Should California Revise its Antitrust Laws?

There are many current efforts at the state and federal level to update, modernize, and expand antitrust laws. The nation's primary federal antitrust law, the Sherman Act, [17] was adopted in 1890. California's primary antitrust statute, the Cartwright Act, [18] was adopted in 1907 and has seen few substantive updates over the intervening 117 years. While portions of the Cartwright Act may be broader than the Sherman Act, the Cartwright Act lacks counterparts to provisions in the federal laws that outlaw monopolization and attempts to monopolize and provisions providing for the review and challenge of mergers and acquisitions and single firm conduct.

These gaps in California's antitrust laws align with some of the deepest concerns in today's economy, creating the momentum for antitrust reexamination. The vertical integration[19] of some of our largest entities, as well as the sheer scale of some digital platforms such as Google and Meta present unique competitive challenges not foreseeable by the drafters of our original antitrust laws. For example, California's antitrust laws were written well before the rise of the digital economy, when it was likely unimaginable that access to technology products would be offered to consumers for free. As a result of gaps in California law, California is largely unable to use its own laws and courts to address individual conduct issues of the dominant technology firms (hereafter "Big Tech").[20] Numerous states in similar positions have also attempted to supplement their state antitrust laws, including New York,[21] New Jersey,[22] Minnesota,[23] and Pennsylvania.[24]

At the same time, the shortcomings of federal law have prompted numerous antitrust reform proposals at the federal level, including the 2021 Competition and Antitrust Law Enforcement Reform Act (CALERA)[25] by Sen. Klobuchar. This bill proposes to overrule specific Supreme Court cases that have weakened antitrust enforcement and prohibits

[17] 15 U.S.C. § 1. The Sherman Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[18] Bus. & Prof. Code §§ 16700 – 16770.

[19] See Memorandum 2024–25, p. 7. "The traditional vertical merger is one between a downstream firm which produces some final good and an upstream firm which supplies some input necessary to the production of the downstream good. A PC manufacturer might merge with a chip manufacturer."

[20] See, e.g. J. Davis and J. Pollock, Updating the Cartwright Act for the Twenty–First Century: Allowing Antitrust Claims for Unilateral Conduct, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 24 (2023).

[21] See, e.g. S6748B (Gianaris, 2023).

[22] See, e.g. S3778 (Singleton, 2023).

[23] See, e.g. HF 1563 (Greenman, 2023).

[24] See, e.g. HB 2012 (Pisciottano, 2023).

[25] S. 225 (Klobuchar, 117th Congress 2021).

exclusionary conduct[26] that presents an appreciable risk of harming competition.[27] ACR 95 specifically directed the Commission to consider both CALERA and New York's Twenty–First Century Anti–Trust Act[28] in its analysis of California's antitrust laws.[29]

The staff have endeavored to provide a representative sample of the varied responses given to the question of whether California's antitrust laws need reform or whether federal and state law is sufficient:

Arguments in favor:

- The Concentration in California working group report describes the increased concentration in some of California's important economic sectors which has resulted in a handful of dominant companies who maintain high prices, employ exclusionary tactics that further leverage their market power, and who deter competition and/or impose onerous terms on trading partners. The report provides many examples of dominant firms in California's entertainment, healthcare, agriculture, and labor markets that have grown through unchallenged mergers and acquisitions.[30]
- The Single Firm Conduct working group reports that federal jurisprudence has substantially narrowed the scope of the Sherman Act; and that there is a consensus that federal law has been weakened by decades of limiting federal law.[31] Its report details federal courts' creation of numerous specific rules about potentially exclusionary conduct such as ones for predatory pricing and refusals to deal that effectively immunize much conduct from antitrust scrutiny under federal law. Many of these rules were controversial from the start. Others have become more controversial as they have become outmoded. [32]
- The Mergers and Acquisitions working group reports that less aggressive merger enforcement "has coincided with substantial increases in market concentration, the rise of the dominant firms and unusually high profit rates in the economy."[33]
- Many public commenters allege negative effects of concentration and dominance by a few entities in various sectors of the California economy,

[26] Exclusionary conduct may include such things as exclusive supply or purchase agreements, tying, predatory pricing, or refusal to deal. Federal Trade Commission, *Monopolization Defined*.
[27] Congressional Research Service Bill Summary, S. 225 (Klobuchar) 117th Congress (2021).
[28] S933 (Gianaris, 2021).
[29] 2022 Cal. Stat. res. Ch. 147.
[30] Memorandum 2024–14.
[31] Memorandum 2024–25, p. 13.
[32] Memorandum 2024–15, pp. 6–7.
[33] Memorandum 2024–25, p. 3.

including the grocery industry,[34] book sales,[35] hospitals and nursing,[36] warehousing and logistics,[37] franchising and rideshare,[38] and digital search.[39] This consolidation has hurt business opportunities in the state and suggests more enforcement tools are necessary.

- Findings in New York's Twenty–First Century Anti–Trust Act describe a growing accumulation of power in the hands of large corporations and anticompetitive practices that harm great numbers of citizens.[40]
- Corporate concentration disadvantages communities of color and can lead to reduced wages, such as in the service industry, which employs many workers of color. Concentration increases prices and decreases data privacy. Corporations should have a duty to advance the public interest, monopolies should be abolished, and mergers and acquisitions should undergo a race equity impact analysis.[41]
- The Mergers and Acquisitions working group reports that less aggressive enforcement against mergers "has coincided with substantial increases in market concentration, the rise of the dominant firms, and unusually high profit rates in the economy."[42]
- Some individuals aligned with the founders of the Chicago School[43] acknowledge increasing concern about market concentration and anticompetitive conduct by large technology companies that are "unprecedented in nature." California, as the home to many of these technology companies, has an interest to ensure these firms don't stifle innovation and competition.[44]
- California antitrust law needs to address more clearly restrictive covenants in employment relations such as no–poach, no–shop, and non–competes which restrict worker mobility. California should increase penalties for

[34] Testimony of Michael Strumwasser and Kathy Finn on behalf of the United Food and Commercial Workers, International Union (UFCW), Western States Council, May 2, 2024.

[35] Testimony of Elayna Trucker on behalf of Napa Bookmine, June 20, 2024.

[36] Testimony of and letter from Carmen Comsti on behalf of the California Nurses Association/National Nurses United, June 20, 2024, and testimony August 15, 2024. Testimony by Mike Rabourn on behalf of California Nurses Association/National Nurses United, May 2, 2024.

[37] Testimony of Sheheryar Kaoosji on behalf of the Warehouse Workers Resource Center, May 2, 2024.

[38] Testimony of and letter from Marshall Steinbaum, May 2, 2024.

[39] Testimony of and presentation by David Segal and Peter Curzon on behalf of Yelp, June 20, 2024.

[40] S933 § 2 (Gianaris, 2021).

[41] Letter from Liberation in a Generation, May 2, 2024.

[42] Memorandum 2024–25, p. 3.

[43] The "Chicago School" of antitrust policy was popularized in the 1970s and emphasized the risks of overintervention. Instead, it argued for a narrowly tailored enforcement standard focused on economic metrics such as price, output, and efficiency. As a result, decades of rather passive antitrust enforcement are associated with this policy named after a group of scholars from the University of Chicago including Robert Bork, Richard Posner and Milton Friedman. Francine McKenna, *What Made the Chicago School so Influential in Antitrust Policy*?, Chicago Booth Review (Aug. 7, 2023).

[44] K. MacVey and W. Wang, California Should Amend the Cartwright Act to Address Single Firm Monopolization, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 49, 51 (2023).

some restrictive covenants.[45]

- Federal antitrust law is constricted by decades of Chicago School scholarship and antitrust enforcement that waxes and wanes.[46]
- There is increased concentration in 75% of nation's industries with an average of 90%, resulting in fewer firms with a greater share of profits.[47]
- Decades of consolidation in the media industry have enabled a handful of companies to amass significant power in the industry's labor markets and use this oligopsony power to push down wages for creative workers.[48]
- The "Big Three" companies in the entertainment industry, Disney, Amazon, and Netflix, grew through acquisitions and have developed "walled gardens"[49] of self–produced content. Disney is now the second largest distributor of television and online services and withdrew its content from Netflix and increased its prices. Netflix, the largest employer of writers, increased prices by 11% between 2021 and 2022. Amazon and Roku each have 36% market share of streaming video devices.[50]
- Entertainment industry profits went up while writers pay declined. Disney mergers resulted in a reduction of writer employment by 32% from 2009 through 2016.[51]
- AT&T and DirecTV promised lower prices before their merger but raised prices after the merger. There are high barriers to entry in the entertainment industry's creative labor markets. Six companies increased revenues and profits from 2014 – 2018 by licensing series to streaming services and foreign networks, while writers' income declined by 16% during this same period.[52]
- Between 1997 and 2012, more than three–quarters of US industries became more concentrated, and the average increase was 90%, as calculated by a commonly accepted measure of market concentration. A monopolist's continuing grip on a market is a sign that competing firms are unable to enter. The persistence of a monopoly tends to deprive citizens of better goods or services and more choices, and a Nobel laureate said that undue concentration causes social and economic ills. Sustained high profits and

[45] D. Polden, Restrictions on Worker Mobility and the Need for Stronger Policies on Anticompetitive Employment Contract Provisions, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 128, 129, 127 (2023).

[46] Memorandum 2024–25, pp. 17–21.

[47] Writers Guild of America West, Broken Promises, Media Mega–Mergers and the Case for Antitrust Reform, p. 5, December 2021.

[48] Letter from Writers Guild of America West, June 12, 2024.

[49] A "walled garden" is the term for a closed ecosystem where the flow of information is controlled by the ecosystem operator/owner.

[50] Writers Guild of America West, The New Gatekeepers: How Disney, Amazon, and Netflix Will Take Over Media, pp. 18 – 32, August 2023.

[51] Writers Guild of America West and American Federation of Musicians Comment on Draft FTC–DOJ Merger Guidelines, pp. 36–49, Sept. 18, 2023.

[52] Writers Guild of America West, Comment on DOJ–FTC Request for Information on Merger Enforcement, pp. 4–12, April 21, 2022.

outsized margins are good indicators of monopolies.[53]

- Federal law only allows a party who deals directly with the alleged violator to sue under federal law, so injured consumers and other indirect purchasers bear the cost of an antitrust violations. While California antitrust law expressly allows these indirect purchasers to sue a violator, California's laws lack provisions to target a single firm's anticompetitive conduct.[54]
- The Consumer Welfare Standard working group reported that there is a "broad consensus" among scholars that current legal presumptions have narrowed the substantive scope of antitrust law and weakened its ability to protect competition. These presumptions include the false–positive framework as well as the idea that vertical mergers are unlikely to harm competition. [55]
- A new administration could change the direction and intensity of any federal antitrust enforcement and reverse the 2023 Department of Justice and Federal Trade Commission merger guidelines.[56] This unpredictability heightens the need for California to have its own antitrust laws and enforcement.[57]
- Federal enforcers have limited resources; matters having a more local impact within California may not be a top priority for them.[58]
- The degree to which federal authorities have successfully challenged mergers has changed over time with no change in the language of the federal statutes. An explanation of the variable winds of antitrust enforcement is that the courts are responding to the developments in law, economics, and politics, such as the Chicago School of antitrust enforcement. More recent scholarship has exposed flaws in the premises that underlie the Chicago School and has demonstrated the many ways that mergers can harm consumers and businesses.[59]
- What constitutes "substantial lessening" of competition under the Clayton Act has shifted over time. Before the 1970s, merger law was applied to prevent increased market concentration in its incipiency, accepting a strong presumption of harm from increased market concentration as low as five percent. However, the Chicago School approach treated growing concentration as more efficient and desirable. Now, enforcement agencies

[53] J. Elias, Antitrust Restoration from California Anchored by a New Monopolization Synthesis, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 34 (2023).

[54] Memorandum 2024–35, p. 4.

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

[56] Department of Justice and Federal Trade Commission 2023 Merger Guidelines.

[57] Transcript, Mergers and Acquisitions working group, pp. 5–6. June 20, 2024.

[58] Memorandum 2024–25, p. 15.

[59] Memorandum 2024–25, p. 21.

are embracing a Post–Chicago school of thought that is concerned with rising concentration and questioning key Chicago School assumptions about self–correcting markets.[60]

- Federal antitrust law is not stable as shown by changes to the merger guidelines over the decades. After decades in which the requirements to establish monopoly and market power were significantly increased, the 2023 merger guidelines attempt to reduce some of those requirements, and to restore some of the Sherman Act caselaw of the 1950s and 1960s.[61]
- While the federal Clayton Act[62] has very broad language regarding mergers, case law over the last century has limited its scope.[63]
- Federal courts have failed to honor the presumptions of *Philadelphia National Bank,*[64] which have made federal challenges to mergers more difficult.[65]
- California should prevent further mergers in the streaming markets and require regular merger retrospectives.[66]

Arguments against:

- There is no demonstrated need for reform and federal law is sufficient to challenge unilateral conduct. There is no evidence that California's lack of antitrust laws reaching unilateral conduct has resulted in high prices or inferior products or services.[67]
- California can use federal law and federal and state regulators brought eleven suits against Big Tech between 2020–2023; California has thrived with its existing legal regime.[68]
- Amending California law to require notice of mergers and acquisitions is unnecessary in light of federal law and federal handling of merger approvals.[69]

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[60] A. Deluard, Competition Beyond Rivalry: Adapting Antitrust Merger Review to Address Market Realities, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 108–109 (2023).

[61] A. Deluard, Competition Beyond Rivalry: Adapting Antitrust Merger Review to Address Market Realities, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 108 (2023).

[62] U.S.C. §§ 12–27. This law aims to promote fair competition and prevent unfair business practices that could harm consumers. It prohibits certain actions that might restrict competition, like tying agreements, predatory pricing, and mergers that could lessen competition. See Department of Justice, The Antitrust Laws.

[63] Letter from Michael Strumwasser and Andrea Sheridan Ordin on behalf of the United Food and Commercial Workers Western States Council, p. 13, March 14, 2024.

[64] U.S. v Philadelphia National Bank, 374 U.S. 321 (1963).

[65] Memorandum 2024–25, pp. 17–18. The presumption held that if a plaintiff makes its initial showing, then the defendant not only bears the burden of proving that the merger will not be anticompetitive, they must do so with clear and convincing evidence, which is beyond the usual preponderance standard for an affirmative defense in a civil case. This legal framework for assessing a merger was known as the structural presumption because of the almost decisive role it accorded to market concentration.

[66] Letter from Writers Guild of America West, p. 3, June 12, 2024.

[67] Letter from Eric P. Enson on behalf of the California Chamber of Commerce, April 25, 2024.

[68] Jonathan Barnett, ICP Analytics LLC, Does the European Union's Digital Markets Act Provide an Appropriate Model for Maintaining Competition in California's Innovation Economy? pp. 46, 52, December 2023.

[69] Letter from Eric P. Enson on behalf of the California Chamber of Commerce, p. 4 June 18, 2024.

- California's booming technology sector proves the status quo is working. U.S. antitrust law requires proof of harm, which is superior to Europe's competition laws which reduce the ability for firms to recoup the costs of innovation.[70]
- California regulators are already bringing actions against anticompetitive mergers under federal law so there is no need for another state law. California law already permits any person whose business or property is injured to sue and recover treble damages, prejudgment interest, and attorneys' fees. California laws are already burdensome.[71]
- Concentration in certain markets cannot always be proven to impact prices. The conclusions of the Concentration in California working group report falter when examined against a more holistic view of the empirical evidence. The "doom and gloom narrative" not only fails to hold up nationally, but poorly captures California's markets.[72]
- Evidence on labor market concentration is mixed and proving labor harms is difficult. Further study is needed as to mergers that harm workers but benefit consumers. The Biden Administration's more aggressive approach to antitrust enforcement to improve competition is not entirely supported by empirical evidence. Current attempts to quantify labor market competition models are not well developed. Some models of labor power don't account for search frictions and job transfer costs.[73]
- Section 2 of the Sherman Act is broad and balanced and sufficient to address Big Tech concerns. The courts are adept at reading the language to accommodate the challenges of new technology, and a new formulation would introduce uncertainty. There are many goliaths outside of Big Tech; a statutory carveout is not merited merely because some of its participants are particularly well known.[74]
- The *Microsoft* case shows that federal law is sufficient to adapt to and capture complex and rapidly evolving new technology. Using the rule of reason, the courts can use the broadness of the Sherman Act to interpret law to meet current economic and competitive challenges.[75]
- Innovation is often maximized when there are only a few firms in a market. California already enjoys sufficient tools to police anticompetitive mergers

[70] Letter from the Information Technology & Innovation Foundation, p. 3, June 20, 2024.

[71] Letter from the Civil Justice Association, p. 2, August 2, 2024.

[72] Letter from the Information Technology & Innovation Foundation, pp. 6, 12, May 2, 2024; A. Deluard, Competition Beyond Rivalry: Adapting Antitrust Merger Review to Address Market Realities, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 108 (2023).

[73] B. Albrecht, Dirk Auer, and G. Manne, Labor Monopsony and Antitrust Enforcement: A Cautionary Tale, pp. 1–2, 9, 32, May 7, 2024.

[74] M. Pocha and P. Jones, 133 Years Young: Sherman Act Section Two Keeps Up with Big Tech, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 83, 84 (2023); B. Mejia, D. Bansai, and A.J. Kasner, Over–Prescription is Bad Medicine: The Case Against a Knee–Jerk Revision of Antitrust Injury, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 89, 91 (2023).

[75] Jonathan Barnett, ICP Analytics LLC, Does the European Union's Digital Markets Act Provide an Appropriate Model for Maintaining Competition in California's Innovation Economy? p. 26, December 2023.

and should avoid taking cues from neo–Brandeisian[76] inspired merger guidelines or legislative proposals that seek to take merger enforcement well beyond its proper scope.[77]

- Some believe that the antitrust law changes suggested by CALERA are too broad and will invite frivolous lawsuits, chill procompetitive conduct and innovation, and would undermine federal judicial precedent under the Sherman Act.[78]
- An explanation for the "variable winds of antitrust enforcement" at the federal level and the introduction of new merger guidelines show that the federal courts can, and enforcers have, adapted to developments in law, economics, and politics. The courts can adopt to new learning about the digital world and new economy and can adjust their tolerance for mergers and acquisitions without any changes in the relevant antitrust statutes.[79]
- Clear goals and legal standards for antitrust enforcement should guide any reforms; more study is needed to build a body of evidence to inform actions.[80]
- The conclusions of the Concentration in California working group can be challenged on various grounds, thus undermining their reform proposals.[81]

Should California Have its own Law on Single Firm Conduct?

California's antitrust law, the Cartwright Act, does not apply to conduct by a single firm to monopolize or attempt to monopolize. Accordingly, any effort to challenge single firm conduct must generally be brought in federal court under Section 2 of the federal Sherman Act[82] which makes it unlawful "to monopolize or attempt to monopolize."

Several of the expert working groups opined in favor of establishing a California–specific law for single firm conduct. The Single Firm Conduct working group concluded that "the most glaring deficiency in the Cartwright Act is its failure to reach purely unilateral conduct,"[83] and the Enforcement and Exemptions working group described enforcement through federal antitrust law and judges as "relatively anemic," and suggested

[76] "Neo–Brandeisian," or the "New Brandeis" movement is named after Supreme Court Justice Luis Brandeis, whose decisions limited the power of big business. Brandeis helped popularize the belief that the government had a duty to prevent any single entity from becoming too dominant, and thus to insure competitive markets. Sheelah Kolhatkar, "Lina Khan's Battle to Rein in Big Tech," The New Yorker, November 29, 2021.

[77] Letter from Information Technology & Innovation Foundation, p. 8, June 20, 2024.

[78] S. Torpey, B. Annette, and Q. Cummings, Should California Adopt Revisions Proposed by Congress and the New York State Legislature to Address Single Firm Conduct? 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 12, 14, 17 (2023).

[79] Memorandum 2024–25, p. 20.

[80] Letter from International Center for Law & Economics, p. 45, May 7, 2024.

[81] Letter from Information Technology & Innovation Foundation, p. 11, May 2, 2024.

[82] 15 U.S.C. § 1.

[83] Memorandum 2024–15, p. 13.

that the Legislature amend the Cartwright Act to apply to single firm conduct.[84]

Arguments for:

- California cannot rely on federal law and enforcement due to differing resources and priorities, federal law's denial of relief to indirect purchasers and other limitations in federal law, and federal agencies' lack of resources, other priorities, or political pressures.[85]
- The Single Firm Conduct working group offered numerous recommendations and options for the structure of a single firm conduct law in the Cartwright Act.[86]
- California's own statute would permit cases challenging mergers or single firm conduct to be brought in state rather than in federal courts. California judges could develop California single firm conduct law. State courts might bring superior information and perspective, and California could prioritize pursuing actions that have more of an impact in California than nationwide. California cannot depend on federal agencies to bring actions on matters that may be of great or sole interest to California.[87]
- Multiple antitrust regimes already exist; many states have differing antitrust laws, and many multinational companies are subject to EU laws.[88]
- California's absence of law on single firm conduct is a "blindspot," leaving it without an important protection; California needs a law that provides an alternative to the rule of reason and adopts an abuse of dominance standard.[89]
- California needs a provision prohibiting anticompetitive single firm conduct that can reach Big Tech.[90]

Arguments against:

- While federal laws do not preempt California's antitrust laws, there may be

[84] Memorandum 2024–35, pp. 11, 21.

[85] K. MacVey and W. Wang, *California Should Amend the Cartwright Act to Address Single Firm Monopolization*, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 49 (2023); Memorandum 2024–35 and transcript, working group 6, Enforcement and Exemptions, August 15, 2024.

[86] Memorandum 2024–15, pp. 13–18.

[87] Memorandum 2024–25, p. 15.

[88] Memorandum 2024–25, p. 15 and Austra O. Deluard, An Overview of EU Competition Law, June 22, 2023.

[89] J. Davis and J. Pollock, Updating the Cartwright Act for the Twenty–First Century: Allowing Antitrust Claims for Unilateral Conduct, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 24 (2023); J. Elias, Antitrust Restoration from California Anchored by a New Monopolization Synthesis, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 34 (2023); Letter from the American Economic Liberties Project, California Nurses Association, Democracy Policy Network, Economic Security California, Ending Poverty in California, Farm Action, Greenlining Institute, Institute for Local Self–Reliance, Liberation in a Generation, Rise Economy, Small Business Majority, TechEquity Action, United Food and Commercial Workers International Union Western States Council, Warehouse Workers Resource Center, and Writers Guild of America West, April 24, 2024; Letter from Michael Strumwasser and Andrea Sheridan Ordin on behalf of the United Food and Commercial Workers Western States Council, March 14, 2024.

[90] Letter from the United Food and Commercial Workers Western States Council, November 10, 2022.

concerns about extraterritorial effects and dormant Commerce Clause[91] challenges where state and federal laws differ.[92]

- Existing federal antitrust law is sufficient and modern federal antitrust decisions have correctly made it more difficult to successfully challenge single–firm conduct or monopolization.[93]
- Two different legal regimes will cause confusion and uncertainty, burden businesses and chill innovation.[94]
- Some consider California to have a burdensome civil liability climate; more regulation would exacerbate that problem and could push companies to leave California.[95]
- Any state attempts to regulate labor–management relations in antitrust law are preempted by federal labor law for all employers affecting interstate commerce.[96]

Should California Have Specific Antitrust Laws for Technology Companies?

The legislation authorizing Commission's antitrust study cites studies voicing concerns about the ability of current antitrust laws to counter increasingly powerful technology companies. Indeed, one of the three questions ACR 95 asks the Commission to answer is "Whether the law should be revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices."[97]

This question, while phrased in terms of "antitrust injury," essentially requires an analysis of the laws necessary to rein in the negative competitive effects of Big Tech's conduct, while recognizing and preserving some of the benefits. Also inherent in this exercise is consideration of whether Big Tech should be treated differently from other dominant firms.

Arguments for:

- The Technology Platforms working group suggested a framework for ex

[91] The dormant Commerce Clause doctrine restrains states' ability to "discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Or.,* 511 U.S. 93, 98 (1994); *see also Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087-88 (9th Cir. 2013).

[92] S. Liu, Dormant Commerce Clause: A Potential Brake on State Antitrust Legislation, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 148 (2023).

[93] Memorandum 2024–26, p. 4.

[94] Letter from the Computer & Communications Industry Association, March 25, 2024.

[95] Letter from the Civil Justice Association of California, August 2, 2024.

[96] Letter from Tom Campbell, March 13, 2024.

[97] 2022 Cal. Stat. res. Ch. 147.

ante regulation[98] which would include:

- A user and sales or market capitalization threshold to limit application of the law to the largest technology companies.
- Deeming the following conduct presumptively unlawful:
  - Self–preferencing;
  - Discrimination that harms competition;
  - Restrictions on interoperability;
  - Tying;[99]
  - Using data from the covered platform to support another business line.

- Requiring any acquisition by a covered platform to be subject to automatic merger review by the Attorney General.[100]
- The Enforcement and Exemptions working group reviewed several existing regulatory models (including those of the EU and proposed state and federal legislation) and suggested the following common practices could serve as a starting point for a California regulatory approach:
  - Limit application of the law to the very largest technology companies offering digital platforms and/or services dependent on digital technologies, by size, revenues, and/or number of consumers using the products within the jurisdiction;
  - Designate certain special obligations that those companies will have to government, competitors, and consumers;
  - Establish a regulatory agency or specialized group within an existing agency to promulgate and administer rules;
  - Specify a set of business practices known to have exclusionary effects to be the primary focus of regulation, including (a) impeding data portability, (b) self–preferencing on the platform, (c) discriminatory platform access, and (d) undue interference with pricing or payments.

[98] "Ex ante" regulation refers to regulations that anticipate and resolve problems before they occur. This is often contrasted with "ex post" enforcement, which is the practice of resolving disputes after they have occurred, typically via lawsuit. For a further discussion, see Richard Posner, Regulation vs. Litigation: Perspectives from Economics and Law (2010) p. 13, Daniel P. Kessler ed. "Regulation and litigation tend to differ along four key dimensions: (a) regulation tends to use ex ante (preventive) means of control, litigation ex post (deterrent) means; (b) regulation tends to use rules, litigation standards; (c) regulation tends to use experts (or at least supposed experts) to design and implement rules, whereas litigation is dominated by generalists (judges, juries, trial lawyers), though experts provide input as witnesses; and (d) regulation tends to use public enforcement mechanisms. Litigation more commonly uses private enforcement mechanisms—private civil lawsuits, handled by private lawyers although the decision resolving the litigation is made by a judge (with or without a jury), who is a public official (the jurors are ad hoc public officials)."

[99] Tying occurs when a firm sells one product or service but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that it will not purchase that product from any other supplier. See Department of Justice, Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act: Chapter 5, updated March 18, 2022.

[100] Memorandum 2024–26, p. 12.

- Lay out something akin to a "structured rule of reason"[101] framework for enforcement actions.[102]

- Big Tech should be regulated as common carriers.[103]
- 76% of the American public think Big Tech should not have so much power and 68% would support a proposal to break up the big artificial intelligence companies to prevent them from controlling the entire sector. California must consider corporate concentration and artificial intelligence in its recommendations. The Commission should consider limiting ownership or control of an online platform and certain other businesses that utilize the covered platform for the sale or provision of products or services, as well as laws prohibiting platform discrimination and requiring interoperability.[104]
- Amazon dominates the bookseller business and uses books as a loss leader. Amazon has undue influence over what books are published and their terms of sale. Independent bookstores have declined from 7,000 to 2,500 over last few decades and writers have few options to secure publishing deals. Amazon should be required to separate its different lines of businesses and its monopoly power needs to be reined in.[105]
- Sector specific policies could effectively address the harms resulting from Big Tech's market position and end their serial acquisitions and copying of smaller rivals, which discourage investment in innovative technologies. Ex–post antitrust enforcement, which relies on government or private litigation after the conduct occurs, does not prevent harmful conduct. This enforcement after the fact also takes vast resources and years to resolve and may result in judicial decisions with little precedential power. As a result, California should consider structural separation, neutrality mandates, and nondiscrimination rules.[106]
- California needs greater authority to review hospital mergers.[107]

Arguments against:

- Speakers representing the Technology Platforms working group, though careful to say they did not represent a group consensus, supported amending California antitrust law without specifically focusing on tech platforms.[108]

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[101] The "structured rule of reason" or "quick look" is a mode of antitrust analysis that has been recognized as existing between the "per se" and "rule of reason" modes, which allows the courts to consider how the analysis should be structured to most efficiently differentiate between reasonable and unreasonable restraints of trade, and to devise rules for offering proof or even presumptions where justified. *In re Cipro Cases I & II*, 61 Cal. 4th 116,147–78 (2015).

[102] Memorandum 2024–35, pp. 16–17.

[103] G. Sitaraman and M. Ricks, Tech Platforms and the Common Law of Carriers, 73 Duke L.J. 1037 (2024).

[104] Letter from American Economic Liberties Project, California Independent Booksellers Alliance, California Nurses Association, Economic Security California, Ending Poverty in California, Small Business Majority, TechEquity Action, June 19, 2016.

[105] Letter from Elayna Trucker, June 18, 2024 and letter from Judy Wheeler Ditter, June 19, 2024.

[106] Letter from Ganesh Sitaraman, Morgan Ricks, Shelley Welton, Lev Menad, Tejas Narechania, and Danielle D'Onfro, July 1, 2024.

[107] Testimony from Anthony Wright on behalf of Health Access, May 2, 2024.

[108] Transcript, working group 5, Technology Platforms, pp. 10–11, June 20, 2024.

- New York State's 21st Century Antitrust Act[109] is a good model for California and applies to all companies, not just technology giants. Due to legal decisions that have narrowed the application of federal antitrust laws, "abuse of dominance" legislation would reinvigorate enforcement against single firm conduct.[110]
- Changes in the regulatory framework applied to technology platforms need to be carefully evaluated to be sure they will improve economic performance. The potential for the adoption of an ex-ante regulatory framework to have significant and adverse unintended consequences is significant.[111]
- California's technology industry supports nearly 1.5 million jobs, in both technical and non-technical roles, which includes 57,000 tech businesses, and accounts for 7.8 percent of the state's workforce. The industry's economic impact totals more than $542 billion and is 16.7 percent of California's entire economy. The changes the Commission is considering would harm California businesses, consumers, and workers alike, increasing costs, reducing quality, and discouraging innovation.[112]
- Professor Carl Shapiro argues that stopping Big Tech from better serving their customers would not promote competition.[113]
- Focusing on Big Tech specifically could leave out competitors like Walmart, whose retail business is larger than Amazon's.[114]
- A system like EU's Digital Markets Act is expensive and may unfairly punish efficient digital markets.[115]
- The existing antitrust framework provides a stable basis for Big Tech firms to take risks and pursue returns on their significant research and development investments. Digital Markets Act regulations have hurt consumers.[116]
- Mergers and acquisitions by Big Tech are part of the business lifecycle for many small businesses and disrupting this process could cause harm to small businesses.[117]

[109] S933 (Gianaris, 2021).
[110] Letter from the American Liberties Project, January 18, 2023.
[111] Letter from Eric P. Enson on behalf of the California Chamber of Commerce, p. 10, June 18, 2024.
[112] Letter from Los Angeles County Business Federation, Silicon Valley Leadership Group, Bay Area Council, San Mateo County Economic Development Association, Torrance Chamber of Commerce, Employers Group, La Cañada Flintridge Chamber of Commerce and Community Association, April 30, 2024.
[113] Letter from Chamber of Progress, May 23, 2023.
[114] Letter from Chamber of Progress, May 30, 2024.
[115] Jonathan Barnett, ICP Analytics LLC, Does the European Union's Digital Markets Act Provide an Appropriate Model for Maintaining Competition in California's Innovation Economy? pp. 19-20, 27, December 2023.
[116] Letter from Google, p. 2, 5, June 19, 2024.
[117] Testimony from Caleb Williamson on behalf of the ACT, The App Association, June 20, 2024.

Should California Adopt an Abuse of Dominance (AOD) Standard?

Both proposed reforms, the New York State 21st Century Antitrust Act[118] and CALERA,[119] noted in ACR 95 contain an "abuse of dominance" (AOD) provision that makes it unlawful for a dominant entity to abuse that position to its competitive advantage. This concept is based upon Article 102 of European Union (EU) law that prohibits "any abuse by one or more undertakings of a dominant position within the internal market or on a substantial part of it…."[120] The EU Court of Justice defines a dominant position as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[121] Such a provision has long been a fixture of European and Canadian antitrust laws, which draw on their own respective definitions, regulations and methods of enforcement.

However, neither CALERA or the New York State 21st Century Antitrust Act have yet passed and any version of the AOD standard would be a significant change for U.S. antitrust law.[122]

Arguments for:

- Section 2 of the Sherman Act is criticized as being ill equipped to capture the architecture of market power in the modern economy and has allowed the rise of Big Tech and other de facto monopolies. *Trinko*[123], *Brooke Group,*[124] and other cases have further weakened Section 2's ability to capture the conduct of the large technology and digital firms.[125]
- Current antitrust laws have allowed large monopolistic corporations to dominate and harm product and labor markets with market shares well below current notions of market dominance.[126]
- The New York bill defines AOD both in terms of evidence of dominance

[118] S933 (Gianaris, 2021).
[119] S. 225 (Klobuchar) 117th Congress (2021).
[120] Treaty on the Functioning of the European Union, Document 12008E102.
[121] European Parliament, Fact Sheets on the European Union, Competition Policy.
[122] S. Torpey, B. Annette, and Q. Cummings, Should California Adopt Revisions Proposed by Congress and the New York State Legislature to Address Single Firm Conduct? 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 12 (2023).
[123] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398, 410–11 (2004).
[124] Brooke Group Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209 (1993).
[125] S. Torpey, B. Annette, and Q. Cummings, Should California Adopt Revisions Proposed by Congress and the New York State Legislature to Address Single Firm Conduct? 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 12, 16 (2023).
[126] S. Torpey, B. Annette, and Q. Cummings, Should California Adopt Revisions Proposed by Congress and the New York State Legislature to Address Single Firm Conduct? 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 12, 15 (2023).

and restraints that are presumed to be illegal when engaged in by dominant firms. These restraints include exclusive dealing, tying, restraints on prices of wages and restraints on union recognition.

- Big Tech's dominance allows them to charge as much as 30% to creators[127] for sales of their apps in Big Tech's application stores, and dominant delivery application firms charge 30% or more to restaurants on every individual order.[128]
- Antitrust has ignored and failed labor while allowing employers to increase their market power and get advantages denied them by the labor laws. California should have its own Section 2 of the Sherman Act, to prevent employers from exploiting their market power by committing labor violations with impunity due to the ineffectiveness of the NLRB process.[129]
- The economy should allow all to thrive, but corporate concentration and a focus on short term price effects has led to reduced wages in service industries where many people of color work. This commentor recommends California adopt the equivalent of Section 5 of the Federal Trade Commission Act that would allow the state to more holistically address harmful conduct rooted in an AOD standard.[130]

Arguments Against:

- The EU's Digital Markets Act (DMA) uses a per se approach that is criticized for arbitrary results. The more flexible rule of reason approach, which requires a case–by–case evaluation of all the circumstances of any particular conduct, avoids overdeterrence and captures the complexity of business behaviors such as vertical restraints[131] which have mixed competitive effects.[132]
- If California, New York, Minnesota, Maine, and New Jersey adopted an AOD standard, the estimated U.S. total harm to small and medium sized businesses would be $212 billion due to business disruptions.[133]
- AOD is a poor fit for California, and authorizing a regulator to deny acquisitions unless the merging parties can prove they are in the public interest would harm venture capital and startup entrepreneurship.[134]

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[127] Letter from American Economic Liberties Project, p. 7, June 17, 2024.

[128] Letter from American Economic Liberties Project, p. 19, June 17, 2024.

[129] Letter from Michael Strumwasser and Andrea Sheridan Ordin on behalf of the United Food and Commercial Workers Western States Council, March 14, 2024.

[130] Letter from Liberation in a Generation, May 2, 2024; see also Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, File No. P221202, November 10, 2022.

[131] A vertical restraint is a contractual restriction between undertakings operating at different levels in the supply chain, e.g. between a producer and a retailer. LexisNexis Glossary, Vertical restraints definition.

[132] Jonathan Barnett, ICP Analytics LLC, Does the European Union's Digital Markets Act Provide an Appropriate Model for Maintaining Competition in California's Innovation Economy? p. 26, December 2023.

[133] Letter from Data Catalyst, p. 16, January 2024.

[134] Letter from Chamber of Progress, May 30, 2024.

- AOD has never been recognized as an offense in the U.S. and is included in the EU competition law, but it has only rarely been enforced because of its unavoidable ambiguity.[135]
- Critics contend the AOD standard in Europe is too punitive for mergers, that its threshold for 30–40% market share is too low and could capture small and medium size businesses, and it would stifle innovation and prevent mergers that may be procompetitive.[136]
- The EU's AOD standard has led to over–enforcement of competition in the EU for decades. California should not adopt the same model.[137]
- California should maintain its ex–post enforcement system and not use the EU's ex–ante regulatory approach.[138]

Should California have its own Merger Laws?

The federal Hart–Scott–Rodino Act[139] (HSR) requires companies to file premerger notifications with the Federal Trade Commission (FTC) and the Antitrust Division of the federal Justice Department (DOJ) for transactions over a certain threshold size. There were 3,520 transactions in 2021 large enough to trigger HSR filings. The FTC and DOJ must determine which mergers to challenge under standards established by the federal Clayton Act, which prohibits mergers whose effect "may be substantially to lessen competition or tend to create a monopoly."[140] In 2021, less than 2% of the HSR reportable mergers were investigated by the federal agencies for a variety of reasons, not the least of which is because premerger review is resource intensive.[141] State attorneys general also have a right to challenge mergers, but do not currently have access to HSR filings, and HSR's strict confidentiality provisions prohibit the federal agencies from sharing with the AGs.[142]

While California has a vital stake in evaluating mergers affecting its economy, it only has authority to review mergers in narrow circumstances[143] and has no state–specific

[135] Memorandum 2024–15, p. 14.

[136] S. Torpey, B. Annette, and Q. Cummings, Should California Adopt Revisions Proposed by Congress and the New York State Legislature to Address Single Firm Conduct? 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 12, 14–15 (2023).

[137] Letter from Computer & Communications Industry Association, Sept. 28, 2023.

[138] Letter from Computer & Communications Industry Association, May, 1 2024.

[139] 15 U.S.C. § 18(a). The 2024 minimum threshold for reporting is $119.5 million. Federal Trade Commission, New HSR thresholds and filing fees for 2024.

[140] 15 U.S.C. § 13.

[141] A. Garcia, *Why Has California Waited So Long to Enact Its Own Merger Review Law?* 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 99 (2023).

[142] Uniform Law Commission, Draft Antitrust Pre–Merger Notification Act, p. 1, June 3, 2024. See also Memorandum 2024–25, pp. 15–16 for a discussion of state notification provisions and coordination between state and federal agencies.

[143] See, e.g., the Office of Health Care Affordability's regulations for Material Change Transactions and Pre–Transaction Review.

merger law under which it can challenge these transactions. Currently, California must bring an action in federal court to challenge a merger under the Clayton Act.

Arguments for:

- Much of the growth and emergence of dominant companies in many sectors in California such as in agriculture, health care, and entertainment are attributed to mergers and acquisitions.[144]
- California should have its own merger notice law that requires information about the effect of the merger within California, includes a filing fee to cover costs of review, and bars laches from running on any merger challenge based on the receipt of the filings.[145]
- Big Tech has achieved its dominance through mergers and acquisitions; in 2019 and 2020 alone they acquired over 70 companies.[146]
- The federal agencies are resource constrained in their review of mergers.[147]
- Antitrust enforcement has failed labor by ignoring the effects of mergers on workers and allowing employers to increase their market power. California should have own merger law because labor markets are mainly local and federal law is not stable, nor is federal enforcement reliable. California should have its own merger law similar to Section 7 of the Clayton Act and should affirmatively state that federal law is not binding on state courts.[148]
- Decades of entertainment sector consolidation caused 11,500 writers to strike for their share of the industry growth. The Commission should recommend that merger reviews consider the impact on workers, enhance enforcement against abuses of dominance, conduct merger retrospectives, and allow the state's antitrust enforcers to regulate anti–competitive behavior in concentrated industries.[149]
- Merger law needs an alternative to the consumer welfare standard, should reintroduce structural presumptions and bright–line rules in vertical and horizontal mergers, shift the burden of proof in merger challenges onto merging parties, minimize the weight given to "efficiencies," and consider the labor effects of mergers.[150]
- California needs its own merger review process and the ability to consider

[144] Memorandum 2024–14, p. 1.

[145] Letter from Michael Strumwasser and Andrea Sheridan Ordin on behalf of the United Food and Commercial Workers Western States Council, pp. 15–16, March 14, 2024.

[146] A. Garcia, *Why Has California Waited So Long to Enact Its Own Merger Review Law?* 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 99, 101 (2023).

[147] A. Garcia, *Why Has California Waited So Long to Enact Its Own Merger Review Law?* 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 99, 102 (2023).

[148] Letter from Michael Strumwasser and Andrea Sheridan Ordin on behalf of the United Food and Commercial Workers Western States Council, pp. 2, 9–11, 13, March 14, 2024.

[149] Letter from Writers Guild of America West, June 12, 2024.

[150] Writers Guild of America West, Broken Promises, Media Mega–Mergers and the Case for Antitrust Reform, December 2021, p. 9.

worker and nonprice harms. The Commission could look to the Office of Health Care Affordability for examples on pre–transaction notice requirements.[151]

- California should adopt a pre–merger notification law only in conjunction with additional measures relating to payment of fees to the Attorney General, expanded staffing of the Antitrust Law Section, and penalties for violations.[152]

Arguments against:

- California lacks the resources to review more than approximately five mergers per year.[153]
- California should avoid adopting state–level laws that do not align with federal HSR requirements. Because many California–based companies conduct business in multiple states or globally, a patchwork of state proposals will be unworkable and chill merger activity, most of which is procompetitive and beneficial to consumers.[154]
- If California adopts new substantive tests and analytical approaches to mergers and acquisitions, it may chill competitively neutral or beneficial transactions. Uncertainty regarding legality under new standards increases business costs and stifles innovative businesses.[155]
- Reforms making it easier to challenge mergers might heighten the risk of blocking some pro–competitive mergers. A separate California law could impose significant burdens on California authorities and the merging parties.[156]

If so, should California Adopt the Lower "Appreciable Risk" Standard for Proof of Harm in Any Merger Review?

The federal Clayton Act prohibits mergers whose effect "may be to substantially to lessen competition or tend to create a monopoly."[157] Though this language has remained unchanged since its adoption in 1914, courts over the decades have required ever stricter proof of prospective harm from a merger – a standard that is closer to "likely to cause harm."[158] CALERA recommends that the Clayton Act be amended to include a standard that prohibits mergers whose effect may be "to create an appreciable risk of materially lessening competition" in order to rebalance the standard of harm.[159] Should California do

[151] Letter from California Nurses Association/National Nurses United, June 19, 2024.
[152] Memorandum 2024–35, p. 21.
[153] Memorandum 2024–35, p. 11.
[154] Letter from the Civil Justice Association of California, p. 2, August 2, 2024.
[155] Letter from Eric P. Enson on behalf of the California Chamber of Commerce, p. 10, June 18, 2024.
[156] S. Melanson and M. Yeates, *The Risks of Requiring California–Specific Merger Approvals*, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 117, 118 (2023); Memorandum 2024–25, p. 21.
[157] 15 U.S.C. § 13.
[158] Letter from John Newman, June 19, 2024.
[159] S.4308 (Klobuchar) 117th Congress (2024).

the same?

Arguments for:

- What constitutes "substantial lessening" of competition under the Clayton Act has shifted over time. Before the 1970s, merger law was applied to prevent increased market concentration in its incipiency, accepting a strong presumption of harm from increased market concentration as low as five percent. However, the Chicago School approach treated growing concentration as more efficient and desirable, heralding a retreat from many merger challenges. Now, the FTC and DOJ are embracing a post–Chicago school of thought that is concerned with rising concentration and questioning key Chicago School assumptions about self–correcting markets.[160]
- Supporters of changing to an "appreciable risk" standard argue U.S. federal antitrust law has lagged behind efforts of other developed countries, particularly when it comes to enforcement against dominant digital platforms and other large corporations, and that the goal of the new merger standard is to stop single firm monopolies in their inception.[161]
- California needs a merger law with an "appreciable risk" standard to increase statutory clarity and pave the way for state courts to develop a more sophisticated and effective body of caselaw.[162]

Arguments Against:

- An "appreciable risk" standard might risk thousands of ultimately procompetitive mergers. It is not clear how a stricter standard would be worthwhile.[163]
- The "appreciable risk" standard has been criticized as confusing and garbled and its vagueness could result in frivolous litigation.[164]

Other Suggested Changes to California Antitrust Law

In addition to the considering the larger antitrust issues of mergers, single firm conduct, and Big Tech, ACR 95 directed the Commission to consider other changes that might be made "to promote and ensure the tangible and intangible benefits of free market

[160] A. Deluard, Competition Beyond Rivalry: Adapting Antitrust Merger Review to Address Market Realities, 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 108–109 (2023).

[161] S. Torpey, B. Annette, and Q. Cummings, Should California Adopt Revisions Proposed by Congress and the New York State Legislature to Address Single Firm Conduct? 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 12, 15 (2023).

[162] Letter from John Newman, p. 2, June 19, 2024.

[163] Letter from Information Technology & Innovation Foundation, p. 7, June 20, 2024.

[164] S. Torpey, B. Annette, and Q. Cummings, Should California Adopt Revisions Proposed by Congress and the New York State Legislature to Address Single Firm Conduct? 33 No. 1 Competition: J. Anti. & Unfair Comp. L. Sec. Cal. L. Assoc. 12, 18 (2023).

competition for Californians."[165]

Following are recommended changes to the Cartwright Act from the working groups:

- Clarify that the standing requirement under the Cartwright Act is different from the Sherman Act and is based on general proximate cause rules, i.e. that the plaintiff is required to show that an antitrust violation was merely the proximate cause of its injuries.[166]
- Clarify that vertical minimum resale price maintenance agreements remain per se unlawful.[167]
- Add an amendment declaring that contractual waivers of treble damages, attorneys' fees, and statute of limitations in antitrust cases are unenforceable as against public policy.[168]
- Allow courts to use "structured rule of reason" in evaluating certain antitrust cases.[169]
- Eliminate the distinction between commodities and services made by some federal courts.[170]
- Clarify whether California law on tying allows a legitimate business justification defense.[171]
- Revise or delete specific subsections of the Cartwright Act, as specified, to achieve greater clarity towards antitrusts law's broader purposes.[172]
- Reconsider certain exemptions such as the regulation of beer by the Alcoholic Beverage Control Board, occupational licensing, and agricultural marketing boards.[173]
- Reduce the pleading standard in antitrust cases to align with the standards prevailing in other areas of law to allow consumers greater access to the courts.[174]
- Allow circumstantial evidence of conspiracy because direct evidence of conspiracy is almost entirely in the defendants' possession.[175]
- Allow plaintiffs access to discovery during the pendency of a motion to dismiss to allow the correction to pleadings where certain elements have not been met, but while there is still veracity to the claims.[176]

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[165] 2022 Cal. Stat. res. Ch. 147.
[166] Memorandum 2024–35, pp. 9–10.
[167] Memorandum 2024–35, pp. 13–14.
[168] Memorandum 2024–35, p. 22.
[169] Memorandum 2024–35, p. 6.
[170] Memorandum 2024–34, p. 62.
[171] Memorandum 2024–34, pp. 62–63.
[172] Memorandum 2024–34, pp. 63–64.
[173] Memorandum 2024–35, pp. 19–21.
[174] Memorandum 2024–14, p. 17.
[175] Memorandum 2024–14, pp. 17–18.
[176] Memorandum 2024–14, p. 18.

- Reduce the need to plead or prove market definition in rule of reason cases where there is sufficient evidence of a price or wage effect.[177]
- In addition to adding a California provision banning anticompetitive single firm conduct, the Legislature could clarify that the Cartwright Act is broader than federal antitrust law and should not be bound by federal antitrust decisions.[178]
- Consider precluding merging parties from raising the nonaction of federal antitrust agencies in a merger challenge brought by the California Attorney General.[179]

Further recommendations for changes to the Cartwright Act from public commenters include:

- Justifications for any restraint should be limited to those in the same market as the restraint and to the person harmed.[180]
- Pass–along cases and pass–along defenses[181] should both be allowed, with expert testimony on both sides. The actual damages shown could then be trebled, as per California public policy.[182]
- Eliminate market–share–based safe harbors in conduct cases. A threshold of market power should not be required if there is evidence of harm.[183]
- Clarify that no single particular type of effect is required to show monopoly power and anticompetitive effects should include any negative impact from exclusionary or collusive conduct, not just higher prices, and lower output.[184]

The Single Firm Conduct Group recommended amending the Unfair Practices Act[185] in two ways:

- Narrow the exemption for "privately owned public utilities" to apply only when the California Public Utilities Commission actually regulates rates, not merely when the entity is subject to PUC jurisdiction.[186]
- Consider altering the standard for proving an Unfair Practices Act case. The

[177] Memorandum 2024–14, p. 18.
[178] Memorandum 2024–15, p. 15.
[179] Memorandum 2024–35, p. 12.
[180] Letter from the American Economic Liberties Project, California Nurses Association, Democracy Policy Network, Economic Security California, Ending Poverty in California, Farm Action, Greenlining Institute, Institute for Local Self–Reliance, Liberation in a Generation, Rise Economy, Small Business Majority, TechEquity Action, United Food and Commercial Workers International Union Western States Council, Warehouse Workers Resource Center, and Writers Guild of America West, p. 8, April 24, 2024.
[181] Also known as a "pass–on" defense, this is a way for a defendant to argue that they were not harmed by an antitrust violation because they passed on any overcharge or undercharge to someone else in the distribution chain.
[182] Letter from Tom Campbell, p. 4, March 13, 2024.
[183] Letter from John Newman, p. 4, June 19, 2024.
[184] Letter from John Newman, p. 5, June 19, 2024.
[185] Bus. & Professions Code §§ 17000 – 17101.
[186] Memorandum 2024–15, p. 18.

below–cost pricing provision requires the plaintiff to prove that the defendant's purpose in setting pricing was to destroy a competitor, not merely for business purposes; courts should not accept self–serving declarations to undermine the thrust of this provision and there should be a limit on evidence on purpose. [187]

The Uniform Law Commission's Draft Antitrust Pre-Merger Notification Act

In addition to the expert working group reports and public comments received by the Commission, representatives of the Uniform Law Commission (ULC) presented the ULC's draft of a uniform Antitrust Pre-Merger Notification Act to the Commission.[188] The ULC's draft is intended to be a simple, non–burdensome mechanism for state attorneys general to access HSR filings at the same time as the federal government.[189] According to the ULC, "[b]y providing AGs earlier, confidential access to HSR filings, it is not intended to suggest any view on the merits of the mergers they may review or how they should wield their investigatory and litigation powers." It is the staff's understanding that the ULC intends to seek introduction of legislation implementing the act in several states, including California.

Respectfully submitted,

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[187] Memorandum 2024–15, p. 18.
[188] See Memoranda 2023-49 and 2024-24.
[189] Uniform Law Commission, Draft Antitrust Pre–Merger Notification Act, p. 2, June 3, 2024.