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

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Acknowledgements

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

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

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

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I. Introduction

By Becky Chao, Kelli Smith, and Teri Olle

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

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

Evidence of a revitalized approach to antitrust policy can be seen at the federal level and in the states, supported by a growing body of deeply researched scholarship. Under the first Trump administration, the U.S. Department of Justice (DOJ) brought a landmark monopolization case against Google — the first such high-profile lawsuit in nearly two decades. The Biden administration accelerated antitrust and competition policy by appointing rigorous and innovative leaders — such as Jonathan Kanter, Lina Khan, and Tim Wu — who ushered in a new era of vigorous enforcement.

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

The California Law Revision Commission

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

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

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

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

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

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

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

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

Background

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

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

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

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

[3] Id. at 4.

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

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

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

Urgency of the moment

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

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

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

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

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

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

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

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

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

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

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

Our recommendations include:

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

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

Corporate concentration in California

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

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

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[10] Jenny Duan and Sarah Bohn, "California's Economy," October 2024, Public Policy Institute of California, https://www.ppic.org/publication/californias-economy/.
[11] California Law Revision Commission, *Report on Antitrust Law: Study B-750,* "Concentration and Competition in California: A Focus on Critical Sectors and Labor Markets," March 26, 2024, https://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp7.pdf.
[12] *Id.*
[13] *Id.*
[14] *Id.*

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

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

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

The challenge we face

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

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

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[15] *Id.*
[16] Writers Guild of America West, "The New Gatekeepers: How Disney, Amazon, and Netflix Will Take Over Media," (Aug. 2023), https://www.wga.org/the-guild/advocacy/politics-public-policy-pac/the-new-gatekeepers-how-disney-amazon-and-netflix-will-take-over-media
[17] Jan De Loecker, Jan Eeckhout, and Gabriel Unger, "The Rise of Market Power and the Macroeconomic Implications," November 2019, http://www.janeeckhout.com/wp-content/uploads/RMP.pdf.
[18] David Leonhardt, "Big Business is Overcharging You $5,000 a Year," *The New York Times*, Nov. 10, 2019, https://www.nytimes.com/2019/11/10/opinion/big-business-consumer-prices.html.
[19] "Overpatented, Overpriced: How Excessive Pharmaceutical Patenting is Extending Monopolies and Driving up Drug Prices," I-MAK, August 2018, http://www.i-mak.org/wp-content/uploads/2018/08/I-MAK-Overpatented-Overpriced-Report.pdf.

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

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

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

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

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

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

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

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

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

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

How corporate concentration harms competition

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

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

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

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

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

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

By Michael Swerdlow, Kelli Smith, and Becky Chao

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Recommendation: Give California antitrust enforcers rulemaking authority

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

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

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

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

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

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

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

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

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

[46] "Economic Justice, Judges, and the Law," Alliance for Justice, August 2022. Accessible online: https://afj.org/article/economic-justice-judges-and-the-law/
[47] This piece was written prior to Chair Khan's government service. See Lina M. Khan, *The End of Antitrust History Revisited*, 1679-1680, HARVARD LAW REVIEW (2020), https://harvardlawreview.org/print/vol-133/the-end-of-antitrust-history-revisited (last visited Apr 14, 2024).
[48] Mike Scarcella, "Google's ties to outside backers questioned in Epic Games appeal," Reuters, January 9, 2025 https://www.reuters.com/legal/government/googles-ties-outside-backers-questioned-epic-games-appeal-2025-01-09/ (last visited Mar 11, 2025)
[49] "Preliminary Draft:: Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure, and the Federal Rules of Evidence," Committee on Rules of Practice and Procedure, Judicial Conference of the United States, August 2024, https://www.uscourts.gov/sites/default/files/2025-02/preliminary_draft_of_proposed_amendments_2024.pdf

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Examples of harmful single-firm conduct

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

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

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

Conduct that acquires or exploits monopsony power by suppressing wages:

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

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

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

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

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

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

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

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

Conduct that acquires or exploits market power by harming consumers:

- ➔ **Price gouging,** in which dominant firms exploit emergencies or other unusual market disruptions to raise prices on essential goods. When firms in concentrated markets are allowed to price gouge, it provides rivals an opportunity to tacitly collude and raise their prices along with the dominant firm. This increase in control over prices by the dominant firm can benefit rivals while exploiting consumers. We continue to see repeated instances of this behavior, driving and exacerbating inflation.[62]
- ➔ **Deploying exploitative pricing algorithms,** such as Amazon's Project Nessie which "induced other online stores to raise their prices and allowed Amazon to extract additional profits from shoppers," per the FTC's recent complaint,[63] or RealPage, which facilitated collusion among corporate landlords in the rental housing market to raise rents and artificially restrict housing supply.[64] Deploying algorithms like this impairs rivals' ability to fairly compete while hiking prices across the economy.

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

- ➔ **Imposing vertical restraints,** such as anti-steering provisions or resale price maintenance, which reduce a trading partner's ability to recommend customers use cheaper or higher-quality services.
- ➔ **Engaging in price discrimination,** wherein firms use their buyer power to force suppliers to sell them the same volume and type of product at a lower price than smaller rivals.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

supplement benefits, and administrative services — to some customers allowed them to "increase utilization" of certain other health plans,[72] and
- ➔ Blocking rival smartphone app distributors allowed them to enhance consumer convenience and overall security.[73]

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

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

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

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

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

[72] *Ben-E-Lect v. Anthem Blue Cross Life & Health Ins. Co.*, 51 Cal. App. 5th 867, 877 (2020)
[73] *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1042 (N.D. Cal. 2021), aff'd in part, rev'd in part and remanded, 67 F.4th 946 (9th Cir. 2023)
[74] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)
[75] *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[87] U.S. Dep't of Justice & Fed. Trade Comm'n, 2023 Merger Guidelines (2023), https://www.justice.gov/atr/2023-merger-guidelines.
[88] *Id* ("the Agencies may use evidence about market shares and market concentration as part of their analysis. These structural measures can provide insight into the market power of firms as well as into the extent to which they compete.")
[89] *United States v. Phila. Natl. Bank*, 374 U.S. 321 (1963) (Ruling that, "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market[,] is so inherently likely to lessen competition substantially that it must be enjoined in the absence of [rebuttal] evidence.")

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

By Michael Swerdlow, Becky Chao, and Kelli Smith

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[105] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)
[106] American Economic Liberties Project, "Tools for Reforming Antitrust Policy: Crack Down on Illegal Price Fixing with Pleading Standards that Place the Burden of Proof on Large Corporations," Sept. 13, 2022, https://www.economicliberties.us/our-work/antitrust-toolkit-pt2/#.

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

➔ **Preliminary injunctive relief:** The Office of the Attorney General should be empowered to intervene in price-fixing matters and request preliminary injunctive relief with a lower evidentiary threshold.

➔ **Industry bans for offenders**: Courts should have the power to bar individuals who violate price-fixing laws from returning to the industries in which they committed these illegal acts.

➔ **Whistleblower protections**: A whistleblower bounty program should be established, offering protection and incentives for individuals who expose price-fixing, safeguarding them from retaliation by employers, buyers, or sellers.

C. Recommendation: Curb algorithmic collusion

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

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

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

To hedge against this situation, California should:

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

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

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

- ➔ **Codify a low threshold for preliminary injunctions of pricing algorithms.** As we've seen in housing, agriculture, and oil, pricing algorithms are inflationary. If the government or another plaintiff can show they're likely to succeed per traditional preliminary injunction criteria, they should be able to enjoin the algorithms' usage before the trial is complete. Had this policy been in place at the time, it would have stopped Agri Stats[108] and Realpage[109] years ago.
- ➔ **Ban tacit collusion.** As a result of increasing consolidation in an industry, companies no longer need to engage in overt communication to collude. Instead, they can do so tacitly without an explicit agreement to do so through a combination of announcements, investments, and algorithms that facilitate "conscious parallelism."[110] To prevent tacit collusion, a ban would prevent a firm from raising prices solely because a competitor has done so.[111]

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

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

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

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

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

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

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

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

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

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

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

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

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

By Becky Chao

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

By Carmen Comsti

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

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

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

"Labor market concentration depresses wages by 20%."

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

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

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

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

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

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

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

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[141] Janelle Jones and Ben Zipperer, Economic Policy Institute, "Unfulfilled Promises: Amazon fulfillment centers do not generate broad-based employment growth," Feb. 1, 2018. https://www.epi.org/publication/unfulfilled-promises-amazon-warehouses-do-not-generate-broad-based-employment-growth/
[142] Letter from Solana Rice, Liberation in a Generation, to CLRC chair, submitted to CLRC on May 2, 2024.
[143] See *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lunder Co.*, 549 U.S. 312, 317-18 (2007) (holding that "general theoretical similarities of monopoly and monopsony combined with the theoretical and practical similarities of predatory pricing and predatory bidding convince us that our two-pronged [Sherman Act test] should apply to predatory-bidding claims"); see FTC v. Kroger Co., No 3:24-CV-003470-AN, 2024 WL 5053016, at *31 (D. Or. Dec. 10, 2024) (describing federal case law recognizing labor markets as cognizable markets under the Sherman Act).
[144] Cal. Bus. & Prof. Code § 16720; see Knevelbaard Dairies v. Kraft Foods, Inc., 232 F. 3d 979, 987-88 (9th Cir. 2000) (applying California's statutory *per se* rule prohibiting price-fixing to buyer conspiracies).

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

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

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

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

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

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

[145] Executive Order 14036, "Executive Order on Promoting Competition in the American Economy," The White House (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.
[146] Department of Justice and Federal Trade Commission, 2023 Merger Guidelines, December 18, 2023, https://www.justice.gov/atr/2023-merger-guidelines

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

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

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

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

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

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

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

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

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

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

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

[155] *Id.*

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

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

VII. Strengthen antitrust enforcement mechanisms

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

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

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

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

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

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

VIII. Conclusion

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

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

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

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

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