

FIFTH SUPPLEMENT TO MEMORANDUM 2024-24  
**Antitrust Law: Status Update (Public Comment)**

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This supplement presents additional public comment that the staff has received relative to the Antitrust Study.<sup>1</sup> The staff has received a number of public comments relating to the Antitrust Study. The most recent comments are attached as Exhibits to this memorandum. If the staff receives additional public comments, the comments will be provided in another supplemental memorandum.

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**American Economic Liberties Project, Institute for Local Self-Reliance and Rise Economy**

This comment is submitted by Lee Hepner, Senior Legal Counsel, on behalf of the [American Economic Liberties Project](#), the [Institute for Self-Reliance](#), and [Rise Economy](#). The comment relates to a presentation by Google at the Commission’s June 20, 2024, meeting.<sup>2</sup>

**American Economic Liberties Project**

This comment is submitted by Lee Hepner, Senior Legal Counsel, on behalf of the American Economic Liberties Project. The comment provides a report, authored by the American Economic Liberties Project, for state lawmakers seeking to address the market power of “Big Tech companies.” More information about the American Economic Liberties Project can be found on their [website](#).

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

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

<sup>2</sup> See [Fourth Supplement to Memorandum 2024-24](#), p. 3 and EX p. 2.

**Angela Harris, Founder of Wellness of Life Enterprises, Inc.**

This comment is submitted by Angela Harris, founder of Wellness of Life Enterprises, Inc. The comment relates to technology platforms and small businesses. More information about Wellness of Life can be found on their [website](#).

Respectfully submitted,

Sharon Reilly  
Executive Director

June 17, 2024

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

Ambassador Huebner, Vice Chair Carrion, and Commissioners:

It has come to the attention of the undersigned organizations that a representative from Google has been invited to present at the June 20th meeting of the California Law Revision Commission (“the Commission”) on the subject of technology platforms. We are deeply concerned by the Commission’s choice to elevate the voice of a confirmed illegal monopolist - one with a history of using its resources to cynically distort antitrust policy debates - in a conversation about reforming California’s antitrust law. We urge the Commission to retract its invitation for Google - or any other entity that receives funding from Google - to present at the meeting.

Google is a confirmed illegal monopolist that has already been found liable for violating federal and California state antitrust law. In *Epic Games v. Google*, video game developer Epic presented evidence that Google had used a wide variety of anticompetitive deals to kill competition and lock software developers into its Play Store, where Google collects anticompetitive fees on app purchases and in-app purchases.<sup>1</sup> These included billions of dollars in de-facto bribes Google paid out to major developers to discourage them from creating competing app stores, and revenue sharing agreements with phone makers to prevent them from pre-installing other app stores in their devices. In December of last year, a jury unanimously ruled against Google on all eleven counts.

The *Epic* verdict is just the first domino to fall in the current reckoning against Google’s far-reaching monopoly. Google’s alleged monopoly in the market for search services is being challenged by the Department of Justice and California Attorney General. At the time California joined the lawsuit, Attorney General Rob Bonta remarked, “Google’s market dominance leaves consumers and small businesses with little choice when it comes to internet search engines.” By using exclusionary agreements to dominate the market, Google has stifled competition and

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<sup>1</sup> Meghan Bobrowsky, Miles Kruppa, “Google Loses Antitrust Case Brought by Epic Games,” *Wall Street Journal* (Dec. 2024), <https://www.wsj.com/tech/google-loses-antitrust-case-brought-by-epic-games-651f5987>; Lee Hepner, “A Judge Can Break Up Google Right Now. Will He?” *The Big Newsletter* (April 2024) <https://www.thebignewsletter.com/p/monopoly-round-up-a-judge-can-break>

rigged the advertising market.”<sup>2</sup> Trial proceedings revealed Google paid over \$26 billion to be the exclusive default search engine on Apple devices, undermining competition and allowing Google to become complacent on privacy<sup>3</sup> and quality.<sup>4</sup> California has also joined the Justice Department in a lawsuit<sup>5</sup> alleging Google’s illegal monopolization of the digital advertising technology stack through serial acquisitions and auction manipulation, allowing the company to extract more than 30 cents of each dollar<sup>6</sup> spent on its products and starving media publishers of revenue.

Just as it would be inappropriate to invite a bank robber to recommend reforms to laws against robbing banks, we believe it is wholly inappropriate for Google to have a privileged voice in shaping the Commission’s recommendations regarding antitrust law. Google will certainly use this opportunity to recommend proposals that allow them to perpetuate their monopoly power, and discourage reforms necessary to facilitate a more fair economy.

Google’s historical engagement with antitrust policymaking is instructive. A major *Wall Street Journal* exposé<sup>7</sup> published this month revealed that Google paid millions to disgraced George Mason University law professor Joshua Wright to undermine Obama-era antitrust actions against Google in academic and popular writings that often failed to disclose Google’s funding. Google’s financial support for Wright included hundreds of thousands of dollars it donated to GMU’s Law and Economics Center, which published Wright’s research, while Wright served as a commissioner on the Federal Trade Commission. During that time, Wright led a successful push to limit the FTC’s authority to police unfair and deceptive business practices.

According to the *Wall Street Journal*, Google was informed of a Title IX complaint against Wright in June 2022. But Wright continued to produce academic and popular work advocating for Google’s interests on regulatory issues, signing a new six-month, \$430,000 contract with the

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<sup>2</sup> “Attorney General Becerra Moves to Join Federal Lawsuit Against Google for Anticompetitive Actions,” State of California Department of Justice (Dec. 2020) <https://oag.ca.gov/news/press-releases/attorney-general-becerra-moves-join-federal-lawsuit-against-google>

<sup>3</sup> Thomas Brewster, “Google’s Privacy Chief is Out and Will Not Be Replaced,” *Forbes* (June 2024) <https://www.forbes.com/sites/thomasbrewster/2024/06/04/googles-privacy-chief-is-out-and-will-not-be-replaced/?sh=4bc0219a7fc8>

<sup>4</sup> Thomas Germain, “You’re Not Imagining It: Google Search Results Are Getting Worse, Study Finds,” *Gizmodo* (Jan. 2024) <https://gizmodo.com/google-search-results-are-getting-worse-study-finds-1851172943>

<sup>5</sup> “Justice Department Sues Google for Monopolizing Digital Advertising Technologies,” U.S. Department of Justice (Jan. 2024) <https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies>

<sup>6</sup> Emma Roth, “Google is being sued by the US government and eight states over online advertising,” *The Verge* (Jan. 2024) <https://www.theverge.com/2023/1/24/23569127/google-advertising-monopoly-antitrust-lawsuit-federal-government>

<sup>7</sup> Brody Mullins, “The Hidden Life of Google’s Secret Weapon,” *Wall Street Journal* (June 2024) [https://www.wsj.com/us-news/law/google-lawyer-secret-weapon-joshua-wright-c98d5a31?mod=article\\_relatedinline](https://www.wsj.com/us-news/law/google-lawyer-secret-weapon-joshua-wright-c98d5a31?mod=article_relatedinline)

firm in June 2023. Google did not cut ties with Wright until the allegations of sexual misconduct began to circulate widely online.

The company's willingness to break ethical norms to tip the scales of antitrust debates reveals its fundamental contempt for public interest governance. If given a privileged seat at the Commission, Google will cynically cast its own interests as the interests of consumers and the public. The success of this strategy in shaping Obama-era policy decisions has resulted in clear harms to consumers, honest businesses, the entire media industry and our democracy, as revealed by today's antitrust suits.

Furthermore, we believe the Commission's decision is misguided in light of who is excluded. The constrained format of Commission meetings means Google has a seat at the table while representatives of the many constituencies affected by platform monopolies like Google are excluded: software developers and startups, journalists, consumers, labor organizations, and many more. This is a puzzling prioritization given the Commission's mandate to outline a path to reform and modernize California's antitrust laws in the broader public interest, following examples like the 21st Century Antitrust Act in New York.

In summary, the Commission's decision to elevate a confirmed illegal monopolist and antitrust policy saboteur over other stakeholders at its meeting on technology platforms does not communicate an earnest commitment to reinvigorating California's antitrust laws. We respectfully recommend the Commission rescind its invitation for Google to provide a public oral presentation to the Commission, and, further, to require all other presenters to fully disclose any relevant sources of funding.

Sincerely,

The American Economic Liberties Project  
Institute for Local Self-Reliance  
Rise Economy

June 17, 2024

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

The logo for the American Economic Liberties Project, featuring a red square with the text "AMERICAN ECONOMIC LIBERTIES PROJECT" in white, set against a background of light blue wavy lines.

AMERICAN  
ECONOMIC  
LIBERTIES  
PROJECT

Ambassador Huebner, Vice Chair Carrion, and Commissioners:

In 2022, we authored a report for state lawmakers seeking to address the market power of Big Tech companies. That report, “Tools for Taking on Big Tech’s Economic Power: A Guide for State Lawmakers,” is attached hereto.

Our Report urges state lawmakers to:

- 1) Regulate App Store Dominance to Help Small and Mid-Sized Businesses;
- 2) Adopt Common Carrier Rules to Stop Big Tech’s Self-Preferencing;
- 3) Stop Subsidizing Big Tech’s Expansion;
- 4) Implement an “Abuse of Dominance” Standard for State Antitrust Law;
- 5) Cap Delivery App Corporation Fees and Ban Abusive Tactics That Harm Restaurants;
- 6) Adopt a “Right to Repair” Law for Consumer Electronics;
- 7) Tax Digital Ad Revenue; and
- 8) Provide Antitrust Enforcers With More Resources.

California lawmakers have since adopted legislation to prohibit third-party food delivery companies from imposing anti-competitive “price parity” clauses on independent restaurants (AB 286-Gonzalez), and establishing a right-to-repair for electronics and appliances (SB 244-Eggman). California is currently considering legislation (AB 886-Wicks) that redirects revenue from online digital platforms to journalism outlets, consistent with our recommendation to tax digital ad revenue. Several states, including New Jersey, New York, Maine, Minnesota and Pennsylvania, have introduced bills to create an abuse of dominance standard.

California can continue to lead the way, matching the innovation of its unrivaled tech industry with responsible regulations that rein in Big Tech’s corporate power to enhance future innovation, protect workers, and create pathways to market entry for entrepreneurs and small- and mid-size businesses.

Sincerely,

The American Economic Liberties Project

Encl.

AMERICAN  
ECONOMIC  
LIBERTIES  
PROJECT

# Tools for Taking on Big Tech's Economic Power

A Guide for State Lawmakers

Pat Garofalo



EX 5

## ABOUT THE AUTHOR

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**PAT GAROFALO** is the Director of State and Local Policy at the American Economic Liberties Project and Fight Corporate Monopolies. Pat is the author of *The Billionaire Boondoggle: How Our Politicians Let Corporations and Bigwigs Steal Our Money and Jobs* and writes the Boondoggle newsletter. Prior to joining Economic Liberties, Pat served as managing editor for Talk Poverty at the Center for American Progress, assistant managing editor for opinion at *U.S. News & World Report*, and economic policy editor at *ThinkProgress*. His work has appeared in *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *The Atlantic*, *The Nation*, *The Guardian*, and *The Week*, among others.





## INTRODUCTION

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Lawmakers in several state legislatures in recent years proposed new ways to challenge the dominance of Big Tech corporations such as Apple, Google, Amazon, and Facebook. Their interest was born out of necessity: Dominant tech corporations are taking control of an ever-growing swathe of the economy, using their power to become gatekeepers over key avenues of commerce. This allows them to extract fees from local businesses and deprive those businesses of customers, push down worker wages, and use subsidies from state governments to further entrench their dominance, among other harms.

Big Tech corporations use a variety of abusive and anticompetitive tactics to achieve their dominance, and no one policy solution will address them all. Nor can states go it alone: The federal government should approve complementary measures, through Congress and agencies such as the Federal Trade Commission, to rein in Big Tech's power to limit the ability of other businesses and workers to access free markets for their products and labor.

But there are many steps state lawmakers can take on their own to address the power of these corporations. Several are outlined below: We detail the policy problem posed by Big Tech, outline possible solutions, and explain how to respond to some of the critiques – both legitimate and not – from those invested in the status quo. And we suggest model legislation that has already been introduced at the state level, where applicable.

By adopting these policies, state lawmakers would be following in the long American tradition of state governments being at the forefront of the effort to protect Americans from the abuses of monopolies. Throughout the 19<sup>th</sup> and 20<sup>th</sup> centuries, in sectors from telegraphs to banks to pharmacies to railroads, state governments put in place rules to ensure fair competition and access to markets, and to structure commerce so that businesses were competing on the merits of their ideas and quality of their products, not on their ability to become gatekeepers or seize public resources. Reining in Big Tech will require the same commitment from state lawmakers today.

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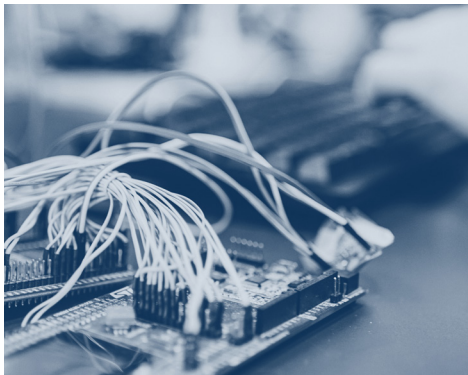
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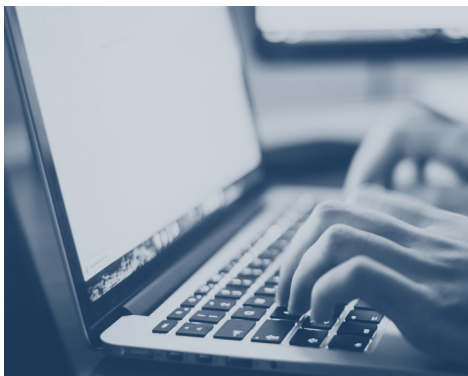
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# **Regulate App Store Dominance to Help Small and Mid-Sized Businesses**

# THE PROBLEM

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Due to their dominance of smartphone operating systems, nearly every app that is downloaded onto a mobile device comes via Apple's App Store or the Google Play Store. These monopolies use that gatekeeping ability to charge high fees – as much as 30 percent – to app creators. By comparison, a typical credit card network charges around 3 percent in transaction fees. Apple made \$64 billion of revenue last year on app store charges alone.<sup>1</sup>

Apple and Google are able to collect those fees because they require app developers who sell in their stores to use in-house payment systems that Apple and Google control. Use of an alternative payment system results in expulsion from the store entirely, as was the case with Epic Games' *Fortnite*. Apple also prevents iPhone users from downloading an alternative store to the App Store, ensuring that every app downloaded on an iPhone is subject to Apple's gatekeeping power.

Apple and Google also implement a gag rule that prevents developers from communicating to users in the stores that prices for the app might be cheaper elsewhere, such as on the developer's own website. This harms developers – who have to turn over up to nearly a third of their revenue to a gatekeeper – as well as consumers, who face higher prices. In a recent court case, Apple was told it must cease maintaining this gag order, a ruling it has appealed.

# THE POLICY

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State lawmakers can advance legislation to address this multifaceted problem:

- Ban app distributors from requiring developers to use in-house payment systems, thereby opening up competition that could result in lower fees.
- Make it illegal to prevent users from downloading alternatives to preloaded app stores.
- Make it illegal to prohibit app developers from communicating with potential users about fees and costs. (A judge recently ruled that these gag orders are illegal under California's unfair business practices law.<sup>2</sup>)

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<sup>1</sup> Matthew Stoller and Pat Garofalo, "States Are Right to Rebel Against Big Tech," The New York Times, March 18, 2021, <https://www.nytimes.com/2021/03/18/opinion/apple-google-app-monopoly.html>.

<sup>2</sup> United States District Court, Northern District of California, Epic Inc. vs. Apple Inc., CaseNo. 4:20-cv-05640-YGR, [https://storage.courtlistener.com/recap/gov.uscourts.cand.364265/gov.uscourts.cand.364265.812.0\\_3.pdf](https://storage.courtlistener.com/recap/gov.uscourts.cand.364265/gov.uscourts.cand.364265.812.0_3.pdf).

- Prohibit retaliation by dominant corporations if a developer pursues any of the above options.

These measures will enable small and mid-sized developers to communicate effectively with their customers about prices, use the payment systems of their choice, and not be locked into particular distribution networks, as well as give consumers the choice to use alternative app stores.

**Model bill:**

HB518, Louisiana, 2021

## THE PUSHBACK

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Apple claims that its high fees are warranted because it evaluates apps to ensure they comply with basic rules against scamming consumers. However, several investigative reports have found that's not true.<sup>3</sup> Apple and Google also note that they've responded to criticism of their fees by lowering them for certain small businesses that earn under specific revenue thresholds. But that the corporations face no competitive pressure to reduce fees and only did so as a public relations move – and roughly in concert – reinforces that they have monopolized the market for app distribution and require further regulation.

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<sup>3</sup> Reed Albergotti and Chris Alcantara, "Apple's tightly controlled App Store is teeming with scams," The Washington Post, June 6, 2021, <https://www.washingtonpost.com/technology/2021/06/06/apple-app-store-scams-fraud/>; Sean Hollister, "Apple's \$64 Billion-A-Year App Store Isn't Catching the Most Egregious Scams," The Verge, April 21, 2021, <https://www.theverge.com/2021/4/21/22385859/apple-app-store-scams-fraud-review-enforcement-top-grossing-kosta-elfetheriou>.

A blurred screenshot of code, likely HTML or CSS, showing attributes like 'min-width: 1335px', 'images.unsplash.com', and 'data-perf="eager-'.

## Adopt Common Carrier Rules to Stop Big Tech's Self-Preferencing

# THE PROBLEM

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The fact that many Big Tech corporations both run platforms and compete on those platforms with their own products gives them a large incentive to self-preference, or put their own products in front of consumers who are searching for a given item or piece of information, even if better products or information are available elsewhere. For instance, Google will give Google Maps or Google Shopping more prominent placement in search results, even if another service has better geographical information for that location or more and better choices for consumers, or if Google's own service is rife with scams and misinformation.<sup>4</sup>

Studies have shown that users prefer the results Google's algorithm naturally provides, rather than those it produces when it engages in self-preferencing, so Google is actively degrading its own chief product.<sup>5</sup> It does so anyway because directing users to other Google properties keeps them within Google's ecosystem, allowing Google to show them more ads and thus make more profit. As of 2019, fewer than half of searches that originate on Google result in a click away from Google.<sup>6</sup>

Such self-preferencing harms not only Google's direct competitors, but local businesses with listings and information on sites that are pushed further down Google's search results, making it harder for them to find customers, or forcing them to pay Google for ads that increase their visibility. And this issue is not limited to Google: Self-preferencing also occurs on Amazon's platform, when it lists its own private-label products above those sold by third-party sellers, or gives preferential treatment to third-party sellers that use Amazon's other services, such as its fulfillment and distribution services.

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4 Pat Garofalo, "Close to Home: How the Power of Facebook and Google Affects Local Communities," American Economic Liberties Project, August 30, 2020, <https://www.economicliberties.us/our-work/close-to-home-how-the-power-of-facebook-and-google-affects-local-communities/>.

5 Michael Luca, Tim Wu, Sebastian Couvidat, and Daniel Frank, "Does Google Content Degrade Google Search? Experimental Evidence?," Harvard Business School Working Paper No. 16-035, 2015, [https://scholarship.law.columbia.edu/faculty\\_scholarship/1931](https://scholarship.law.columbia.edu/faculty_scholarship/1931); Hyunjin Kim and Michael Luca, "Product Quality and Entering through Tying: Experimental Evidence," *Management Science* 65.2, November 2018, [https://pdfs.semanticscholar.org/98b7/8685df1812c91fb22647963c8b2b280abf79.pdf?\\_ga=2.179720416.535816151.1591294487-2003198443.1591294487](https://pdfs.semanticscholar.org/98b7/8685df1812c91fb22647963c8b2b280abf79.pdf?_ga=2.179720416.535816151.1591294487-2003198443.1591294487).

6 Rand Fishkin, "Less than Half of Google Searches Now Result in a Click," SparkToro, August 13, 2019, <https://sparktoro.com/blog/less-than-half-of-google-searches-now-result-in-a-click/>.



## THE POLICY

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State lawmakers can designate tech platforms as common carriers, meaning they have to act as neutral arbiters of content, not preference their own services. Common carrier rules for digital platforms were recommended in a report by the House Antitrust Subcommittee last year, as well as in a lawsuit against Google filed by Ohio Attorney General Dave Yost<sup>7</sup>. As Economic Liberties has explained, such rules will ensure that, “anyone engaged in legal behavior has access to this infrastructure on equal terms for equal service.”<sup>8</sup>

## THE PUSHBACK

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Critics claim that common carrier rules are an inappropriate intrusion into private business activities, but the U.S. has a long history of imposing such rules. For example, in the early 1900s, Congress made it illegal for railroad owners to transport products in which they had a financial interest. Common carrier-like rules have also been imposed on banks, telephone networks, and television networks, to ensure that vital avenues of commerce can not be co-opted to benefit one particular corporation’s products.<sup>9</sup> Most states have broad powers to designate certain corporations as public utilities or common carriers.

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7 Investigation of Competition in the Digital Marketplace: Majority Staff Report and Recommendations,” House Judiciary Committee’s Antitrust Subcommittee, October 6, 2020, <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3429>; State of Ohio ex rel Dave Yost, Ohio Attorney General v. Google, Case No. 21 CV H, Filed June 8, 2021, [https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Filed-Complaint-\(Time-Stamped\).aspx](https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Filed-Complaint-(Time-Stamped).aspx).

8 Matt Stoller, “How To Prevent the Next Social Media-Driven Attack On Democracy—and Avoid a Big Tech Censorship Regime,” American Economic Liberties Project, February 3, 2021, [https://www.economicliberties.us/our-work/how-to-prevent-the-next-social-media-driven-attack/#\\_ftn3](https://www.economicliberties.us/our-work/how-to-prevent-the-next-social-media-driven-attack/#_ftn3).

9 “Investigation of Competition in the Digital Marketplace: Majority Staff Report and Recommendations.”

A photograph of an Amazon pickup and returns station. The sign is mounted on a light-colored wall and features the Amazon logo followed by the text "amazon pickup & returns". The sign is illuminated from below. To the right of the sign, there is a brick wall and a window. The overall image has a blue tint.

amazon pickup & returns

# Stop Subsidizing Big Tech's Expansion

# THE PROBLEM

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Big Tech corporations have collected billions of dollars in subsidies from state and local governments. Amazon alone has received more than \$4 billion, most of which helped it build out its warehousing and distribution network.<sup>10</sup> Google and Facebook have both received hundreds of millions of public dollars to build data centers.<sup>11</sup> Apple recently received \$850 million in public funds for a single research and development site in North Carolina.<sup>12</sup>

These subsidies are a waste of public funds: Research has shown they have no association with positive economic outcomes such as increased job creation or rising incomes.<sup>13</sup> Most of the time, in fact, they simply pay a corporation to do what it would have done anyway.<sup>14</sup>

Subsidies also help Big Tech corporations entrench their dominance vis-a-vis their smaller competitors. For example, smaller retailers don't receive the same support for building out their distribution that Amazon does; Amazon then uses access to its distribution network as a way to leverage fees and data from smaller sellers.<sup>15</sup> Facebook and Google's business models are dependent on amassing and storing massive amounts of data, the cost of which is defrayed by state subsidies that potential competitors don't receive. These arrangements also often include nondisclosure agreements signed by public officials, so details about them are hidden from the public.<sup>16</sup>

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10 Amazon Tracker, Good Jobs First, accessed July 15, 2021.

11 Subsidy Tracker, Good Jobs First, accessed July 15, 2021.

12 "Garofalo, Pat, "Apple Schools North Carolina," Boondoggle, April 27, 2021, <https://boondoggle.substack.com/p/apple-schools-north-carolina>.

13 See: Pat Garofalo, *The Billionaire Boondoggle: How Our Politicians Let Corporations and Bigwigs Steal Our Money and Jobs*, Thomas Dunne Books, March 2019; Greg Leroy, *The Great American Jobs Scam: Corporate Tax Dodging and the Myth of Job Creation*, Berrett-Koehler Publishers, July 2005; Richard Florida, "The Uselessness of Economic Development Incentives," *CityLab*, December 7, 2012, <https://www.bloomberg.com/news/articles/2012-12-07/the-uselessness-of-economic-development-incentives>; and Cailin Slattery and Owen Zidar, "Evaluating State and Local Business Tax Incentives," *Journal of Economic Perspectives* 34.2, Spring 2020, <https://scholar.princeton.edu/zidar/publications/evaluating-state-and-local-business-tax-incentives>, among many other works.<sup>12</sup> "Garofalo, Pat, "Apple Schools North Carolina," Boondoggle, April 27, 2021, <https://boondoggle.substack.com/p/apple-schools-north-carolina>.

14 Tim Bartik, "'But For' Percentages for Economic Development Incentives: What percentage estimates are plausible based on the research literature?," W.E. Upjohn Institute for Employment Research, July 1, 2018, <https://doi.org/10.17848/wp18-289>.<sup>12</sup> "Garofalo, Pat, "Apple Schools North Carolina," Boondoggle, April 27, 2021, <https://boondoggle.substack.com/p/apple-schools-north-carolina>.

15 Daniel A. Hanley, "Eyes Everywhere: Amazon's Surveillance Infrastructure and Revitalizing a Fair Marketplace," Open Markets Institute, July 2021, [https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/60eee57a56b0254d2f05a6b8/1626269051310/AmazonSurveillance\\_Report\\_2021\\_Final.pdf](https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/60eee57a56b0254d2f05a6b8/1626269051310/AmazonSurveillance_Report_2021_Final.pdf).

16 Pat Garofalo, "How Amazon, Google and Other Companies Exploit NDAs," *The New York Times*, June 29, 2021, <https://www.nytimes.com/2021/06/29/opinion/nda-amazon-google-facebook.html>.

## THE POLICY

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States can simply deny subsidies to Big Tech corporations by eliminating their subsidy programs altogether or setting caps on the size of corporations allowed to receive them. They can also use their powers to limit the ability of local governments to employ subsidies by passing a ban on intrastate incentivizing of corporate relocations.

To eliminate concerns about being at a competitive disadvantage vis-a-vis other states, state governments can pass legislation to form an interstate compact against corporate tax giveaways, under which states would pledge not to use incentives to poach corporations from other compact states. States can also ban the use of nondisclosure agreements in economic development deals.

### **Model bills:**

HB0211, Illinois, 2021 (bans intrastate job poaching);

HB0145, Illinois, 2021 (forms an interstate compact against corporate giveaways);

S1196, New York, 2021-2022 (bans nondisclosures in economic development agreements)

## THE PUSHBACK

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Economic development officials and state lawmakers often claim that they must engage in subsidization of Big Tech firms or they will miss out on job creation and investment. But, as noted above, corporate subsidies are not correlated with positive economic outcomes generally, and 75-90 percent of corporate relocations would have occurred even in the absence of subsidies.<sup>17</sup> For tech particularly, corporate leaders choose to locate in a few existing hubs, even when subsidies are available.<sup>18</sup> The highest-profile example of this is Amazon choosing to place its “HQ2” in the metro areas of Washington, D.C., and New York City, even when higher subsidies were available from nearby jurisdictions.

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<sup>17</sup> Bartik.

<sup>18</sup> Pat Garofalo, “Rural America Gets Extra Hurt By Corporate Giveaways,” Boondoggle, April 17, 2020, <https://boondoggle.substack.com/p/rural-america-gets-extra-hurt-by-9> “Investigation of Competition in the Digital Marketplace: Majority Staff Report and Recommendations.”



# Implement an “Abuse of Dominance” Standard for State Antitrust Law

## THE PROBLEM

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State antitrust law, like that at the federal level, is inadequate for challenging the actions of Big Tech corporations due to bad case law and bipartisan neglect. Because enforcers and judges have focused exclusively on what’s known as the “consumer welfare” standard, antitrust cases hinge on consumer prices and so-called “efficiency” within businesses, rather than antitrust law’s traditional role of protecting workers and businesses from abusive or anticompetitive tactics by powerful firms.<sup>19</sup>

This has harmed workers and small and medium-sized businesses by allowing a few corporations to become dominant in many sectors of the economy, perhaps most prominently in tech, where many products are superficially “free” and corporations regularly leverage their dominance in one line of business to move into new ones.

## THE POLICY

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State lawmakers can adopt what’s known as an “abuse of dominance” standard for their state antitrust laws, rather than the current consumer welfare standard, which requires stricter proof of monopolization.

Applying an abuse of dominance standard would be a significant change, allowing state enforcers to challenge many of the practices that have led to today’s concentrated economy and that current antitrust law and precedent allow to go unchecked. Lawmakers can also add explicit protection for workers into an antitrust reform bill by ensuring that power over a labor market can be prosecuted as an antitrust violation. While labor market dominance is technically an antitrust violation, it’s rarely enforced.

### **Model bills:**

S933, New York, 2021-2022

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<sup>19</sup> “The Courage to Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New Structuralist Approach,” American Economic Liberties Project, January 12, 2021, <https://www.economicliberties.us/our-work/courage-to-learn/>.

## THE PUSHBACK

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Critics claim that an abuse of dominance standard, while ostensibly aimed at major corporations, will sweep up smaller firms. But most small and mid-sized businesses simply do not have enough market share or sufficient power to be considered dominant. Crucially, being found dominant is not illegal – what’s illegal is abusing that dominance by foreclosing opportunities for other businesses or using power to unilaterally push down wages or otherwise restrict workers’ ability to sell their labor in a free market.





# Cap Delivery App Corporation Fees and Ban Abusive Tactics That Harm Restaurants



## THE PROBLEM

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Delivery app corporations such as DoorDash, Grubhub, and UberEats use a variety of abusive and anticompetitive tactics to insert themselves between restaurants and their customers. They then use that position to extract fees from restaurants that total 30 percent – or even more – of every individual order.<sup>20</sup> During the pandemic, Economic Liberties spoke with restaurant owners who reported that delivery app fees eclipsed their costs for labor and rent.

Chief among these tactics is posting a restaurant’s menu without its permission, to give the appearance of an official partnership, then refusing to take it down or alter it, or suggesting that the restaurant is closed or not accepting orders if the restaurant owner does not agree to such a partnership. These deceptive listings will often include restaurants’ own trademarked logos or other intellectual property.<sup>21</sup>

The delivery app corporations also list their own phone numbers on their online properties or those they affiliate with, instead of the restaurant’s phone number, to direct calls to themselves and then charge restaurants for “lead generation.”<sup>22</sup>

The end goal of all of these tactics is to insert the delivery app corporations between restaurants and their customers, thus enabling them to levy the assortment of fees they charge.

## THE POLICY

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Lawmakers in more than 70 states, counties, and cities capped the fees that delivery apps can charge restaurants in response to the coronavirus pandemic, as many restaurants were forced to turn to delivery-only or majority-delivery business models due to state-required shutdowns.<sup>23</sup> State governments can permanently cap those fees, ideally with one cap for delivery and a separate cap for marketing fees. They can also require a detailed breakdown of fees be presented to the consumer on each bill, to increase transparency.

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20 Moe Tkacik, “Rescuing Restaurants: How to Protect Restaurants, Workers, and Communities from Predatory Delivery App Corporations,” American Economic Liberties Project, September 18, 2020, <https://www.economicliberties.us/our-work/rescuing-restaurants-how-to-protect-restaurants-workers-and-communities-from-predatory-delivery-app-corporations/>.

21 Ibid.

22 Natt Garun, “Yelp swaps restaurant phone numbers with Grubhub-affiliated ones when you call from the app,” The Verge, August 6, 2019, <https://www.theverge.com/2019/8/6/20756878/yelp-grubhub-commission-fees-restaurant-fake-phone-numbers-app>.

23 Protect Our Restaurants fee cap tracker, <https://www.protectourrestaurants.com/>.

State lawmakers can also make it illegal for delivery app corporations to post a restaurant's menu or use other intellectual property without receiving explicit permission from the restaurant first, as California and New Hampshire have done.

**Model bills:**

AB2149, California, 2020 (prevents menu/trademark stealing);

City of Chicago rules for third-party delivery services (require fee transparency)

## THE PUSHBACK

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Critics claim that fee caps are a form of price control that interferes with a free market, but they're a straightforward structuring of the market for a particular service within a state. Furthermore, there's little "free market" about how the delivery apps operate: They use no-price-discrimination clauses to mandate that prices remain the same across the apps and for on-site dining, and as the apps have consolidated, they have raised fees in concert. Menu stealing and trademark infringement, meanwhile, are simply fraudulent business practices that should be treated as such.



# **Adopt a “Right to Repair” Law for Consumer Electronics**

## THE PROBLEM

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Corporations like Apple prevent consumers who purchased devices such as iPhones from repairing them at home or at independently owned shops; instead, they force consumers to bring their devices to authorized repair shops, which are required to buy parts only from specific vendors, or to Apple’s own repair facilities. Many consumer electronics are rife with predatory designs that make repairing them functionally impossible outside of official channels, and corporations make software diagnostic tools unavailable to unauthorized repair facilities.<sup>24</sup>

This exclusivity drives up costs for consumers, who spend hundreds of dollars per year to repair devices – or simply purchase new ones because repair is so difficult – than they would if repair services were more widely available. According to an investigation by the Federal Trade Commission, it’s clear that corporate repair restrictions “steered consumers into manufacturers’ repair networks or to replace products before the end of their useful lives.”<sup>25</sup> Repair restrictions also drive down local employment and increase e-waste, according to various studies.<sup>26</sup>

## THE POLICY

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State legislators in more than half of U.S. states have introduced bills giving consumers the right to repair various products, including digital electronics, which would force manufacturers to share diagnostic designs and information and sell parts to independent repair shops.<sup>27</sup> In 2022, New York State passed the first right-to-repair consumer electronics law in the nation.

### **Model bills:**

*SF 64, Minnesota, 2019-2020*

## THE PUSHBACK

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24 “Nixing the Fix: An FTC Report to Congress on Repair Restrictions,” Federal Trade Commission, May 2021, [https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing\\_the\\_fix\\_report\\_final\\_5521\\_630pm-508\\_002.pdf](https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf).

25 Ibid.

26 Daniel A. Hanley, Claire Kelloway, and Sandeep Vaheesan, “Fixing America: Breaking Manufacturers’ Aftermarket Monopoly and Restoring Consumers’ Right to Repair,” Open Markets Institute, April 2020, [https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ea8a6d93b485d0feb9b5d6b/1588111098207/Report\\_RightToRepair\\_HanleyKellowayVaheesan-1.pdf](https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ea8a6d93b485d0feb9b5d6b/1588111098207/Report_RightToRepair_HanleyKellowayVaheesan-1.pdf).<sup>23</sup> Protect Our Restaurants fee cap tracker, <https://www.protectourrestaurants.com/>.

27 Nathan Proctor, “Half of U.S. states looking to give Americans the Right to Repair,” U.S. PIRG, March 10, 2021, <https://uspirg.org/blogs/blog/usp/half-us-states-looking-give-americans-right-repair>.

Big Tech corporations such as Apple, Microsoft, and Google lobby heavily against state and federal efforts to implement right-to-repair legislation. They claim that laws giving consumers more repair options will result in harms to privacy and expose consumers to unscrupulous repair facilities.<sup>28</sup> However, the FTC found in its investigation that “there is scant evidence to support manufacturers’ justifications for repair restrictions.”<sup>29</sup>

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<sup>28</sup> Brian X. Chen, “Why You Should Care About Your Right to Repair Gadgets,” *The New York Times*, July 14, 2021, <https://www.nytimes.com/2021/07/14/technology/personaltech/right-to-repair-iphones-android.html>.

<sup>29</sup> FTC, “Nixing the Fix.”



# Tax Digital Ad Revenue

## THE PROBLEM

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Big Tech firms like Facebook, Google, and to a growing extent, Amazon make money selling ads. Those ad-based models lead to a range of harms, such as Google’s self-preferencing, as described above, or Facebook’s algorithms leading to the spread of misinformation and conspiracy theories. They have also led to the collapse of the newspaper industry, as ad money that used to support a wide network of journalism outlets, both nationally and locally, is now siphoned into the hands of a few dominant corporations, whose data collection practices and ability to target ads to individual consumers can simply never be matched by an individual publication.

## THE POLICY

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States can tax the revenue corporations make from digital ads. In 2020, Maryland became the first state in the nation to pass a digital ad tax through the legislature, on corporations that make more than \$10 million in digital ad revenue annually in the state. While taxing digital ad revenue does not fundamentally change the business model Big Tech corporations employ, it can be an incentive to push them to examine other options, such as subscription models, and can raise significant revenue for the state to spend on other priorities, including ameliorating some of the harms caused by tech corporations.

### **Model bill:**

*HB5645, Connecticut, 2021*

## THE PUSHBACK

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Maryland’s tax was immediately challenged in court, and critics point to implementation and jurisdictional challenges, such as determining where both ads and ad impressions originate. Indeed, states that want to adopt digital ad taxes are going to have to adapt them to whatever courts say is permissible, or push for a federal law overruling bad court decisions. To reduce these concerns, states can work together to craft common digital ad taxes and revenue sharing.<sup>30</sup>

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<sup>30</sup> Girard Miller, “How States Can Gird for the Coming Fights Over Taxing Digital Ads,” *Governing*, April 7, 2021, <https://www.governing.com/finance/how-states-can-gird-for-the-coming-fights-over-taxing-digital-ads.html>.



# **Provide Antitrust Enforcers With More Resources**



## THE PROBLEM

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Most states dedicate very few resources to antitrust enforcement, a problem exacerbated by the fact that antitrust cases, due to bad case law and legal procedures, are long and expensive to undertake. Most states have fewer than three antitrust investigators on staff; 13 states have none. Just six states – California, New York, Florida, Texas, Washington, and Ohio – employ nearly half of all state-level antitrust lawyers.

Still, states have advanced serious efforts to use existing antitrust law to rein in the power of Big Tech, such as Texas' case, joined by 10 other states, against Google's monopoly in advertising technology, Washington, D.C.'s case against Amazon's treatment of third-party sellers, Ohio's pursuit of common carrier designation for Google, or 47 states' joint effort against Facebook's monopolization of social media.

## THE POLICY

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State lawmakers can dedicate more funding to antitrust offices, perhaps funded by a tax on large corporations. They can also push Congress to heed the call of 45 state attorneys general to provide federal funding for state antitrust efforts.

## THE PUSHBACK

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Increased antitrust funding will run up against states' traditional budget priorities. And critics will point to the length and difficulty of antitrust cases as a reason not to pursue more of them, which is why increased funding should be paired with other reforms to antitrust law to reflect the realities of today's dominant corporations, particularly in tech.



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The American Economic Liberties Project is a new, independent organization fighting against concentrated corporate power to realize economic liberty for all, in support of a secure, inclusive democratic society.

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June 12, 2024

California Law Revision Commission  
C/O Legislative Counsel Bureau  
925 L St, Suite 275

**RE: California Law Revision Commission – Study B-750 (Antitrust Law), Technology Platforms Report**

Dear Executive Director Reilly and Members of the Law Revision Commission:

My name is Angela Harris, and I am the founder of Wellness of Life Enterprises, INC. My clinic is on 51st and J Street in East Sacramento. I have an online store and I also sell my products on Amazon.

I've been on J Street for almost twenty years, and my brand has been serving the health and wellness industry for more than thirty years. I have worked incredibly hard to build my brand and business.

I took time to attend the hearing on May 2<sup>nd</sup> and I authored this [CalMatters opinion editorial](#) to share my concerns. Thank you for giving me the opportunity to describe what helps energize the existence of small businesses survival. As a California established small business owner, my online presence is essential. Tech platforms like Google, Instagram, and Amazon are giant companies that have helped small brands like mine connect with customers and grow profoundly.

The proposal being considered by the Commission will prohibit what is described as “self-preferencing” by big technology platforms. However, the opportunities provided by these companies are often free and help small businesses, not harm them.

I am not concerned that one company operates both Facebook and Instagram, Google Maps and Search, or Amazon shopping and delivery trucks. What matters to small businesses is that these services are necessary to operate sufficiently, satisfy consumers, and help us manage our bottom line to obtain our goals. These platforms help us retain more customers, combat inflation, and expand our capacity for substantial growth. Dismantling big tech creates disruptions to the digital services we rely on and will make it even more difficult for us to succeed and achieve the American Dream.

When you consider recommending legislation, please ask yourselves a simple question: Will this policy fracture small businesses or support our bottom line?

Small businesses make up close to 90 percent of all businesses in California. As you review the working groups recommendations, please also consider the needs of California small business owners and that steadily contribute to our state's economy.

Angela Harris, Founder Wellness of Life  
Wellnessoflife@gmail.com  
(916)761-7316

