholds used in other antitrust reform proposals and were chosen by staff "to capture a range of industries and distinguish this provision from federal proposals."[29] But none of these thresholds are based on an empirical analysis of whether an entity has substantial market power or an ability to use it to the detriment of consumers, workers or competition.

Finally, but just as importantly, adding a misuse of market power provision to California law will have a significant financial impact. Law enforcement and litigation costs will, of course, increase, but they are not the only costs California will suffer. Rather, presumptive bans on acquisitions and other, common business conduct have the potential to drive firms out of the State, with adverse effects on state and local tax collection and the state's overall tax base. Indeed, all the types of companies mentioned above that are covered by the thresholds set forth in the Market Power Misuse Memo – prominent banks, pharmaceutical companies, retailers, oil companies, auto companies, tech companies and even small startups – will have to give serious consideration to whether remaining in California is tenable. Business disruptions or changes in business conduct or strategy due to new legislation are also costly for businesses as well as the consumers they serve and the workforces they employ.

[28] Market Power Misuse Memo, p. 5.

[29] Market Power Misuse Memo, p. 6.

Conclusion

As many have noted, the “vast majority of mergers raise no competitive concerns.”[30] Indeed, economists have repeatedly concluded that most mergers drive innovation and competition.[31] Merger law enforcement, however, is critical to ensuring that the right balance is struck and is aimed at halting problematic mergers, but allowing procompetitive mergers. Yet the proposals in the Merger Memo do not strike this balance. They will not improve merger decision making over current, federal standards and they will not reduce the costs of merger enforcement. Likewise, the proposals in the Market Power Misuse Memo bring a blunt approach to addressing market power issues without even asking whether market power is present. CalChamber urges the Commission to move on from these proposals or, at the most, order further study.

Sincerely,

Eric P. Enson

Eric P. Enson

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[30] “California Antitrust Law and Mergers," Merger and Acquisitions Working Group Report, p. 2.

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

August 20, 2025

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

Dear Chairperson Carrion and Honorable Commissioners:

We welcome the opportunity to provide comments to the California Law Revision Commission (CLRC) on the various legislative proposals under consideration, with a focus on Memorandum 2025-21, "Draft Language for Single Firm Conduct Provision,"[1] and Memorandum 2025-31, "Draft Language for Merger Provisions."[2] The work of the CLRC is both critical and time sensitive. We commend the Commission and the Commission staff for their serious and thoughtful efforts to date, including retaining the advice and deeply substantive participation of a broad array of experts with diverse perspectives and backgrounds. When it comes to single firm conduct, it is noteworthy that all of the experts rejected the *status quo*, opting instead to endorse significant reform.

I. <u>Overview</u>

Below, we provide an overview of our recommendations for the proposed Single-Firm Conduct (SFC) and merger provisions.[3] All stakeholders are best served by a law that is as clear and predictable as possible. These improvements further this aim by (i) aligning the proposal with existing law where it makes sense to do so, (ii) expressly rejecting existing law where it does not make sense, and (iii) harmonizing the proposals with California's unique body of existing law.

<u>Single-Firm Conduct: Approve Option Two with Suggested Improvements at the September 18, 2025 Meeting</u>

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[1] Cal. Law Revision Comm'n, *Memorandum 2025-21: Draft Language for Single Firm Conduct Provision* (Mar. 24, 2025), https://clrc.ca.gov/pub/2025/MM25-21.pdf.

[2] Cal. Law Revision Comm'n, *Memorandum 2025-31: Draft Language for Merger Provisions* (June 16, 2025), https://clrc.ca.gov/pub/2025/MM25-31.pdf.

[3] Although this submission is focused on the merger and SFC provisions, we look forward to engaging with the Commission and its staff as it moves forward with its important work of crafting additional provisions to address anticompetitive conduct that falls outside the scope of these provisions and existing federal antitrust jurisprudence. Such work will be necessary to achieve the Legislature's directive to recommend changes to the state's antitrust laws "to promote and ensure the tangible and intangible benefits of free market competition for Californians."

At this advanced stage of the Study, we strongly urge the Commission to move from discussion to action with the urgency the circumstances demand.[4] At its upcoming September meeting, the undersigned respectfully urge the Commission to approve Option Two[5] for the SFC provision including the codification of the findings and declarations[6] and incorporating the following changes:

- **Simplify the General Prohibition:** Simplify proposed Sec. 16720.1(a)(1) to state that the following is unlawful: to act "in restraint of trade, or to attempt to restrain trade."

- **Establish "Clear and Convincing" Standard of Proof for Defense to General Prohibition:** Establish that a defendant must demonstrate by "clear and convincing" evidence that the pro-competitive benefits of what would otherwise be a prohibited restraint of trade (1) are achievable only through that conduct; and (2) outweigh the anticompetitive effects of the challenged conduct.

- **Specify Certain Restraints of Trade by Firms with Substantial Market Power Are *Per Se* Violations of Proposed Sec. 16720.1:**[7] Establish that certain restraints of trade by firms with substantial market power are *per se* unlawful where the plaintiff establishes that the firm (1) has substantial market power; and (2) the challenged conduct has produced some anticompetitive effects within the market. At a minimum, the following should be included in the list of *per se* unlawful conduct:

  - **Tying:** Any restraint that conditions the sale or purchase of any product or services on an agreement to sell or purchase another product or service; and

  - **Exclusive dealing:** Any restraint that requires another person to deal exclusively or primarily with the firm imposing the restraint or another person specified by that firm or any restraint that has the necessary effect of requiring another person to deal exclusively or primarily with the firm imposing the restraint or another person specified by that firm.

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[4] We strongly agree with staff's conclusion in Memorandum 2025-30 that additional analysis of whether to expressly address the harms from abuses of monopsony power is entirely unwarranted and unnecessary. The law is well-settled on the point that "the effects of monopsony power in labor markets are just as pernicious as the effects of monopoly." Cal. Law Revision Comm'n, *Memorandum 2025-30: Draft Language for Single Firm Conduct Provision and Public Comment* (June 17, 2025), https://www.clrc.ca.gov/pub/2025/MM25-30.pdf (citing Cal. Law Revision Comm'n, *Memorandum 2024-14: Expert Report: Concentration in California* (Mar. 28, 2024), at 4, https://www.clrc.ca.gov/pub/2024/MM24-14.pdf).

[5] Cal. Law Revision Comm'n, *supra* note 1.

[6] We endorse the findings proposed in Cal. Law Revision Comm'n, *Memorandum 2025-21: Draft Language for Single Firm Conduct Provision* (Mar. 24, 2025), 11-12, https://clrc.ca.gov/pub/2025/MM25-21.pdf as updated by the Staff recommendations in Cal. Law Revision Comm'n, *Memorandum 2025-30: Draft Language for Single Firm Conduct Provision and Public Comment* (June 17, 2025), https://www.clrc.ca.gov/pub/2025/MM25-30.pdf.

[7] We characterize the treatment applicable to this conduct as *per se* unlawful because once the elements are established, the defendant cannot offer a rebuttal or a defense to justify the challenged conduct. That said, it could also be characterized as a "quick look" approach, as it combines elements of both the *per se* and "quick look" approaches.

- **Specify Certain Restraints of Trade by Firms with Substantial Market Power Are Presumptively Unlawful:** Establish that certain restraints of trade by firms with substantial market power are presumptively unlawful under proposed Sec. 16720.1.[8] This conduct would be subject to a "quick look" type of analysis, such that the burden would first be on the plaintiff to establish that (1) the firm has substantial market power; and (2) the challenged restraint of trade produced some anticompetitive effect within the market. The burden would then shift to the defendant to demonstrate by "clear and convincing" evidence that the pro-competitive benefits of the challenged restraint (1) are achievable only through that conduct; and (2) clearly outweigh the anticompetitive effects of the challenged restraint.

  To address harm to workers, at a minimum, the following should be included in the list of presumptively unlawful restraints of trade:

  - **<u>Restraining Workers' Freedom of Association:</u>** Any restraint on a person's ability to exercise their full freedom of association to obtain acceptable terms and conditions of employment; and

  - **<u>Restraining Autonomy of Independent Businesses:</u>**[9] Any restraint on the wages, benefits, or other non-price terms and conditions of employment offered by another firm including any restraint on another firm's ability to independently decide whether to employ another person, recognize a union of its employees, or to otherwise agree to negotiate with its employees collectively over terms and conditions of employment.[10]

- **Codify that Out-of-Market Benefits Cannot Be Offered as a Defense:** Incorporate language from New York's 21st Century Anti-Trust Act,[11] expressly stating that harm to competition in one market may not be offset by purported benefits in a separate market.

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[8] The recommended framework for assessing the presumptively unlawful conduct is similar to the "quick look" standard of review under the Cartwright Act. As the California Supreme Court has explained, the "quick look" approach is "applicable to cases where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *In re Cipro Cases I & II*, 61 Cal. 4th 116 (2015) (internal quotation marks omitted). The Court added that, under this standard, "a defendant may be asked to come forward with pro-competitive justifications for a challenged restraint without the plaintiff having to introduce elaborate market analysis first." *Id*.

[9] Similar to New York's Twenty-First Century Anti-Trust Act, it will be necessary to exempt bona fide labor unions to ensure this provision does not interfere with the ability of workers to organize and bargain collectively for improved wages and working conditions. *See* Twenty-First Century Anti-Trust Act, S00335, 2025-2026, Reg. Sess. (N.Y. 2025), available at https://legislation.nysenate.gov/pdf/bills/2025/S335.

[10] Given that vertical price fixing is *per se* illegal under the Cartwright Act, the inclusion of a savings clause, as recommended below, may be important. This would help ensure that California's new SFC provision does not unintentionally supplant the California Supreme Court's ruling in *Mailand v. Burckle*. *See* 20 Cal. 3d 367, 572 P.2d 1142 (1978).

[11] Twenty-First Century Anti-Trust Act, S00335, 2025-2026, Reg. Sess. (N.Y. 2025), available at https://legislation.nysenate.gov/pdf/bills/2025/S335.

- **Expressly Account for Unlawful Conduct through Intermediaries:** Clarify that the prohibited conduct is unlawful whether it is carried out directly or indirectly by another entity or person such as an independent contractor or other intermediary.

- **Grant the California Attorney General Rulemaking Authority:** Grant the Attorney General Rulemaking Authority to designate additional conduct that should be added to the list of *per se* and presumptively unlawful conduct, similar to the authority that is provided for in New York's 21st Century Anti-Trust Act.

- **Add a Savings Clause:** Include a savings clause to ensure the new SFC provision does not override existing law that provides for a *per se* or "quick-look" standard of review for certain types of SFC.

<u>Merger Provision: Options Two, Three, and Four with Suggested Improvements</u>

For the merger provision, we recommend that the Commission adopt a provision that incorporates elements of Options Two, Three, and Four from Memorandum 2025-31[12] as well as our recommended improvements. These improvements are critical for addressing mergers that may result in anticompetitive effects for workers. Below, we highlight the elements that must be included in a California state merger provision to provide adequate tools for public and private enforcers to block anticompetitive mergers:

- **Adopt the "Appreciable Risk" standard:** We support including this component of Option Four.

- **Codify *Philadelphia National Bank* Presumption:** We support including this component of Options Two and Three.

- **Codify the 2023 Merger Guidelines Presumptions:** We support including this component of Option Three.

- **Designate the 2023 Merger Guidelines as Persuasive Authority:** We support including this component of Option Two.

- **Provide Explicit Direction to the California Department of Justice (CA DOJ) to Consider a Merger's Effects on Labor Markets and Workers:** We support the addition of this language from New York's 21st Century Anti-Trust Act.

- **Formalize a Role for Workers in the CA DOJ's Merger Review Process:** We support the addition of this language from New York's 21st Century Anti-Trust Act.

- **Shift the Burden of Proof for Acquisitions by Mega-Firms:** For companies with a market capitalization of $100 billion or more, we support shifting the burden to the

[12] Cal. Law Revision Comm'n, *supra* note 2.

merging parties to prove by "clear and convincing" evidence that a merger does not create an appreciable risk of materially lessening competition.[13]

California has an opportunity to reclaim the animating spirit of the antitrust reforms of the early Twentieth century, particularly as they relate to protecting competition in labor markets for the benefit of workers. As things stand today, federal and California state antitrust law is ill-equipped to address a substantial amount of anticompetitive conduct. Over the last half-century or so, in particular, courts have been narrowing the reach of antitrust law and ratcheting up the burden of proof to a degree that private and public enforcers cannot afford the time or resources necessary to litigate many antitrust cases, regardless of the strength of the case. We offer these recommendations in support of the Commission's vital role in initiating a course correction for the benefit of California workers, consumers, and small- and medium-sized businesses.

Sincerely,

International Brotherhood of Teamsters

Teamsters California

United Food and Commercial Workers, Western States Council

California Federation of Labor Unions

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[13] It would be appropriate to provide an exemption to this mega-firm burden-shifting provision for acquisitions that fall below a certain threshold, understanding that they would still be subject to a forthcoming general state law prohibitions on anticompetitive mergers as well as Section 7 of the Clayton Act.

September 3, 2025

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

Dear Chairperson Carrion and Honorable Commissioners:

The undersigned labor unions offer the following improvements to the California Law Revision Commission (CLRC) legislative proposals on Mergers as set forth in Memorandum 2025-31, "Draft Language for Merger Provisions."[1] Below, we set forth suggested language to implement the recommendations set forth in our August 20 submission[2] for the Merger provision, along with an explanation of why we support this language.

I. Merger Provision: Adopt Options Two, Three, and Four with Suggested Improvements

For the Merger provision, we recommend that the Commission adopt a provision that incorporates elements of Options Two, Three, and Four from Memorandum 2025-31 as well as our recommended changes. These changes are critical for addressing mergers that may result in anticompetitive effects for workers.

A. Adopt the "Appreciable Risk" standard

We support adoption of the "appreciable risk" standard included in Option Four. A departure from the federal standard of "may be substantially to lessen competition," is necessary in the face of federal precedent that has slowly but surely chipped away at the incipiency standard. As it stands today, courts often interpret the language of Section 7 of the Clayton Act as requiring certainty, or near-certainty, that the effect of a merger would be substantially to lessen competition. This standard ratchets up the burden of proof for plaintiffs to a degree that only the most egregious of mergers are blocked, while a significant number of anticompetitive mergers are allowed to proceed.

The "appreciable risk" standard, which is included in Senator Klobuchar's Competition and Antitrust Law Enforcement Reform Act (CALERA), would effectively address this problem

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[1] Cal. Law Revision Comm'n, *Memorandum 2025-31: Draft Language for Merger Provisions* (June 16, 2025), https://clrc.ca.gov/pub/2025/MM25-31.pdf.

[2] *Multi-party 14* (Aug. 20, 2025), available at https://drive.google.com/file/d/1NH8uxAalSwNyyk4ElBAAnB-iYEiuj3Iu/view.

by providing a clear statement that state courts are to apply a true incipiency standard. The plain language of this standard would disallow a court from requiring a plaintiff to show that a proposed merger "*will*" lessen competition, replacing inappropriately burdensome certitude[3] with something more like a *cognizable possibility.*

The phrase "appreciable risk" would clearly be administrable for courts as they already have experience applying the concept of appreciability in other areas of law[4] and, to some degree, in antitrust cases.[5] Dictionary definitions, which are frequently relied on by courts in statutory interpretation, further support the conclusion that Courts are likely to interpret and apply this language consistent with the incipiency standard.[6] For example, Merriam-Webster defines "appreciable" as "capable of being perceived or measured"[7] and also provides several relevant definitions of "risk," as 1) "possibility of loss or injury" or 2) "someone or something that creates or suggests a hazard."[8] Similarly, The American Heritage Dictionary defines "appreciable" as "[p]ossible to estimate, measure, or perceive,"[9] and provides relevant definitions of "risk" including 1) "[t]he possibility of suffering harm or loss; danger" and "[a] factor, thing, element, or course involving uncertain danger; a hazard."[10] Such definitions provide workable elements for both court interpretation and jury instructions.

B. Codify *Philadelphia National Bank* Presumption and the 2023 Merger Guidelines Presumptions

We support codifying the *Philadelphia National Bank* presumption and the structural presumptions set forth in the 2023 Merger Guidelines from the Department of Justice (DOJ) and

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[3] *Cf. Fed. Trade Comm'n v. Microsoft Corp*., 681 F. Supp. 3d 1069, 1090 (N.D. Cal. 2023), *aff'd*, No. 23-15992, 2025 WL 1319069 (9th Cir. May 7, 2025) (finding that plaintiff failed to meet a burden of showing that competition "would *probably* be substantially lessened" by proposed transaction) (emphasis added).

[4] *See, e*.g., CACI No. 1400. No Arrest Involved - Essential Factual Elements, Judicial Council of California Civil Jury Instructions (2025 edition), https://www.justia.com/trials-litigation/docs/caci/1400/1400/ (instruction regarding restraint "for some appreciable time," which can be "as brief as 15 minutes").

[5] *See, e.g., United States v. Yellow Cab Co*. 332 U.S. 218, 225 (1947) (In determining whether the complaint charges a violation of § 1 or § 2 of the Sherman Act, "[i]t is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint, or a conspiracy."); *id*. at 225-226 (finding that "interstate purchases of replacements of some 5,000 licensed taxicabs in four cities" is "an appreciable amount of commerce under any standard.").

[6] Cal. Law Revision Comm'n, *Memorandum 2025-31: Draft Language for Merger Provisions,* at 11 (June 16, 2025), https://clrc.ca.gov/pub/2025/MM25-31.pdf. *See also* Sen. No. 130 119th Cong. 1st Sess. §2(b)(2) (2025), available at https://www.congress.gov/bill/119th-congress/senate-bill/130/text?s=1&r=1&q=%7B%22search%22%3A%22antitrust%22%7D.

[7] *Appreciable,* Merriam-Webster, https://www.merriam-webster.com/dictionary/appreciable (last visited Sep. 3, 2025).

[8] *Risk,* Merriam-Webster, https://www.merriam-webster.com/dictionary/risk (last visited Sep. 3, 2025).

[9] *Appreciable,* The American Heritage Dictionary of the English Language, https://www.ahdictionary.com/word/search.html?q=appreciable (last visited Sep. 3, 2025).

[10] *Risk*, The American Heritage Dictionary of the English Language, https://www.ahdictionary.com/word/search.html?q=risk (last visited Sep. 3, 2025).

the Federal Trade Commission (FTC) (the "Merger Guidelines" or the "Guidelines"),[11] consistent with elements of Options Two and Three. Codifying both presumptions reflects the fundamental principle that mergers in concentrated markets with substantial increases in concentration or market shares are likely to result in a substantial lessening of competition or tend to create a monopoly or monopsony.

The general presumption along with specific concentration and market share thresholds, as set forth in our draft text, offer greater predictability for market participants and streamline merger review and enforcement. Because merger review and litigation can be very expensive and time-consuming for the California Department of Justice ("CA DOJ"), private enforcers, and the courts, burden shifting presumptions, like these, provide for a more efficient allocation of costs and resources.

C. Designate the Merger Guidelines as Persuasive Authority

We support the inclusion of statutory language that directs courts to treat the Merger Guidelines as persuasive authority as set forth in Option Two. In December 2023, the DOJ and FTC finalized the Merger Guidelines following multiple listening sessions and a public comment period that elicited more than 5,000 comments from consumers, workers, state attorneys general, academics, businesses, trade associations, practitioners, and entrepreneurs. In a show of bipartisan support for the Guidelines, on February 18, 2025, the incoming Republican Chair of the FTC and the Acting Assistant Attorney General of the Antitrust Division at the DOJ announced that they would remain as the framework for the agency's merger review analysis.[12]

The Guidelines reflect best practices and are firmly rooted in the law. Where some prior iterations downplayed concerns related to market structure, the 2023 Merger Guidelines give appropriate weight to these concerns, drawing on extensive legal precedent and the agencies' practical experience, including the FTC's history of market studies. Critically, the Guidelines recognize that "[l]abor markets frequently have characteristics that can exacerbate the competitive effects of a merger between competing employers," such as "high switching costs and search frictions associated with finding, applying, interviewing for, and acclimating to a new

[11] *Merger Guidelines: U.S. Department of Justice and the Federal Trade Commission,* U.S. Dep't of Just. & Fed. Trade Comm'n, § 2.1, Guideline 1, (Dec. 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

[12] *FTC Chairman Andrew N. Ferguson Announces that the FTC and DOJ's Joint 2023 Merger Guidelines Are in Effect*, Fed. Trade Comm'n (Feb. 18, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/02/ftc-chairman-andrew-n-ferguson-announces-ftc-dojs-joint-2023-merger-guidelines-are-effect; Omeed Assefi, *Use of the 2023 Merger Guidelines,* U.S. Dep't of Just. Antitrust Div. (Feb. 18, 2025), https://www.justice.gov/atr/media/1389861/dl?inline.

job."[13] Finally, the Guidelines provide important guidance on how to assess rebuttal evidence, including the prospect of entry by other firms and procompetitive efficiencies.[14]

Courts' frequent deference to the federal agencies' merger guidelines provides additional support for why it is not only appropriate, but also good policy, for the Commission to expressly designate the 2023 Merger Guidelines as persuasive authority. Doing so will provide a valuable, transparent framework for how the law is likely to be applied by enforcers and the courts. Although merger cases are not frequently litigated, in the short time since they were issued, it is notable that at least ten federal court decisions have identified the 2023 Merger Guidelines as useful and persuasive authority.[15]

D. Direct the California Department of Justice to Prioritize Workers in Merger Review

We support the addition of language that would (1) provide explicit direction to the CA DOJ to consider a merger's effects on labor markets and workers; and (2) formalize a role for workers in the CA DOJ's merger review process. For these provisions, we recommend the Commission adopt language that is similar to "New York's 21st Century Anti-Trust Act" bill.[16]

An effective merger enforcement regime must prioritize the investigation of potential anticompetitive effects of mergers on workers, in addition to consumers. And a thorough investigation of a merger's potential for anticompetitive effects in labor markets can only be achieved when workers have a seat at the table. Including our recommended provisions ensures that workers and their representatives are empowered to participate in the merger review process by sharing their unique industry knowledge, expertise, and point of view.

E. Shift the Burden of Proof for Acquisitions by Mega-Firms

For companies with a market capitalization of $100 billion or more, we support shifting the burden to the merging parties to prove by "clear and convincing" evidence that a merger does

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[13] *Merger Guidelines,* U.S. Dep't of Just. & Fed. Trade Comm'n, § 2.10, Guideline 10, (Dec. 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

[14] *Merger Guidelines,* U.S. Dep't of Just. & Fed. Trade Comm'n, § 3, (Dec. 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

[15] Federal courts that have favorably cited the 2023 Merger Guidelines include *Ambilu Tech. AS v. U.S. Composite Pipe S.,* 2024 WL 993284 (M.D. La. Mar. 7, 2024)*; Innovative Health LLC v. Biosense Webster, Inc.,* 2025 WL 1712388 (C.D. Cal. Apr. 22, 2025)*; Tevra Brands LLC v. Bayer HealthCare LLC,* 2024 WL 2261946, (N.D. Cal. May 16, 2024)*; FTC v. Cmty. Health Sys., Inc.,* 2024 WL 2854690 (W.D.N.C. June 5, 2024) *(op. vacated, appeal dismissed on other grounds); In re Essar Steel Minnesota LLC,* 2024 WL 4047451 (Bankr. D. Del. Sept. 4, 2024)*; Fed. Trade Comm'n v. Tapestry, Inc.,* 755 F. Supp. 3d 386, 412 (S.D.N.Y. 2024)*; Fed. Trade Comm'n v. Meta Platforms, Inc.,* 775 F. Supp. 3d 16 (D.D.C. 2024)*; Pennsylvania v. Ctr. Lane Partners, LLC,* 2024 WL 4792043 (W.D. Pa. Nov. 14, 2024)*; Fed. Trade Comm'n v. Kroger Co.,* 2024 WL 5053016 (D. Or. Dec. 10, 2024)*;* and *Steves & Sons, Inc. v. Jeld-Wen, Inc.,* 2024 WL 5174825 (E.D. Va. Dec. 19, 2024).

[16] Twenty-First Century Anti-Trust Act, S00335, 2025-2026, Reg. Sess. (N.Y. 2025), available at https://legislation.nysenate.gov/pdf/bills/2025/S335.

not create an appreciable risk of lessening competition or tend to create a monopoly or monopsony.[17] Establishing this presumption allows for more efficient resource allocation among the CA DOJ and the merging parties, particularly given the former's limited funding and information disadvantages relative to these firms. A cut off of $100 billion is also appropriate in that it identifies companies that are (1) well-resourced to affirmatively take on this burden of proof; and (2) have market power over a substantial number of workers, consumers, and small- and medium-sized businesses, among other market participants, such that any acquisition above a certain threshold has the potential to result in significant anticompetitive harm.

II. <u>Recommended Merger Provision Language</u>

Section X is added to read:

(a) VIOLATION.—No person shall acquire, directly or indirectly the whole or any part of the stock or other share capital, or acquire the whole or any part of the assets of another person where, in any line of commerce or in any activity affecting commerce in any section of the state, the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, may be to ***<u>(1)</u>*** create an appreciable risk of lessening competition ~~**more than a de minimis amount**~~, or ***<u>(2)</u>*** tend to create a monopoly or monopsony.[18]

(b) GENERAL PRESUMPTION.—Except as provided in paragraph (c), a merger that may produce a firm controlling an undue percentage share of the relevant market and result***<u>ing</u>*** in a significant increase in the concentration of firms in that market ***<u>is illegal under Section X(a) including a merger that would result in—</u>*** ~~**shall be deemed to substantially lessen competition.**~~[19]

(1) A market with a Herfindahl-Hirschman Index ("HHI") greater than 1,800 or more and a change in HHI greater than 100 points;[20] or
(2) A person with a market share over thirty percent of the market and a change in HHI greater than 100 points.

<u>(c) EXCLUSION.—Paragraph (b) shall not apply if the defendant establishes by clear and convincing evidence that, in any line of commerce or in any activity affecting</u>

[17] It would be appropriate to provide an exemption to this mega-firm burden-shifting provision for acquisitions that fall below a certain threshold, understanding that they would still be subject to a forthcoming general state law prohibitions on anticompetitive mergers as well as Section 7 of the Clayton Act.

[18] This reflects Paragraph (a) of Option Four with suggested changes.

[19] This reflects Paragraph (b) of Option Two with suggested changes.

[20] This subdivision, and the one that directly follows, reflects paragraph (c)(1)-(2) of Option Three with no edits. As explained in footnote 44 of Memorandum 2025-31, this language mirrors section 2, 2.1: Guideline 1 of the Merger Guidelines.

commerce in any section of the state, the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, would not be to (1) create an appreciable risk of lessening competition, or (2) tend to create a monopoly or monopsony

(d) ***MEGA-MERGERS.—A merger in which the acquiring company or the person being acquired has a market capitalization of $100 billion is illegal under Section X(a) unless the defendant establishes by clear and convincing evidence that, in any line of commerce or in any activity affecting commerce in any section of the state, the effect of such acquisition, or of the use of such stock by the voting or granting of proxies or otherwise, would not be to (1) create an appreciable risk of lessening competition, or (2) tend to create a monopoly or monopsony.***

(e) ***For purposes of this Section, an appreciable risk of lessening competition in any line of commerce or in any activity affecting commerce in any section of the state may not be offset by purported benefits in a separate line of commerce or activity.***

Sincerely,

International Brotherhood of Teamsters

Teamsters California

United Food and Commercial Workers, Western States Council

California Federation of Labor Unions

Email to Commission Staff, 9/8/25

Please see below for an update to our recommended language for increased clarity:

b. In assessing the degree to which the merging firms compete for labor, evidence that a merger may have an adverse impact on any one or more of **THE MEASURES DESCRIBED IN PARAGRAPH (a)** can demonstrate that substantial competition exists between the merging firms. (adapted from Guideline 10 of Merger Guidelines at 27)

On Sep 8, 2025, at 3:04 PM, Amanda Lewis wrote:

All, following up on language to implement one of our recommendations for the merger provision, please see below:

In considering any transaction under this Section.—

a. A transaction's effects on labor markets shall be considered including but not limited to effects on workers' countervailing bargaining power, the ability to unionize and collectively bargain, wages, benefits, working conditions, other measures of workplace quality, and the rate of improvement or degradation of any of these measures. (language is adapted from NY bill and Guideline 10 of Merger Guidelines at 27)
b. In assessing the degree to which the merging firms compete for labor, evidence that a merger may have an adverse impact on any one or more of these measures can demonstrate that substantial competition exists between the merging firms. (adapted from Guideline 10 of Merger Guidelines at 27)
c. Given the unique features of certain labor markets (i) the level of concentration at which competition concerns arise may be lower in labor markets than in product markets; and (ii) labor markets can be relatively narrow. (adapted from Guideline 10 of Merger Guidelines at 27)

Best,
Amanda

Amanda G. Lewis

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August 27, 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: Antitrust Law – Study B-750 Support for Staff Recommendations on Single-Firm Conduct and Mergers

Dear Chairperson Carrion and Honorable Commissioners:

On behalf of our client, Economic Security California Action[1], we write to comment on the staff recommendations presented in Memorandum 2025-31, "Draft Language for Merger Provisions" and on the staff's previous recommendations regarding single firm conduct. We commend the staff on their continued excellent work regarding this ongoing study. The most recent memorandum carefully and clearly lays out the various paths the Commission may take as it modernizes California's merger law. We

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[1] The following organizations have also endorsed this letter: American Economic Liberties Project; California Nurses Association; Consumer Federation of California; Democracy Policy Network; End Poverty in California; Institute for Local Self Reliance; Rise Economy; Small Business Majority; TechEquity Collaborative; United Domestic Workers (UDW/AFSCME Local 3930); United Food and Commercial Workers Western States Council (UFCW).

commend the Commission's commitment to ensuring that California antitrust law will protect workers, consumers, and small businesses.

I. Recommendations Regarding Single-Firm Conduct

Before addressing the latest staff recommendations to modernize California's merger provisions, we first wish to address the staff's previous recommendations regarding single-firm conduct, which we previously discussed in our March 28, 2025 letter. We endorse the recommendations submitted by the International Brotherhood of Teamsters, Teamsters California, United Food and Commercial Workers Western States Council, and California Federation of Labor Unions regarding single firm conduct provisions. Their August 20, 2025 letter urges the Commission to approve Option Two with critical improvements, including simplifying the general prohibition against restraints of trade, establishing clear standards of proof, and creating per se violations for conduct by firms with substantial market power. We agree.

We also would like to reiterate our strong support for the Enhanced Purpose Statement, Statement Rejecting Federal Principles, and Statement Rejecting Federal Precedents the staff has prepared. These provisions are all grounded in current law, will provide crucial guidance to courts about how to adjudicate Cartwright Act cases, provide clarity, consistency, and fairness in the application of the law as a result, and, consistent with every expert white paper, guarantee that California's antitrust law is of independent force and effect and not destined to follow the federal jurisprudence that has become increasingly hostile to meaningful antitrust enforcement. As we explained in our March 28, 2025 letter, this draft language appropriately and accurately catalogues the broad scope of harms that can result from anticompetitive conduct and is grounded in and inspired by the comments in the expert white papers before the Commission. We believe this language is critical to ensuring that the Commission's intended reform is successful, and urge the Commission to adopt it in full.

We urge the Commission to take immediate action at its September 18, 2025 meeting to vote on and approve these single-firm conduct recommendations. We agree with the Teamsters' letter's observation that the time has come for the Commission to take action on the single-firm conduct proposals before it. California cannot afford further delay while harmful consolidation continues to damage workers, consumers, and communities across the state. Inaction at this stage is tantamount to endorsing California's broken antitrust status quo which, as the Commission's exemplary work has demonstrated, cannot and should not continue.

II. Recommendations Regarding the Staff's Draft Language for Merger Provisions

The staff has issued a memorandum, Memorandum 2025-31, that comprehensively analyzes the potential options for the Commission as it considers proposals to update and revitalize the merger provisions of California's antitrust law. After considering those recommendations, we urge the Commission to:

- **Reject Option One**: California should not merely copy the Clayton Act, as this would import decades of weak federal precedent;
- **Adopt Options Two, Three, and Four together**: Combining the *Philadelphia National Bank* presumption, bright-line thresholds from the 2023 Guidelines, and the "appreciable risk" standard creates a strong, clear, and enforceable framework; and
- **Recommend comprehensive merger reform**: The Commission should include premerger notification requirements, industry-specific standards, and explicit consideration of labor and community impacts in its recommendation to the Legislature.

A. The Current State of Market Concentration in California

Market concentration in California has reached crisis levels. Across healthcare, technology, grocery, retail, and media, to take prominent examples, consolidation has produced markets dominated by a handful of firms. That dominance stifles new entry, narrows consumer choice, and leaves workers with fewer alternatives, suppressing wages, benefits, and bargaining power.

Federal antitrust enforcement has proven insufficient to check this trend. Federal agencies lack the vigor to adequately enforce the antitrust laws in our dynamic modern economy, and federal agencies cannot realistically monitor, much less litigate, every transaction—especially those that result in extreme consolidation locally without triggering concerns at a national level. Even when they do, judicial interpretation of Section 7 of the Clayton Act has eroded its prophylactic purpose. Courts now demand proof that harm is "likely" or "probable," rather than recognizing, as Congress intended, that mergers must be stopped in their incipiency before damage becomes irreversible. Memorandum 2025-31 at 2.

The insufficiency of federal enforcement creates an urgent need for California to enact its own mergers and acquisitions laws that empower the California Attorney

General to block harmful deals at home, particularly those that impact local economies. California need not tether its future merger law to the failed "consumer welfare" era that has allowed consolidation to flourish across our economy, from healthcare to technology to grocery stores to media. Instead, to prevent harmful consolidation, especially in local and regional markets, California should establish a state-level pre-merger notification system that applies to all market sectors, gives the Attorney General the opportunity to evaluate whether a proposed merger contributes to consolidation in a market, considers the impact on consumers and workers, and allows for timely action to intervene. California should also set clear merger thresholds to protect competition and prevent monopoly formation, while increasing transparency in merger reviews to ensure accountability.

B. Staff Recommendations to Revise California's Merger Provisions.

Against this backdrop, the staff has presented four options for California merger law, each representing a different level of departure from current federal jurisprudence. Option One largely mirrors the Clayton Act with modest amendments. Option Two codifies the *Philadelphia National Bank* presumption and designates the 2023 Merger Guidelines as persuasive authority. Option Three incorporates specific bright-line thresholds from the Guidelines. Option Four adopts an "appreciable risk" standard that lowers the burden of proof for enforcement actions. The Commission has been asked not to select among them at this stage, but to receive comment. We urge the Commission to seize the opportunity to direct staff to prepare a robust composite approach that integrates the strongest elements of Options Two, Three, and Four, while rejecting Option One.

We agree with staff's central insight: Adopting merger provisions that simply replicate the federal Clayton Act would squander California's opportunity to modernize its state antitrust law. California should instead take from the federal framework what remains sound, discard what has been hollowed out by judicial narrowing, and craft a statute that restores the protective force Congress originally intended but that courts have eroded.

We also agree that California's new merger law should specifically include and address monopsony harms. Labor markets are as critical as product markets, and California merger law should protect against the pernicious harms to workers that result from employer concentration and wage suppression. The effects of monopsony power in labor markets create the same competitive distortions as monopoly power in product markets.

Below, we discuss each option presented by the staff.

Option One: Copying the Clayton Act

We oppose adopting Option One, which would largely replicate Section 7 of the Clayton Act. This approach would perpetuate the very defects that necessitate reform. Simply replicating the Clayton Act's language would import decades of weak federal jurisprudence that has raised the burden of proof and undermined merger enforcement. California should not tether its future merger law to the failed "consumer welfare" era that has allowed consolidation to flourish across every sector of the economy. Such an approach would be inconsistent with what the Commission endorsed in January 2025 and would fail to achieve the California Legislature's directive in ACR-95 to recommend a modernization of state antitrust law to promote and ensure the tangible and intangible benefits of free market competition for Californians.

Option Two: *Philadelphia National Bank* Presumption

Option Two would codify the structural presumption recognized in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), which held that mergers producing firms with undue market share and significantly increasing concentration are presumptively unlawful. This approach would restore the incipiency principle that Congress intended and restore the recognition that highly concentrated markets are inherently uncompetitive. Designating the 2023 DOJ/FTC Merger Guidelines as persuasive authority would further strengthen this option by grounding California law in modern enforcement practice. This approach would provide clear guidance to courts and restore the incipiency standard Congress originally intended when it enacted the Clayton Act. It makes sense for the approach in Option Two to be included in the Commission's recommendation to the Legislature.

Option Three: Federal Merger Guidelines

Option Three incorporates specific presumptions from the 2023 Guidelines: Mergers that raise the HHI above 1,800 with an increase of more than 100 points, or that produce a firm with a market share above 30% plus an HHI increase over 100 points, would be presumptively unlawful. 2023 Merger Guidelines § 2. Codifying these bright-line rules would give enforcers practical tools, create predictability for businesses, and reduce costly evidentiary burdens by establishing clear parameters for the otherwise vague terms "undue concentration" and "significant increase" relied on in *Philadelphia National Bank*. The Guidelines were adopted by federal agencies following rigorous national vetting and have been relied upon by courts, providing direct guidance based on established metrics. We further recommend extending this approach beyond horizontal mergers to vertical and adjacent-market mergers, particularly in technology and healthcare, where dominance in one market can distort competition in another.

Option Four: Appreciable Risk Standard

Option Four would change the Clayton Act legal standard for permissible mergers by changing the "substantially lessen competition standard" to one that asks whether the merger would create an "appreciable risk of materially lessening competition." This standard, which is borrowed from Senator Amy Klobuchar's Competition and Antitrust Law Enforcement Reform Act ("CALERA") proposal, would restore the Clayton Act's original prophylactic purpose.

We strongly support this approach. This proposal would modernize California's merger law by lowering the burden of proof for enforcers and allowing potentially harmful mergers to be stopped at their incipiency, as Congress originally intended. This standard *must* be paired, however, with the *Philadelphia National Bank* presumption (Option Two) and the Guidelines' bright-line thresholds (Option Three)—not treated as a standalone option. We also endorse shifting the burden of proof for mega-firms (*e.g.*, companies with market capitalization above $100 billion) by requiring them to show by clear and convincing evidence that their mergers pose no appreciable risk to competition. *See* Memorandum 2025-31 at 14.

Both the "appreciable risk of materially lessening competition" and "public interest" standards should be implemented for proving harm in merger reviews. Both standards are familiar to courts and antitrust enforcers and would enable California to challenge potentially harmful mergers before damage to competition becomes certain and irreparable.

C. Additional Recommendations Not Captured by the Staff Memorandum.

Finally, we recommend that, in addition to directing that staff prepare a merger proposal that combines Options Two, Three, and Four, the Commission consider strengthening California's merger regime in three further respects:

- **Pre-Merger Notification.** California should adopt its own robust pre-merger notification system, parallel to Hart-Scott-Rodino but tailored to state markets, so as to ensure that the Attorney General can review transactions that escape federal scrutiny.

- **Industry-Specific Standards.** As bills such as AB 853 and AB 3129 recognize, healthcare, grocery, and technology mergers deserve heightened scrutiny given their outsized impact on workers and consumers. California should include heightened scrutiny of mergers in these industries in its merger statute.
- **Labor and Community Impacts.** Merger review should consider wage suppression, union bargaining power, effects on small businesses and communities of color, and reinvestment obligations in banking and fintech. A directive to consider these impacts should be included in the statute.

D. Conclusion Regarding Merger Proposals

California faces a critical moment in addressing the consolidation that has reached alarming levels across our economy. This resulting concentration of market power in too few hands chokes out competition, limits consumer choice, and undermines workers' ability to seek out better employment options.

By adopting the hybrid approach discussed above—combining the *Philadelphia National Bank* presumption, bright-line thresholds from the 2023 Guidelines, and the "appreciable risk" standard—California can reclaim antitrust's original purpose of stopping harmful consolidation in its incipiency and set a national model for protecting competition, workers, and democracy. These combined approaches will:

- **Lower the burden of proof**: Restore the incipiency principle and empower California to block harmful mergers before they damage workers, consumers, and communities;
- **Center workers and communities**: Explicitly include labor market harms, formalize worker participation, and evaluate community and equity impacts;
- **Strengthen scrutiny of mega-firms and key industries**: Shift the burden of proof for the largest companies and apply heightened review in critical sectors; and
- **Make California a leader**: Provide a comprehensive framework that other states can follow in protecting competition and democracy.

The Commission should take action now to provide clear direction to staff on merger language.

* * *

Thank you for considering these comments and for your continued work on this critical issue.

Sincerely,

Scott A. Kronland

Scott A. Kronland

cc: Economic Security California Action

American Economic Liberties Project
California Nurses Association
Consumer Federation of California
Democracy Policy Network
End Poverty in California
Institute for Local Self Reliance
Rise Economy
Small Business Majority
TechEquity Collaborative
United Domestic Workers (UDW/AFSCME Local 3930)
United Food and Commercial Workers Western States Council (UFCW)

9/3/2025

HI Sarah -
Thank you for your patience. We have confirmed that all of the signatories on the ESCA Action letter agree with the following:

"No person shall acquire ... assets of another person where the effect of such acquisition ... may be to create **an appreciable risk of lessening competition.**"

We support language that establishes an "appreciable risk" standard <u>without the additional "materially lessening" or "more than a de minimis amount" qualifiers because we believe that the</u> words "appreciable risk" provide courts with sufficient discretion to block only those mergers that create a cognizable ("appreciable") threat ("risk") to competition.

If necessary, we can amend our letter but we'd prefer not to, given the other demands on all of time at this moment at the end of session.

More rationale:
The relevant portion of Option 4 in the CLRC memo would prohibit mergers that may create "**an appreciable risk of lessening competition more than a de minimis amount."**

In the letter submitted by ESCA and signatories, the standard is articulated as **"an appreciable risk of materially lessening competition."**

These two articulations of the "appreciable risk" standard are essentially the same. In the federal bill CALERA, from which the "appreciable risk" concept is taken, "materially" is defined as "more than a de minimis amount."

But we have also advocated for a sharper, simpler articulation of the "appreciable risk" standard.

You can attribute this position to ALL GROUPS that signed onto the ESCA Action letter -- we confirmed with everyone.

Teri

CAMEO network

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September 8, 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: Antitrust Law – Study B-750 Support for Staff Recommendations on Single-Firm Conduct and Mergers

Dear Chairperson Carrion and Honorable Commissioners:

On behalf of CAMEO Network, I write to comment on the staff recommendations presented in Memorandum 2025-31, "Draft Language for Merger Provisions" and on the staff's previous recommendations regarding single firm conduct. We commend the staff on their excellent continued work regarding this ongoing study. The most recent memorandum carefully and clearly lays out the various paths the Commission may take as it modernizes California's merger law. We commend the Commission's commitment to ensuring that California antitrust law will protect workers, consumers, and small businesses.

CAMEO Network is California's statewide micro-business network made up of 400 organizations, agencies, and individuals dedicated to furthering Micro-Business development in California with small and micro-business financing such as loans and credit, technical assistance and business management training. Annually, CAMEO members serve about 200,000 very small businesses with training, business and credit assistance and loans. These firms – largely start-ups with less than six employees – support or create 300,000 new jobs in California and generate a total of $15 billion in economic activity.

I. Recommendations Regarding Single-Firm Conduct

Before addressing the latest staff recommendations to modernize California's merger provisions, we first wish to address the staff's previous recommendations regarding single-firm conduct, which we previously discussed in our March 28, 2025 letter. We endorse the recommendations submitted by the International Brotherhood of Teamsters, Teamsters California, United Food and Commercial Workers Western States Council, and California Federation of Labor Unions regarding single firm conduct provisions. Their August 20, 2025 letter urges the Commission to approve Option Two with critical improvements, including simplifying the general prohibition against restraints of trade, establishing clear standards of proof, and creating per se violations for conduct by firms with substantial market power. We agree.

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We also would like to reiterate our strong support for the Enhanced Purpose Statement, Statement Rejecting Federal Principles, and Statement Rejecting Federal Precedents the staff has prepared. These provisions are all grounded in current law, will provide crucial guidance to courts about how to adjudicate Cartwright Act cases, provide clarity, consistency, and fairness in the application of the law as a result, and, consistent with every expert white paper, guarantee that California's antitrust law is of independent force and effect and not destined to follow the federal jurisprudence that has become increasingly hostile to meaningful antitrust enforcement. As we explained in our March 28, 2025 letter, this draft language appropriately and accurately catalogues the broad scope of harms that can result from anticompetitive conduct and is grounded in and inspired by the comments in the expert white papers before the Commission. We believe this language is critical to ensuring that the Commission's intended reform is successful, and urge the Commission to adopt it in full.

We urge the Commission to take immediate action at its September 18, 2025 meeting to vote on and approve these single-firm conduct recommendations. We agree with the Teamsters' letter's observation that the time has come for the Commission to take action on the single-firm conduct proposals before it. California cannot afford further delay while harmful consolidation continues to damage workers, consumers, and communities across the state. Inaction at this stage is tantamount to endorsing California's broken antitrust status quo which, as the Commission's exemplary work has demonstrated, cannot and should not continue.

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- **Reject Option One:** California should not merely copy the Clayton Act, as this would import decades of weak federal precedent;
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- **Recommend comprehensive merger reform:** The Commission should include premerger notification requirements, industry-specific standards, and explicit consideration of labor and community impacts in its recommendation to the Legislature.

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A. The Current State of Market Concentration in California

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Federal antitrust enforcement has proven insufficient to check this trend. Federal agencies lack the vigor to adequately enforce the antitrust laws in our dynamic modern economy, and federal agencies cannot realistically monitor, much less litigate, every transaction—especially those that result in extreme consolidation locally without triggering concerns at a national level. Even when they do, judicial interpretation of Section 7 of the Clayton Act has eroded its prophylactic purpose. Courts now demand proof that harm is "likely" or "probable," rather than recognizing, as Congress intended, that mergers must be stopped in their incipiency before damage becomes irreversible. Memorandum 2025-31 at 2.

The insufficiency of federal enforcement creates an urgent need for California to enact its own mergers and acquisitions laws that empower the California Attorney General to block harmful deals at home, particularly those that impact local economies. California need not tether its future merger law to the failed "consumer welfare" era that has allowed consolidation to flourish across our economy, from healthcare to technology to grocery stores to media. Instead, to prevent harmful consolidation, especially in local and regional markets, California should establish a state-level pre-merger notification system that applies to all market sectors, gives the Attorney General the opportunity to evaluate whether a proposed merger contributes to consolidation in a market, considers the impact on consumers and workers, and allows for timely action to intervene. California should also set clear merger thresholds to protect competition and prevent monopoly formation, while increasing transparency in merger reviews to ensure accountability.

B. Staff Recommendations to Revise California's Merger Provisions.

Against this backdrop, the staff has presented four options for California merger law, each representing a different level of departure from current federal jurisprudence. Option One largely mirrors the Clayton Act with modest amendments. Option Two codifies the Philadelphia National Bank presumption and designates the 2023 Merger Guidelines as persuasive authority. Option Three incorporates specific bright-line thresholds from the Guidelines. Option Four adopts an "appreciable risk" standard that lowers the burden of proof for enforcement actions. The Commission has been asked not to select among them at this stage, but to receive comment. We urge the Commission to seize the opportunity to direct

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staff to prepare a robust composite approach that integrates the strongest elements of Options Two, Three, and Four, while rejecting Option One.

We agree with staff's central insight: Adopting merger provisions that simply replicate the federal Clayton Act would squander California's opportunity to modernize its state antitrust law. California should instead take from the federal framework what remains sound, discard what has been hollowed out by judicial narrowing, and craft a statute that restores the protective force Congress originally intended but that courts have eroded.

We also agree that California's new merger law should specifically include and address monopsony harms. Labor markets are as critical as product markets, and California merger law should protect against the pernicious harms to workers that result from employer concentration and wage suppression. The effects of monopsony power in labor markets create the same competitive distortions as monopoly power in product markets.

Below, we discuss each option presented by the staff.

Option One: Copying the Clayton Act
We oppose adopting Option One, which would largely replicate Section 7 of the Clayton Act. This approach would perpetuate the very defects that necessitate reform. Simply replicating the Clayton Act's language would import decades of weak federal jurisprudence that has raised the burden of proof and undermined merger enforcement. California should not tether its future merger law to the failed "consumer welfare" era that has allowed consolidation to flourish across every sector of the economy. Such an approach would be inconsistent with what the Commission endorsed in January 2025 and would fail to achieve the California Legislature's directive in ACR-95 to recommend a modernization of state antitrust law to promote and ensure the tangible and intangible benefits of free market competition for Californians.

Option Two: Philadelphia National Bank Presumption
Option Two would codify the structural presumption recognized in United States v. Philadelphia National Bank, 374 U.S. 321 (1963), which held that mergers producing firms with undue market share and significantly increasing concentration are presumptively unlawful. This approach would restore the incipiency principle that Congress intended and restore the recognition that highly concentrated markets are inherently uncompetitive. Designating the 2023 DOJ/FTC Merger Guidelines as persuasive authority would further strengthen this option by grounding California law in modern enforcement practice. This approach would provide clear guidance to courts and restore the incipiency standard Congress originally intended when it enacted the Clayton Act. It makes sense for the approach in Option Two to be included in the Commission's recommendation to the Legislature.

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Option Three: Federal Merger Guidelines
Option Three incorporates specific presumptions from the 2023 Guidelines: Mergers that raise the HHI above 1,800 with an increase of more than 100 points, or that produce a firm with a market share above 30% plus an HHI increase over 100 points, would be presumptively unlawful. 2023 Merger Guidelines § 2. Codifying these bright-line rules would give enforcers practical tools, create predictability for businesses, and reduce costly evidentiary burdens by establishing clear parameters for the otherwise vague terms "undue concentration" and "significant increase" relied on in Philadelphia National Bank. The Guidelines were adopted by federal agencies following rigorous national vetting and have been relied upon by courts, providing direct guidance based on established metrics. We further recommend extending this approach beyond horizontal mergers to vertical and adjacent-market mergers, particularly in technology and healthcare, where dominance in one market can distort competition in another.

Option Four: Appreciable Risk Standard
Option Four would change the Clayton Act legal standard for permissible mergers by changing the "substantially lessen competition standard" to one that asks whether the merger would create an "appreciable risk of materially lessening competition." This standard, which is borrowed from Senator Amy Klobuchar's Competition and Antitrust Law Enforcement Reform Act ("CALERA") proposal, would restore the Clayton Act's original prophylactic purpose.

We strongly support this approach. This proposal would modernize California's merger law by lowering the burden of proof for enforcers and allowing potentially harmful mergers to be stopped at their incipiency, as Congress originally intended. This standard must be paired, however, with the Philadelphia National Bank presumption (Option Two) and the Guidelines' bright-line thresholds (Option Three)—not treated as a standalone option. We also endorse shifting the burden of proof for mega-firms (e.g., companies with market capitalization above $100 billion) by requiring them to show by clear and convincing evidence that their mergers pose no appreciable risk to competition. See Memorandum 2025-31 at 14.

Both the "appreciable risk of materially lessening competition" and "public interest" standards should be implemented for proving harm in merger reviews. Both standards are familiar to courts and antitrust enforcers and would enable California to challenge potentially harmful mergers before damage to competition becomes certain and irreparable.

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C. Additional Recommendations Not Captured by the Staff Memorandum.

Finally, we recommend that, in addition to directing that staff prepare a merger proposal that combines Options Two, Three, and Four, the Commission consider strengthening California's merger regime in three further respects:

- Pre-Merger Notification. California should adopt its own robust pre-merger notification system, parallel to Hart-Scott-Rodino but tailored to state markets, so as to ensure that the Attorney General can review transactions that escape federal scrutiny.
- Industry-Specific Standards. As bills such as AB 853 and AB 3129 recognize, healthcare, grocery, and technology mergers deserve heightened scrutiny given their outsized impact on workers and consumers. California should include heightened scrutiny of mergers in these industries in its merger statute.
- Labor and Community Impacts. Merger review should consider wage suppression, union bargaining power, effects on small businesses and communities of color, and reinvestment obligations in banking and fintech. A directive to consider these impacts should be included in the statute.

D. Conclusion Regarding Merger Proposals

California faces a critical moment in addressing the consolidation that has reached alarming levels across our economy. This resulting concentration of market power in too few hands chokes out competition, limits consumer choice, and undermines workers' ability to seek out better employment options.

By adopting the hybrid approach discussed above—combining the Philadelphia National Bank presumption, bright-line thresholds from the 2023 Guidelines, and the "appreciable risk" standard—California can reclaim antitrust's original purpose of stopping harmful consolidation in its incipiency and set a national model for protecting competition, workers, and democracy. These combined approaches will:

- Lower the burden of proof: Restore the incipiency principle and empower California to block harmful mergers before they damage workers, consumers, and communities;
- Center workers and communities: Explicitly include labor market harms, formalize worker participation, and evaluate community and equity impacts;
- Strengthen scrutiny of mega-firms and key industries: Shift the burden of proof for the largest companies and apply heightened review in critical sectors; and

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- Make California a leader: Provide a comprehensive framework that other states can follow in protecting competition and democracy.
- The Commission should take action now to provide clear direction to staff on merger language.

Thank you for considering these comments and for your continued work on this critical issue.

Sincerely,

Heidi Pickman
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CAMEO Network