MEMORANDUM 2025-52

Antitrust Study
(Public Comment, Update to Commission-Approved Language, and Draft of Tentative Recommendation)

At its September 2025 meeting, the Commission[1] directed the staff to prepare a draft tentative recommendation for Single Firm Conduct (SFC).[2] In addition to preparing introductory language as authorized by the Commission, the staff also identified several technical corrections, detailed further below.

This memorandum also contains public comment received on and since the Commission's prior meeting relating to SFC and the draft tentative recommendation.

PUBLIC COMMENTS & STAFF DRAFT TENTATIVE RECOMMENDATION

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

Small Business Majority

This comment was submitted by Bianca Blomquist, the California Director of Small

[1] Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website. Other materials can be obtained by contacting the Commission's staff, 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.

[2] Memorandum 2025-44, pp. 4-8.

Business Majority. According to its website:

> Small Business Majority is a national small business organization that empowers America's diverse entrepreneurs to build a thriving and equitable economy. We engage our network of more than 85,000 small businesses and 1,500 business and community organizations to deliver resources to entrepreneurs and advocate for public policy solutions that promote inclusive small business growth. Our work is bolstered by extensive research and deep connections with the small business community that enable us to educate stakeholders about key issues impacting America's entrepreneurs, with a special focus on the smallest businesses and those facing systemic inequities.

California Waste Haulers Council

This comment was submitted by J. Kelly Astor, General Counsel for California Waste Haulers Council (CWHC). According to its website, CWHC is coalition of independent refuse associations and its objectives are:

- To promote the general welfare and business interests of our members;
- To encourage the highest standards of ethical business practices among our members in the public interest;
- To work for the benefit and the fostering of goodwill for the members of the waste management industry throughout the State of California and the State of Nevada;
- To afford to all agencies of government on the federal, state, county and city levels a means of cooperation and coordinated effort to the most efficient and economic standard of collection, disposal and recycling of refuse materials.
- To foster and further the American principle of free enterprise and competition.

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

This comment was submitted by United Food and Commercial Workers Western States Council and cosigned by the entities above. According to its website:

> The United Food and Commercial Workers Western States Council is the regional coordinating body of 11 UFCW local unions representing over 200,000 workers in California, Arizona, Nevada, and Utah. The Council is a part of the 1.2 million member strong UFCW International Union. UFCW members are standing together to improve the lives of workers, families, and communities.

Airlines for America

This comment was submitted by Sean Williams, Vice President of State and Local Government Affairs. According to its website:

> Airlines for America (A4A) is the trade association for the leading U.S. airlines, both passenger and cargo carriers, prioritizing safety and security during this time of record passenger volumes and increased reliance on air cargo shipments. Every day, U.S. airlines operate 27,000 flights carrying 2.7 million travelers and 61,000 tons of cargo while supporting 10 million U.S. jobs and 5 percent of GDP.

Biocom California

This comment was submitted by Claire Conlon, the Senior Director of Government Affairs for Biocom California. According to its website:

> For over 30 years, Biocom California has helped move the life science industry forward with transformative resources that enable companies to make meaningful connections. Biocom California harnesses the collective power and experience of the most innovative and productive life science clusters in the world, with powerful advocacy and transformative programs to help companies in their quest to improve the human condition.

Update to Commission-Approved Language

In addition to drafting an introductory paragraph for the nonexclusive list of elements of federal precedents, the staff is recommending technical changes to the language previously approved by the Commission[3] for clarity and to conform to code style.[4]

In the section relating to California's laws, preferences, and priorities (proposed Section 16730), the staff recommends revising the statement to refer to the proposed statutes relating to Single Firm Conduct rather than Chapter 2:[5]

> (a) The purpose of this ~~chapter~~ <u>this section and Sections 16729 and 16731</u> is the promotion and protection of free and fair competition, which is fundamental to a healthy marketplace that protects all trade participants, including workers and consumers, and to an environment that is conducive to the preservation of our democratic, political, and social institutions.[6]

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[3] Memorandum 2025-44, pp. 4-8.

[4] This Memorandum does not discuss minor technical changes made to conform to code style.

[5] Chapter 2 (commencing with Section 16700 of Part 2 of Division 7 of the Business and Professions Code) relates generally to "Combinations in Restraint of Trade."

[6] The staff notes that as the Commission moves forward with potential language relating to Mergers and Acquisitions the Commission should consider whether any new proposed statue should also be included in this subdivision.

The staff believes this reflects the Commission's intent in crafting proposed Section 16729 and avoids any confusion about whether the Commission intended to make changes to other statutes in that Chapter.[7]

In proposed Section 16730, the staff also recommends replacing "including" for "and" in reference to the basic purpose statement to clarify that the basic purpose statement is part of existing law.

> (d) Federal ~~caselaw~~ case law on the subject of this article is not binding on California courts, but courts may consider federal ~~caselaw~~ case law as persuasive authority to the extent they find it consistent with California law ~~and~~, including 16729.[8]

Next the staff is recommending in subdivision (e) of proposed Section 16730 that the Commission clarify that California agrees with the federal Department of Justice and the Federal Trade Commission's views as specified *in the 2023 Merger Guidelines* related to the concepts stated. The staff is concerned that without a reference to a specific document or point in time, the language is an unlawful delegation of authority[9] in broadly referencing how those two federal authorities view various potential impacts to competition. As noted in prior memoranda,[10] the Merger Guidelines, as well as the general direction of those agencies, are periodically revised. Further, the staff recommends changing "joining" to "agrees with" for clarity.

The staff suggests the following amendment:

> (e) California ~~joins~~ agrees with the U.S. Department of Justice and Federal Trade Commission's 2023 Merger Guidelines in recognizing that unilateral action and multiparty actions, horizontal and vertical relationships, and various forms of corporate entities can interfere with free and fair competition.

Finally, in the proposed statute relating to judicial guidance, the staff noted that (i) should be separated into two subdivisions because it represents distinct concepts, and the latter concept should be rephrased to grammatically harmonize with the introductory paragraph.

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7 Id.

8 The staff notes that as the Commission moves forward with potential language relating to Mergers and Acquisitions the Commission should consider whether any new proposed statue should also be included in this subdivision.

9 An unconstitutional delegation of authority occurs when the Legislature (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy. *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 190. See also Memorandum 2022-52, EX 6 for a fuller discussion of this concept.

10 Memoranda 2025-11, p. 3; 2025-31, p. 7, n 39.

The staff suggests the following amendments:

Section 16731 is added to the Business and Professions Code to read:

Although the following nonexclusive list may constitute evidence of a violation of Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code, California law does not require a finding of any of the following to establish liability:

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

(j) A "relevant market" must be defined where there is direct evidence of market effects or power.

The draft tentative recommendation is attached. The draft proposes a public comment deadline of January 9, 2025.This would mean the Commission could consider any additional public comment at its January 23, 2025, meeting.[11] **The Commission needs to decide whether to approve it for release as a tentative recommendation, with or without additional changes.**

Respectfully submitted,

Sarah Huchel
Chief Deputy Director

Sharon Reilly
Executive Director

[11] This is a proposed Commission meeting date from Memorandum 2025-46, p. 2.

September 22, 2025

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

Re: Single firm conduct

Dear Chair Carrion and members of the commission,

Thank you for the opportunity to comment, and for your ongoing commitment to keeping California's antitrust laws strong to protect small businesses. Small Business Majority has submitted several coalition letters, and today I want to share comments from four small business owners in Modesto, Granite Bay and Redwood Valley. In the interest of time, I will read one of these statements after my brief remarks, and with your permission, submit the others for the record.

The principles under discussion are critical: protecting small businesses from unfair practices by dominant competitors, ensuring mergers and acquisitions don't reshape markets to exclude smaller players, and preventing misuse of market power that leads to unfair, day-to-day practices draining small business resources and innovation.

My name is Bianca Blomquist and I'm the California Director for Small Business Majority, a national research, advocacy and education organization representing 85,000 small business owners across the country to promote inclusive small business growth. Two-thirds of our network are business owners of color, and an additional two-thirds are women entrepreneurs. These are the small businesses that are our state's most prolific job creators, and these are the businesses most harmed by unfair market competition.

Small Business Majority has been following the Commission's work closely. The draft language on single-firm conduct has been before you for months, and over the past six months we have supported Option 2, the findings and the enhanced purpose statement. The public has also emphasized the need to provide the Legislature with your guidance soon, so they can prepare for next year. From our perspective, the three elements of single-firm conduct are ready for a vote. We urge the Commission to move forward—approve what is ready now, and continue your work on misuse of power and mergers separately.

Our national poll of small business owners shows a growing unlevel playing field between small and large companies:

- 56% say one or more large companies dominate their industry
- 56% also agree large companies have an unfair advantage
- 44% say monopolistic practices have increased in recent years
- 83% believe large companies have the resources to take small businesses' creative ideas, mass produce them and drown them out with market power
- And 82% agree our economy is changing and it's time to update our laws

The business testimony I will read demonstrates the realistic harms from Single Firm Conduct and demonstrates support for giving California explicit statutory tools to challenge harmful unilateral behavior by dominant firms, such as monopolization or exclusion.

Savannah Williams, Owner, Digital Media Services by Savannah Williams, Modesto, CA

"As a one-person digital media business, I've seen firsthand how the system is rigged against the little guy. My income is razor-thin, and the biggest obstacle isn't the work itself—it's the constant, overwhelming cost of simply trying to compete. Every little fee for marketing, software, and online marketplaces eats away at what I earn, making it impossible to grow.

The biggest challenge is not about the quality of my work; it's about the unfair advantages that large corporations receive. I'm FORCED to use the same platforms as multi-million-dollar corporations and run by multi-billion-dollar corporations, but I'm hit with the same fees and rules without any of the benefits they get from volume and scale. This means my business is directly competing against companies that pay less for the same services and supplies I need to survive.

For me, the risk is real. My innovative ideas and the unique services I offer could be copied and sold for cheaper by the same large corporation that owns the online marketplace, that can then afford to take a loss on a product for as long as it takes to put me out of business.

Policymakers need to understand that fair competition isn't just an abstract idea—it's about survival for small businesses like mine. When the deck is stacked against us, innovation and consumer choice suffer. The entire economy becomes less dynamic and less resilient."

Again, I urge you to adopt a modified version of Option 2 and thank you for your time.

Megan Wyatt, Owner, Wit & Whimsy Toys, Granite Bay, CA

Competitive disadvantages in pricing is one of the biggest problems for a store like mine. Big box stores can afford to have loss leaders or reduce profit margins because their volume of sales is high enough to make up for it, but a store like mine has to make every sale count.

On top of that, they get better prices for buying in the quantities that they do. There are also companies like Mattel that require such high yearly sales that I am priced out of ordering from them directly. So if I want Mattel products (for instance Barbie), I have to order through a distributor, which increases my cost, sometimes significantly. I can buy Hot Wheels (also Mattel) from Target cheaper than I can from a distributor. Not being able to carry such popular licenses drives customers to stores or online retailers that do carry them. As a result, I worry that customers will stop considering shopping at my store if they are consistently unable to find the products they are looking for.

For supplies and services, I have to assume they are getting better discounts than me. In terms of reach, we'll obviously never compete with Target, Amazon, etc. But that is not a huge concern for me. My focus is predominantly on my brick-and-mortar location and my community. My goal is to be part of the fabric of my community. I think that is what makes my business successful. We have certainly thought about expanding, but at a truly local level.

Consolidation is also a concern. One company [redacted] is buying up small businesses that I order from. This company is a giant pain to deal with, and they don't care because they have gotten so big. An account like mine means nothing to them. But now, I am having a harder time getting that product I was ordering directly from the company that created it, and who cared about my account. And that product starts popping up in box stores for less than I can charge for it. Then it becomes hard for me to carry that product and I have to find something to replace it with. Or decide to bite the bullet and reduce my profit margins and jump through the hoops to get my orders. As a consumer, consolidation is bad. Fewer companies overseeing more industry leads to monopolies and price increases and less choice. I think the current state of the airline industry is a prime example.

Krystyna Kurban, Owner, 352 Innovation LLC, Redwood Valley, CA

Krystyna has owned and operated 352 Innovation since 2022. She had a previous career as an engineer and decided to take her expertise to the next level by learning about electric vehicles and how they work. Through her training, she figured out that there is an untapped market. So, she created a program where she would consult other small business car shops and teach them the basics of how to service electric vehicles. But the more she talked with car shop owners, she realized the EV companies are keeping these shops out of the area. To fix an EV, shops will need to be EV approved shops. And if an EV is taken to a non-dealership shop, they may not be able to receive the certain parts they need due to the dealership and EV companies just not sending the parts to them. She is trying to help the smaller businesses as much as possible with her curriculum, but she can only do so much that the market allows her to do.

She also has a patent pending for multiple ideas that would help change car engine rebuilds and help save older cars. But she is beginning to run out of funds. She has thought of going into venture capital, but is worried once she does, she will be worked out of her company and then her ideas will get stolen from the larger companies that she would work with. She is trying to decide which would be the best option.

California Waste Haulers Council

October 17, 2025

Xochitl Carrion, Chairperson
and Members
California Law Review Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

Re: Antitrust Law - Study B-750

Dear Chairperson Carrion and Commissioners:

The undersigned is general counsel for the California Waste Haulers Council ("CWHC"), an industry trade association comprised of solid waste collection and recycling firms located throughout Southern California. The Council has a direct interest in discussions of possible revision to antitrust law because most California jurisdictions utilize the exclusive franchise tool in arranging the delivery of waste recycling and collection services.

The Commission's webpage identifies 3 issues that will be examined in the course of your study of antitrust law and the potential need for revisions to it. The first asks whether monopolies by single companies should be outlawed, and the third asks, in part, whether there should be any limitation of existing statutory exemptions to the state's antitrust laws. The second issue, which is specific to technology companies, does not appear to apply to the waste sector.

Because the first and third issues for determination carry significant potential impact to CWHC members and member companies, we are grateful for this opportunity to comment. This letter is intended to provide you with a basic understanding of how the solid waste industry has evolved, and how it operates in partnership with local government. In addition, we hope to convey that the exclusive franchise model is a necessary and important tool that must remain available to local jurisdictions and their service providers as California continues to lead the nation in solid waste recycling.

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BACKGROUND

1. The solid waste industry has been consolidating for many years. Some consolidation certainly occurred before 1990, because the collection of solid waste has always been a rather capital-intensive business, and there are efficiencies and corresponding cost-savings to be gained by transitioning from the single-truck operator model to small, multi-vehicle collection fleets.

2. Since 1990, operating costs have increased even more dramatically. This has, in turn, fueled more consolidation than might otherwise have occurred. That year is significant because then is when California, through passage of the landmark Integrated Waste Management Act of 1989 (AB 939), began to emphasize the importance of recovering and recycling solid waste, rather than simply disposing of it. In every year since 1990, solid waste policy and regulation has continued to expand, and with it the burden of ensuring regulatory compliance is achieved.

3. AB 939 required the development of an entirely new waste infrastructure. Before 1990, valuable metals and wastepaper were being recycled, but there was no system in place to address most other materials that lacked a ready market. It was instantly apparent that most local agencies, obligated by AB 939 to divert a greater portion of the waste stream, lacked the financial ability to undertake this effort. Consequently, they turned to their private-sector waste service providers to conceive, construct, and operate a new network of waste sorting and recycling plants (materials recovery facilities or "MRFs") able to receive and process materials that previously had been landfilled. From the hauling industry's perspective, this meant a shift from simply operating collection fleets, to also performing a host of new, labor-intensive and costly recycling activities.

4. Billions of dollars have been invested in waste infrastructure development since 1990. Alongside these "AB 939" investments, other investments were also made to comply with an array of new laws addressing air and water quality concerns, climate change, vehicle emissions, and other worthy environmental objectives. New money is invested every day as facilities and systems are upgraded and expanded to meet ever-increasing waste diversion policy goals.

4. These investments would not have been possible had local governments not been empowered to enter exclusive franchise arrangements with their service providers, because it is these agreements that form the basis for securing the needed investment. A lender's willingness to finance a new recycling collection fleet, a natural gas fueling station, or the construction of a MRF (each typically costing tens of millions of dollars), requires assurance that the borrower will have a continued right to operate, a reliable revenue stream, and in the case of MRFs, a sustained flow of material to be processed. The same considerations influence the borrower's decision making as well.

5. It bears mentioning here that the legal case for limiting competition in the delivery of solid waste handling services, by means of an exclusive franchise, was made well prior to 1990. As far back as 1905, the United States Supreme Court recognized the right of municipalities to grant exclusive contracts for solid waste collection (*California Reduction Co. v Sanitary Reduction Works of San Francisco*, 199 U.S. 306). Several other courts have since shown great deference to solid waste collection services provided through exclusive contracts. Notable examples include *Davis v City of Santa Ana* (1953) 239 P.2d 656; *City of San Marcos v Coast Waste Management* (1996) 54 Cal. Rptr. 2d 588; and *Waste Management of Alameda County, Inc. v Biagini Waste Reduction Systems, Inc.* (1998), 74 Cal. Rptr. 2d 676.

Most residents and businesses in this state are now receiving waste recycling services pursuant to an exclusive franchise. As mentioned earlier, while these arrangements predate the enactment of AB 939, that law has, without question, accelerated the trend and induced more communities to select the exclusive option. The benefits are widely known: the exclusive contract system facilitates local government control, oversight and information gathering, it promotes uniformity and continuity of service, it reduces vehicular traffic, it facilitates regulatory compliance, and it reduces the cost of service through geographic concentration of accounts and economies of scale.

EXCLUSIVITY

As the Commission may be aware, some 74 years after the 1906 *California Reduction Co.* decision, the Legislature in 1980 enacted former Government Code section 66757, which was later repealed and simultaneously recast in 1989 by AB 939 as Public Resources Code section 40059 (the "franchise law"). The bill creating this law was jointly sponsored by the California Refuse Removal Council (predecessor to the CWHC), the California Association of Counties, and the League of California Cities.

Prior to that time, local governments selecting the exclusive franchise option had relied on Article XI of the California Constitution, and on a series of appellate court rulings recognizing that the collection of solid waste is a core duty of local government, a valid exercise of municipal police power, and a proper subject of local control. In addition to the *Davis* case cited earlier, see also *Glass v Fresno* (1936) 17 CA2d 555, 558; *Ponti v Burastero* (1952) 112 CA2d 846, 853; and *Matula v Superior Court* (1956) 146 CA2d 93, 99, among several others.

The franchise law (substantially unchanged from that which was first adopted in 1980), expresses an explicit state regulatory scheme, and was written in direct response to concerns (at the time) over whether the common practice of exclusively franchising waste collection might suddenly be subject to legal challenge. Specifically, its purpose was to meet the eligibility requirements for application of the "State Action" doctrine first adopted in *Parker v Brown* (1943) 55 U.S. 341, the standards for which were later clarified in

California Retail Liquor Dealers Association v MidCal Aluminum, Inc., (1980) 445 U.S. 97 and in *Town of Hallie v City of Eau Claire* (1985) 471 U.S. 34.

Appellate courts construing the issue have concluded that the franchise law, now PRC section 40059, indeed satisfies the two-prong test for State Action immunity, namely, (1) the restraint on trade is clearly articulated and affirmatively expressed as a state policy, and (2) the policy is actively supervised. See *City of Camarillo v Spadys Disposal Service* (1983) 193 Cal. Rptr. 22, and *Tom Hudson & Associates, Inc v City of Chula Vista* (1984) 746 F2d 1370.

ANTITRUST CONSIDERATIONS

The Law Review Commission is considering (Issue 1) whether to revise the law to outlaw monopolies by single companies, and (Issue 3) whether to revise the law to limit existing statutory exemptions to the state's antitrust laws. We submit that it would be a grave mistake to either include the waste sector in a general ban on monopolies, or to limit the exemption that local governments and service providers currently enjoy.

To the extent that exclusive solid waste franchise arrangements may be considered monopolies, they are distinct from other practices which are the ordinary object of antitrust law:

- They are anticompetitive *by design.*
- They always include a governmental partner.
- Their purpose is the performance of an essential public service.
- They result directly from the decision by local government to limit competition in the interest of public health.
- They are embodied in complex franchise agreements containing extensive performance requirements and governmental oversight.
- Without exception, they specifically reserve, to the local government, the sole power to set rates.

These agreements do not stand alone; they are supported by local ordinance schemes which routinely prohibit anyone other than the authorized franchisee from engaging in the business of solid waste collection and recycling. This is a necessary predicate to enforcing exclusivity, and an effective means of assuring the cooperation of nonparties to the exclusive agreement.

If local governments or their recycling service providers were to be suddenly deprived of the safe harbor afforded by PRC section 40059 and thereby lose the right to lawfully enter into exclusive franchise agreements, or to continue performing under existing agreements, it is fair to say that chaos would likely result. Service disruptions, dramatic consumer rate increases, defaults on loan obligations, widespread employee layoffs, and threats to public health (the protection of which is a cornerstone of municipal police power over waste collection) resulting from lack of oversight, and accountability, are just some of the problems such a step may invite.

If the aim of competition is to protect ratepayers from price gouging or other ills commonly associated with certain monopolies, it bears repeating here that every exclusive solid waste franchise in existence reserves to the grantor/local government the power to set and control rates. Increasingly, many jurisdictions have also opted to follow the Proposition 218 (Cal Const art XIIID) protocol (notice, protest, hearing) when setting rates, adding a further layer of ratepayer protection. Every such agreement also incorporates extensive performance, penalty and default provisions for assuring high quality service. Thus, while exclusivity is, by definition, anticompetitive, these agreements include significant safeguards (unique to the waste sector) that have proven, through decades of experience, to be more than adequate in terms of protecting the public.

No local government has even been forced into an exclusive waste services agreement. All who have selected that option did so voluntarily, attesting to the fact that they have found benefit in such agreements, and at a level exceeding what they experienced in less-regulated environments.

Managing solid waste is an essential function of government, comparable in many respects to a public utility. Contactors rendering this service to local jurisdictions under an exclusive franchise agreement are extensively regulated and supervised by them. This form of solid waste handling service, therefore, merits treatment distinct from that of most other businesses. As the court in *Ponti* noted, decades before the franchise law was enacted:

> *"The common-law doctrine that monopolies are odious and therefore illegal refers to franchises and agreements in restraint of trade, and has no application to police regulations designed to promote the health or morality of the public, and, hence, it has no application to an exclusive contract for the removal of waste products such as garbage, refuse, decaying carcasses and similar waste matters, at least where they are a nuisance, offensive, or likely to be dangerous to public health."*

Finally, it must be acknowledged that there are areas of the state in which one or more waste service providers may possess a dominant market share. It is often the case that a jurisdiction that is displeased with its incumbent service provider will look to a neighboring city with a successful operator and engage that company on expiration or termination of its agreement with the incumbent. Typically, though not in every case, the process of making the switch follows an extensive and competitive procurement (RFP) process.

Particularly in rural or remote areas of the state, this can lead to one company emerging with a significant fraction of the local waste business. That fact alone must not lead to the conclusion that the public is being harmed. Indeed, if the newly selected company can offer superior service and better rates, there is no adverse consequence whatsoever for the consumer, who continues to receive protection over the life of the agreement by operation of the rate control, performance, and similar provisions mentioned earlier.

Insofar as dominant market share results from a merger or acquisition, each local jurisdiction has a vote, and it must still formally consent to the change in service provider, or it is excluded from the sale. In those (relatively few) instances involving the waste sector where the proposed merger is of a certain scale (i.e., exceeding the Hart-Scott-Rodino reporting threshold) the Department of Justice and/or the FTC are empowered to weigh in and to require that a portion of the assets are excluded from the purchase.

In short, local governments are not powerless. They are, and should remain, free to select their waste service provider as one of the "aspects of solid waste handling that are of local concern" pursuant to Public Resources Code section 40059. The law reserves this power to local governments for good reason; it is absolutely critical in terms of sustaining their ability to successfully meet the requirements of existing law, to say nothing of the new waste policies and regulations we expect to see emerge in the near future.

We accordingly urge against any change in antitrust law that would have the effect of denying local governments or waste service providers the ability to exclusively franchise for solid waste handling services.

Respectfully submitted,

J. Kelly Astor
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November 17, 2025

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

Re: Antitrust Law – Study B-750 Support for Formal Vote on Single-Firm Conduct Language on December 3rd

Dear Chair Simpson and Honorable Commissioners:

On behalf of a broad coalition of labor, consumer, small business, and nonprofit organizations,[1] we write respectfully, once again, (i) to acknowledge and thank the superb work of the Commission and its staff in addressing single firm conduct, (ii) to applaud the Commission for its related votes on September 18th, and (iii) to urge the Commission formally to vote to approve for public comment final, proposed single firm conduct language reflecting the decisions made on September 18th at its upcoming meeting on December 4th.

By our reckoning, on September 18th, the Commission voted to approve the following, with references to the language proposed or identified by staff in its Memorandum 2025-41, dated September 11, 2025:

Proceed with Single Firm Conduct

- The Commission voted unanimously to treat single-firm conduct as the first sequenced recommendation, separate from the broader antitrust package.

[1] The following organizations have endorsed this letter: American Economic Liberties Project; California Nurses Association; Consumer Federation of California; Democracy Policy Network; Economic Security California Action; End Poverty in California; Institute for Local Self Reliance; Rise Economy; Small Business Majority; TechEquity Collaborative; United Domestic Workers (UDW/AFSCME Local 3930); United Food and Commercial Workers Western States Council (UFCW); and Writers Guild of America West.

Option Selection

- **Discontinued Option 1**: Commission voted to direct staff to stop working on Option 1 (p.7)
- **Adopted Option 2**. Removed phrase "the free exercise of competition or the freedom of trade or production" as having no precedent in antitrust law. Rejected suggestion to add "directly or indirectly through another entity" language as already covered by existing "cause or direct" provisions.
- **"Unreasonable" treatment**: Commission decided against adding "unreasonable" language to statutory text, instead addressing this in comments to avoid creating new legal standards.

Evidence Standard

- **Rejected:** Proposal to raise defense evidentiary standard from "preponderance of evidence" to "clear and convincing." (pp. 10-11)

Basic Purpose Statement

- **Adopted:** Text in subdivision (a) minus the bracketed portion ("[The Legislature finds and declares]") that precedes it. (p. 13)
- Enhanced purpose statement language on labor competition protection incorporated into basic purpose statement

Enhanced Purpose Statement

The Commission voted to amend Staff's proposed Enhanced Purpose statement appearing at pp. 16-17 as follows:

- **Reorganized structure:**
    - Strike subdivisions (a) and (b)
    - Move case law from subdivision (a) into subdivision (d)
    - Current subdivision (d) becomes new subdivision (a).
    - Current subdivision (e) becomes new subdivision (b).
    - Current subdivision (c) remains.

Federal Precedent Clarification

- **Commission Decision**: Include a non-exclusive list of findings that courts are not required to make for liability determination (pp. 20-21)
- **Location**: Will be codified in the Business and Professions Code
- **Offset:** Commission voted to include language proposed by advocates prohibiting anti-competitive harm in one market being offset by benefits in separate markets (p.11)

- **Format**: Remove "Legislature finds and declares" language and instead use a format such as "Although the following may constitute evidence of a violation of [chapter/California law], California law does not require [findings for liability]"

Thank you again to both the Commissioners and the Commission staff for their excellent work on this important issue. We look forward to seeing the additional recommendations from the Commission as this process continues.

Sincerely,

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

November 24, 2025

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

Re: Comments of Airlines for America (Antitrust Law, Study B-750)

On behalf of Airlines for America's (A4A) members,[1] we appreciate the opportunity to comment on the California Law Revision Commission's (CLRC) proposed recommendation for potential amendments to California state antitrust laws.[2] A4A is the trade association for the leading U.S. passenger and cargo airlines, which today carry record passenger and air cargo volumes while prioritizing safety and security. Every day, U.S. airlines operate 27,000 flights carrying 2.7 million travelers and 61,000 tons of cargo while supporting 10 million jobs and 5 percent of the U.S. GDP.[3] We write to (i) affirm that the CLRC's proposed option is inapplicable to air carriers as a regulation of their rates, routes or services, and anything related thereto and (ii) highlight the significant and growing competition in the airline industry that benefits the traveling and shipping public.

First, the Airline Deregulation Act of 1978 ("ADA") preempts enforcement of state antitrust and consumer protection laws against the airline industry.[4] The ADA, championed by consumer advocates and economists, spawned a flurry of new entry and diversification of business models in the airline industry. In turn, those dynamics drove airlines to compete not only on product, but also on price. Prior to 1978, rigid U.S. regulation of airlines, via the Civil Aeronautics Board ("CAB"), served as a highly effective government-imposed barrier to entry. The CAB required an airline to obtain a CAB-issued certificate to fly a specific route, which led to a controlled and inefficient marketplace and left consumers unable to afford to fly. Markets were simply not contestable, because even in the face of high prices and market inefficiencies,

[1] A4A's members are Alaska Air Group, Inc.; American Airlines Group, Inc.; Atlas Air Worldwide Holdings, Inc.; Delta Air Lines, Inc.; FedEx Corp.; JetBlue Airways Corp.; Southwest Airlines Co.; United Airlines Holdings, Inc.; and United Parcel Service Co. Air Canada is an associate member.

[2] *See* Cal. Law Revision Comm'n, Memorandum 2025-44: Draft Minutes of Meeting on September 18, 2025, at pp. 4-8 (Oct. 23, 2025), https://clrc.ca.gov/pub/2025/MM25-44.pdf

[3] Airlines for America: Who We Are, https://www.airlines.org/who-we-are/ (last visited Nov. 12, 2025).

[4] *See* 49 U.S.C. § 41713.

an incumbent serving a route knew that a competitor could not enter that route overnight. Rather, through deregulation, Congress sought to place “maximum reliance on competitive market forces” to encourage “an air transportation system relying on actual and potential competition.”[5]

Importantly, to protect deregulation and the resulting democratization of air transportation, Congress also included a provision in the ADA to “ensure that the States would not undo federal deregulation with regulation of their own.”[6] Specifically, Congress made clear in the ADA that California may not “enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier.”[7] Courts, including the Supreme Court of the United States, have consistently held that this provision “express[es] a broad pre-emptive purpose” and applies to indirect state regulation affecting airline prices, routes or services.[8] Accordingly, we respectfully submit that the CLRC should recognize the limitations of its recommendation through Federally preempted.

Second, the airline industry’s competitiveness and its growth speaks for itself. Post-deregulation, the U.S. has benefited from a plethora of differing business models from global network carriers (“GNCs”) and lower cost network carriers to low-cost carriers (“LCCs”) and even ultra-low-cost carriers (“ULCCs”). Airline business models differ primarily by (1) network scope and product and (2) operational complexity. In general, as network scope (i.e., breadth of destinations served, fleet diversity required to serve those destinations) and product differentiation grow—along with the benefits consumers derive from those attributes—so too do the complexity and associated costs of providing air service.

Since 2000, lower cost carriers have been an engine of growth in the industry and taken a significant share of passengers away from the GNCs. In 2000, GNCs carried 73% of origin-and-destination (“O&D”) passengers. By the first half of 2024, that share had fallen to just 52%, meaning that lower-cost carriers now carry nearly half of all domestic passengers. Moreover, the share of domestic U.S. passengers with access to lower-cost carriers has soared from 62% in 2000 to 90% in the first half of 2024. In fact, more than 50% of domestic O&D passengers now have access to ULCCs, up from 26% just a decade ago, and have benefited from the arrival of two lower-cost startups—Avelo Airlines and Breeze Airways—in spring 2021. As lower-cost carriers grew rapidly, the growth of complementary GNC airline networks facilitated their ability to offer competitive connecting service on more O&D city pairs, expand nonstop service into new markets, and serve more travelers overall. The combination of these developments resulted in more competition and choice than ever for flyers, with the average number of competitors on domestic city pairs rising from 3.33 in 2000 to 3.39 in 2010 and to 3.48 in the first half of 2024.

We also note that in 2023, about 50% of U.S. domestic passengers traveled in city pairs with at least four effective competitors, 28.5% in markets with three competitors and 16.8% in markets with two competitors. U.S. passengers have also benefited from a proliferation of nonstop service in more markets over time. Notably, in 2023 about 57% of U.S. domestic passengers traveled in markets with at least three nonstop competitors, compared with 41% of the market in

[5] 49 U.S.C. § 40101.
[6] *Morales v. Trans World Airlines*, 504 U.S. 374, 378 – 379 (1992).
[7] 49 U.S.C. § 41713(b)(1).
[8] *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 220 and 222 (1995) (emphasizing that “the potential for intrusive regulation of airline business practices [is] inherent in state consumer protection legislation and holding, “the ADA’s preemption prescription bars state-imposed regulation of air carriers”).

2004. In 2023, only about 13% of the U.S. passengers traveled in markets without a nonstop service option, compared with 21% of the U.S. passenger market in 2004. Net new nonstop domestic service (i.e., new routes minus discontinued routes) by major carriers began on 459 nonstop O&D airport pairs between 2004 and 2024.

Airlines also adapt their services and develop products and technologies that meet customer demands. Airlines have broadly expanded choices for consumers, including basic economy and premium economy, while upgrading business class. As evidenced by the American Customer Satisfaction Index and other independently conducted surveys, airline industry customer satisfaction ratings are at record levels. Unbundling has given consumers a greater choice, including very-low-fare basic economy. Additionally, real fares, including ancillary fees, have continued to decline, due in large part to the low barriers to market and route entry—in stark contrast to the period of CAB regulation which predated the ADA.

The increasing role of ancillary pricing has benefited consumers by allowing carriers to 1) offer lower prices to price-sensitive passengers and 2) tailor products to consumer demand. Contrary to common misperception, however, it was not brought about by consolidation. Unbundling is a global phenomenon that commenced in earnest in 2008 amid the Great Recession. It was pioneered by lower-cost carriers such as People express in the 1908s and Ryanair, Easyjet, Frontier, Spirit, WestJet and others. For example, Canada has seen little recent consolidation, but ancillaries are just as critical to service offerings by network carriers and LCCs relative to their U.S. counterparts.

The ongoing successes of competition in the airline business depend on the once-in-a-generation reduction of regulation embodied in the ADA (including through the prohibition of state regulation by Federal preemption). They also depend upon U.S. antitrust law of the post-ADA period, which has provided a high degree of consistency, predictability, and structure to the analysis of competition in the airline industry. The benefits come from (1) a generally consistent framework for antitrust analysis between federal and state law (and, to some extent, consistency with international competition regulation); (2) decades of precedent allowing airlines and other industry participants to predict legal outcomes with relative efficiency and accuracy; and (3) relatively common-sense rules weighing the overall competitive effects of conduct and transactions and condemning only those behaviors and deals that are more likely to detract than to add to competition.

In sum, we encourage the CLRC to recognize and protect existing competition that has been attained through decades of consistent and predictable Federal regulation, especially the significant and growing competition in the airline industry.

We appreciate the CLRC's consideration of our comments. If you have any questions, please contact Sean Williams, Vice President, State and Local Government Affairs, at swilliams@airlines.org.

Biocom California

November 25, 2025

California Law Revision Commission
Richard Simpson, Chairperson
Victor King, Vice-Chairperson
Sharon Reilly, Executive Director
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

RE: Study B-750 (Antitrust Law) — Biocom California Comments

Dear Chairperson Simpson, Vice-Chairperson King, Executive Director Reilly, and Members of the Commission,

Thank you for the opportunity to provide comments on the Commission's ongoing study of California's antitrust laws under Study B-750. Biocom California is the world's largest life science organization, representing biotechnology, pharmaceutical, medical device, genomics and diagnostics companies of all sizes, research universities and institutes, clinical research organizations, investors and service providers. As published in our 2025 Economic Impact Report, the number of life science establishments in California increased to 17,220 in 2024, directly employing 452,455 workers, and generating $396 billion in total economic output for the state. These companies and organizations work on long timelines, carry significant scientific and regulatory risk, and make capital commitments that often span a decade or more. The legal rules governing competition, collaboration, and growth shape whether California is where these companies choose to locate operations.

Single Firm Conduct

The Single Firm Conduct "Option Two" risks creating duplicative, unpredictable, and costly enforcement separate from federal standards. Any proposed statute must be clear and understandable because companies rely on stable rules when forming collaborations, investing in manufacturing, or advancing a new therapy.

The Commission's draft approach to "single firm conduct" raises significant concerns for life sciences, biotechnology and medical device companies—particularly small and mid-stage firms—because it risks sweeping legitimate innovation-driven business practices into presumptively anticompetitive categories. Key concerns include:

- Overbreadth of liability standards. Many early-stage biotech companies operate in niche therapeutic or technological spaces where only a small number of entities are conducting similar research. This is particularly true in the rare disease space, which California has historically excelled in. A broadened definition of "dominant position" or "exclusionary conduct" could inadvertently apply to companies whose market share reflects scientific specialization rather than market power.

- Threat to legitimate IP-based business models. Licensing, exclusive research partnerships, technology-transfer agreements, and long-term supply arrangements are foundational practices in drug and device development. Under a broadened single firm framework, these scientifically necessary agreements could be mischaracterized as restrictive or exclusionary—even when they accelerate innovation and expand patient access.
- Unintended disincentives for investment. A strict or vague standard for single-firm conduct may cause investors to hesitate before funding companies with proprietary platforms, genomic tools, or manufacturing technologies, for fear that their commercialization strategies could trigger legal scrutiny.

For sectors whose progress depends on intellectual property rights, technology exclusivity, and specialized collaboration structures, the proposed single firm conduct framework introduces substantial legal uncertainty at the earliest and most fragile stages of development.

Mergers and Acquisitions (M&A)

Biotechnology and medical device innovation often relies on a development-stage ecosystem where acquisitions, strategic investments, and licensing-by-acquisition are essential pathways to commercializing scientific breakthroughs. Components of the Commission's M&A proposal may unintentionally impede that pipeline. Key impacts include:

- Risk of discouraging essential exit pathways. Most biotech startups depend on eventual acquisition or strategic partnership with a larger company due to the immense capital requirements of clinical trials, FDA approval, and global distribution. For these companies, the entire business plan is to enable discovery (or license same), achieve proof of concept, and get to a point in the FDA approval pathway where a drug candidate becomes an attractive target for companies with more commercialization resources and expertise. A more aggressive merger-control regime—particularly one that presumes harm based on size rather than evidence—could deter larger firms from acquiring or partnering with small innovators.
- Potential slowdown in patient access to new therapies. Many small companies lack in-house manufacturing, regulatory, and commercialization capacity. Acquisitions often accelerate the timeline in which promising therapies, devices, and diagnostics reach patients. Increased merger unpredictability or

mandatory dual federal–state review could significantly slow or block beneficial transactions.
- Increased transaction costs and duplicative reviews. Life science M&A transactions already undergo intense scrutiny at the federal level. A new state-level merger review process—especially one with different or conflicting presumptions—would add complexity, prolong timelines, and increase legal and administrative costs, disproportionately harming small and pre-revenue firms.
- Disruption to capital flow and early-stage financing. A primary consideration for investors when evaluating whether to fund a new platform, device, or therapeutic startup is the likelihood of future acquisition. If California institutes a uniquely stringent or unpredictable M&A review system, venture and private-equity investment may shift to more predictable jurisdictions. It is a likely consequence that funders will demand that their portfolio companies be moved out of California so as not to impede the possibility of mergers and acquisitions, causing irreparable harm to the state's life science ecosystem.

The proposed merger-related provisions risk slowing down or destabilizing the life-science innovation lifecycle, from seed investment to clinical trials to product launch. Many of these transactions involve smaller firms who rely on investment or acquisition by larger firms to bring innovations to patients. Overly rigid presumptions based on market share or arbitrary thresholds could block pro-competitive deals, slow innovation, and ultimately delay patient access to lifesaving treatments.

Across both single firm conduct and mergers, the life sciences industry depends on legal standards that are stable and workable in practice. Research and development programs take years and companies must make major commitments based on the legal environment they expect to face. Clear, consistent rules allow organizations to move forward and maintain California as the leader for scientific innovation.

Biocom California appreciates the opportunity to comment on the proposals before you, and offer our expertise should you wish to discuss further.

Sincerely,

Claire Conlon

Claire Conlon

Senior Director, State Government Affairs
Biocom California

#B-750

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT TENTATIVE RECOMMENDATION

Antitrust Law: Single Firm Conduct

December 2025

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative recommendation. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY **JANUARY 9, 2026.**

Submit comments to Sharon Reilly, sreilly@clrc.ca.gov

The Commission will often substantially revise a proposal in response to comments it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission

c/o Legislative Counsel of California
925 L St., Ste. 275
Sacramento, CA 95814
clrc.ca.gov

SUMMARY OF TENTATIVE RECOMMENDATION

In 2022, the Legislature tasked the California Law Revision Commission[1] with a substantive review of California's antitrust laws. Specifically, the Legislature directed the Commission to study and report on three antitrust topics:

(1) Whether the law should be revised to outlaw monopolies by single companies as outlawed by Section 2 of the Sherman Act, as proposed in New York State's "Twenty–First Century Anti–Trust Act" and in the "Competition and Antitrust Law Enforcement Reform Act of 2021" introduced in the United States Senate, or as outlawed in other jurisdictions.

(2) 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.

(3) Whether the law should be revised in any other fashion such as approvals for mergers and acquisitions and any limitation of existing statutory exemptions to the state's antitrust laws to promote and ensure the tangible and intangible benefits of free market competition for Californians.[2]

To assist the Commission, the staff retained an antitrust expert and assembled eight Working Groups comprised of leading antitrust academics and practitioners to examine various aspects of antitrust law.[3] After considering these reports and presentations by the Working Groups and public comment, the Commission determined California's laws should be revised to outlaw monopolies by single companies but those laws should not be revised in the context of technology companies. While the Commission is also considering recommendations to address mergers and acquisitions, the present recommendation reflects only its deliberations on single firm conduct. This recommendation also includes ancillary language describing the proposed statute's purpose and guidance to the judiciary for its interpretation.

This recommendation was prepared pursuant to Resolution Chapter 147 of the Statutes of 2022.

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1 Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Most materials can be downloaded from the Commission's website (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.

2 2022 Cal. Stat. res. Ch. 147 (ACR 95, Cunningham & Wicks).

3 The Commission's eight Working Groups and the Commission's antitrust expert, Ms. Cheryl Johnson, have contributed extensive and deep academic and practical knowledge of federal and California antitrust law See Memorandum 2023-37, pp. 2-4; 2023-11; 2023-16; and 2023-22.

EX 22

ANTITRUST LAW: SINGLE FIRM CONDUCT

ANTITRUST LAW: SINGLE FIRM CONDUCT

BACKGROUND

LEGISLATIVE ASSIGNMENT AND COMMISSION PROCESS

The Legislature enacted ACR 95 in 2022, which directed the California Law Revision Commission[4] to study California's antitrust laws and determine the following:

> (1) Whether the law should be revised to outlaw monopolies by single companies as outlawed by Section 2 of the Sherman Act, as proposed in New York State's "Twenty–First Century Anti–Trust Act" and in the "Competition and Antitrust Law Enforcement Reform Act of 2021" introduced in the United States Senate, or as outlawed in other jurisdictions.
>
> (2) 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.
>
> (3) Whether the law should be revised in any other fashion such as approvals for mergers and acquisitions and any limitation of existing statutory exemptions to the state's antitrust laws to promote and ensure the tangible and intangible benefits of free market competition for Californians.[5]

To facilitate the Commission's understanding of these issues, the staff retained an antitrust expert and assembled eight Working Groups of leading academics and practitioners to examine different aspects of antitrust law.[6] These economists and attorneys were selected to represent a range of perspectives on Single Firm Conduct, Mergers and Acquisitions, Concerted Action, Consumer Welfare Standard, Technology Platforms, Enforcement and Exemptions, Concentration in California, and Artificial Intelligence.[7]

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[4] Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Most materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise. All Commission meetings are recorded and available for viewing on the Commission's video archive, including Commission deliberations and oral public testimony on the Antitrust Study.

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.

[5] 2022 Cal. Stat. res. Ch. 147 (ACR 95, Cunningham & Wicks).

[6] Memoranda 2023-37, pp. 2-4; 2023-16; 2023-11; and 2023-07, pp. 2-5.

[7] The working groups were composed of the following individuals: *Single Firm Conduct*: Professor Aaron Edlin, UC Berkeley Law; Professor Doug Melamed, Stanford Law School; Sam Miller, UC Law San Francisco (visiting scholar); Professor Fiona Scott Morton, Yale School of Management; and Professor Carl Shapiro, UC Berkeley Law; *Mergers and Acquisitions*: Professor Richard Gilbert, UC Berkeley Economics; Professor Prasad Krishnamurthy, UC Berkeley Law; Professor John Kwoka, Northeastern University, Economics; Professor Daniel Sokol, USC Gould School of Law, Marshall School of Business; and Professor Guofu Tan, USC Dornsife, Economics; *Concerted Action*:

The Working Groups produced their reports independently of the Commission and each is different in form and substance. After the Working Groups finished their individual reports, they circulated them to the other Working Groups for comments prior to submitting them to the Commission. Although the groups were initially directed not to advocate for ultimate results,[8] the groups interpreted this direction variously.[9]

While the Working Groups prepared their reports, the Commission received an overview of antitrust law during a series of lectures from January through December 2023.[10] Representatives of each Working Group presented their reports to the Commission over a series of Commission meetings in 2024.[11] Following each presentation, the Commission heard from panels of individuals and organizations providing different perspectives on the same topics addressed by the Working Groups. Throughout the Antitrust Law Study process, the Commission received and considered robust public commentary from a wide range of individuals and organizations, with approximately 100 written submissions as of November 2025.[12] In addition, the Antitrust and Consumer Protection Section of the California Lawyers Association dedicated its Spring 2023 Competition Law Journal to articles relevant to the Commission's antitrust study.[13]

At its October 2024 meeting, to prepare the Commission for decisions at its next meeting, the staff presented a memorandum that summarized the reports, materials and written and public comments received to date during the course of the Antitrust Law Study, including

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Professor Peter Carstensen, University of Wisconsin School of Law; Professor Josh Davis, UC Law San Francisco; Professor Joseph Farrell, UC Berkeley Economics; Professor Christopher Leslie, UC Irvine School of Law; Julie Pollock, Berger Montague; Sarah Van Culin, Zelle LLP; and Judith Zahid, Zelle LLP; *Consumer Welfare Standard:* Professor Jorge Contreras, University of Utah College of Law; Professor Warren Grimes, Southwestern Law School; Professor Douglas Melamed, Stanford Law School; Heather Nyong'o, Cleary Gottlieb; and Professor Barak Orbach, University of Arizona, James E. Rogers College of Law; *Technology Platforms:* Abiel Garcia, Kesselman Brantly Stockinger LLP; David Kesselman, Kesselman Brantly Stockinger LLP; Professor Mark Lemley, Stanford School of Law; Professor Justin McCrary, Columbia Law School; Brantley Pepperman, Quinn Emanuel; Professor Steve Tadelis, UC Berkeley Economics; and Kevin Teruya, Quinn Emanuel; *Enforcement and Exemptions:* Kathleen Foote, California Department of Justice, Antitrust Section (ret.); Professor Roger Noll, Stanford Economics (emeritus); Marc Seltzer, Susman Godfrey LLP; and Dena Sharp, Girard Sharp; *Concentration in California:* Dean Harvey, Leiff Cabraser Heimann & Bernstein; Cheryl Johnson, California Department of Justice (ret.); Diana Moss, Progressive Policy Institute; Professor Barak Richman, Duke Law School; and Shana Scarlett, Hagens Berman; *Artificial Intelligence:* Abiel Garcia, Kesselman Brantly Stockinger, LLP; David Kesselman, Kesselman Brantly Stockinger, LLP; Professor Sam Miller, UC Law San Francisco; Diana Moss, Progressive Policy Institute; and Professor Fiona Scott Morton, Yale School of Management. For additional biographical information, see Memoranda 2023-11, 2023-16, and 2023-22.

8 Memorandum 2023-7, p. 1.

9 See e.g., Memoranda 2024-15, pp. 15-18 and 2024-26, pp. 11-12.

10 See Antitrust Law Study Page and Memoranda 2023-7, 2023-37, 2023-49.

11 Single Firm Conduct: Memorandum 2024-15; Mergers and Acquisitions: Memorandum 2024-25; Concerted Action: Memorandum 2024-34; Consumer Welfare Standard: Memorandum 2024-33; Technology Platforms: Memorandum 2024-26; Enforcement and Exemptions: Memorandum 2024-35; Concentration in California: Memorandum 2024-14; Artificial Intelligence: Memorandum 2024-47.

12 A list of written public comments with links can be found in the Index of Public Comments on the Antitrust Law Study Page.

13 Memorandum 2024-32, p. 3.

arguments for and against reform.[14] In January 2025,[15] the Commission directed the staff to propose draft statutory language to regulate single firm conduct (SFC) at the state level. The Commission further specified that this language should be distinct from federal law and not be industry specific. At its September 2025 meeting, the Commission voted to bifurcate its SFC recommendation from its deliberations on mergers and acquisitions and directed staff to draft a Tentative Recommendation on Single Firm Conduct for its meeting in December 2025.[16]

SINGLE FIRM CONDUCT

Current Federal and California law

The SFC Working Group explored how California and federal antitrust laws treat anticompetitive conduct by an individual company. Their report explains:

> Single-firm conduct can be purely unilateral, as when a firm designs its product to exclude rivals, discriminates against its rivals, or refuses to deal with them. Such conduct also can involve an agreement between the firm in question and other firms.[17]

The main law addressing SFC is Section 2 of the federal Sherman Antitrust Act, which states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…".[18]

California's main antitrust law, the Cartwright Act,[19] generally does not apply to conduct by a single firm to monopolize, exclude its competitors, or cause other anticompetitive harms. Rather, it focuses on the actions of "two or more persons."[20]

California also has the Unfair Practices Act,[21] (UPA) which was designed to "safeguard the public against the creation or perpetuation of monopolies,"[22] and the Unfair

14 Memorandum 2024-46.

15 Minutes of Commission Meeting on January 23, 2025, p. 4; see also Memorandum 2025-11, pp. 3-7.

16 Memorandum 2025-44, p. 5.

17 Memorandum 2024-15, p. 1.

18 15 U.S.C. § 2.

19 Bus. & Prof. Code §§ 16700 - 16770.

20 Bus. & Prof. Code § 16720; see also *Asahi Kasei Pharma Corporation v. Cotherix, Inc*. (2012) 204 Cal. App. 4th 1, 8 ("[t]he Cartwright Act bans combinations, but single firm monopolization is not cognizable under the Cartwright Act"); *Flagship Theaters of Palm Desert LLC v. Century Theaters, Inc*. (2011) 198 Cal. App. 4th 1366, 1386 ("[T]he Cartwright Act contains no provision parallel to the Sherman Act's prohibition against monopolization (15. U.S.C. § 2), and the Cartwright Act applies only to a 'combination' involving 'two or more persons' (§ 16720), not to unilateral conduct."); *Freehand Corp. v. Adobe* (N.D. Cal. 2012) 852 F.Supp.2d 1171, 1185 (ruling that the Cartwright Act does not address unilateral conduct); Memorandum 2024-15, pp. 9-20.

21 Bus. & Prof. Code §§ 17000 - 17101.

22 Bus. & Prof. Code § 17001. However, this retroactive declaration of purpose was made after the individual provisions of the UPA were enacted between 1913 and 1939; all were codified as the UPA in 1941. California Lawyers Association, *California Antitrust and Unfair Competition Law*, Section 17.01 (2023 LexisNexis).

Competition Law (UCL),[23] which protects the fairness of business practices. However, neither is written to effectively address the behavior targeted by the Sherman Act's Section 2. Although the UPA explicitly prohibits below cost pricing,[24] locality discrimination,[25] secret rebates and allowances,[26] and loss leaders,[27] each prohibition has its own specific limitations and defenses. This complex statutory scheme, together with its lack of singular focus on overall competition, hinders its usefulness as an enforcement vehicle.[28] Similarly, while expansive, the UCL is not an effective tool against single firm conduct because, among other reasons, it does not allow for compensatory damages or automatic attorney's fees, unlike existing provisions of the Cartwright Act and the federal antitrust laws.[29] This significantly limits the feasibility of pursuing most antitrust cases under the UCL.[30] Accordingly, despite the UCL, most efforts to challenge the anticompetitive conduct of a single company are brought in federal court under Section 2 of the Sherman Act.[31]

Section 2 generally prohibits anticompetitive conduct by a single firm that results in substantial market power or that creates a "dangerous probability"[32] of obtaining substantial market power.[33] Substantial market power is not illegal if it is obtained through fair means, like creating a better product.[34] However, it is unlawful if someone obtains a substantial market power through anticompetitive exclusionary conduct, like prohibiting a competitor from obtaining the materials it needs to create a rival product.[35]

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[23] Bus. & Prof. Code §§ 17200 - 17210.

[24] Bus. & Prof. Code §§ 17043, 17048.5.

[25] Bus. & Prof. Code § 17040.

[26] Bus. & Prof. Code § 17045.

[27] Bus. & Prof. Code § 17044.

[28] See generally California Lawyers Association, *California Antitrust and Unfair Competition Law*, Section 17.01 (2023 LexisNexis); Second Supplement to Memorandum 2024-13, EX 6.

[29] Bus. & Prof. Code § 16750 (a), (d), (i); see also *Carver v. Chevron U.S.A. Inc.* (2004) 119 Cal.App. 4th 498, 504 (Noting that the public policy implicit in the unilateral fee shifting provision of Cartwright Act is to encourage injured parties to broadly and effectively enforce Cartwright Act in situations where they otherwise would not find it economical to sue.) The Clayton Act, which governs enforcement of federal antitrust laws, mandates that successful plaintiffs are entitled to treble damages and reasonable attorney fees. Specifically, the statute states: "...any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S.C. §15(a)); This provision ensures that plaintiffs who successfully enforce antitrust laws are compensated for their legal expenses, encouraging private enforcement of these laws. See also *Uneedus v. California Shoppers, Inc.* (1978) 86 Cal.App.3d 932.

[30] Memorandum 2024-15, p. 11.

[31] Federal courts have exclusive jurisdiction to hear cases brought under the Sherman Act or other federal antitrust laws. See 15 U.S.C. §15; *Gen. Inv. Co. v. Lake Shore & Mich. S. Ry.* (1922) 260 U.S. 261, 287. Moreover, as noted by the Enforcement and Exemptions Working Group, "Since passage of the federal Class Action Fairness Act of 2005, most consumer class actions to enforce Cartwright [Act claims] have been heard in federal court." Memorandum 2024-35, p. 3. Further, it is "...federal court judges who now most often are those called upon to interpret the law with regard to Cartwright Act claims...." Memorandum 2024-35, p. 1.

[32] *Spectrum Sports, Inc. v. McQuillan* (1993) 506 U.S. 447, 456.

[33] Memorandum 2024-15, pp. 4-5.

[34] Memorandum 2024-15, p. 3.

[35] See Memorandum 2024-15, p. 4.

Section 2 is very brief, and in the absence of specific statutory direction, the federal courts have developed case law that explains which types of behaviors are anticompetitive.[36] Despite the fact that Section 2 has remained basically unchanged since its enactment in 1890, judicial interpretations have varied considerably over time and narrowed the scope of its application.[37] Moreover, the antitrust laws have not kept up with modern developments, as noted by the SFC Working Group:

> For example, the United States Supreme Court has held that low prices are lawful if the prices remain above cost. Although the Supreme Court acknowledged that aggressive price cuts can harm competition even if the prices remain above cost, it reasoned that a rule that required courts to make case-by-case determinations of the lawfulness of above cost prices would lead to too many mistakes and uncertainty about the law and would thus deter desirable price reductions. Thus, under federal antitrust law, a plaintiff asserting a claim for predatory pricing must show that the defendant's prices are below cost and that the market structure is such that the defendant has a reasonable probability of recouping its losses from below-cost sales once rivals are driven from the market. However, the continued usefulness of the federal predatory pricing rule is questionable when we observe that a rule created thirty years ago, when the digital economy was in its infancy, is poorly suited to products and services with very low or zero marginal costs, as it immunizes virtually all prices from predation claims for such products.[38]

The widespread recognition of the increasing inadequacy of state and federal antitrust laws to assure free and fair competition prompted the California Legislature's request to study antitrust law reform in the context of the modern economy.[39] Among other issues, current federal case law was not designed to address companies who offer their products for free.[40] The goal of antitrust law is to protect robust market competition in all markets,[41] and federal courts' rulings like the one cited above have made effectuating that purpose more difficult.

Public Comments Urging Antitrust Reform and Cautioning Against Antitrust Reform

Throughout the Antitrust Law Study process the Commission received numerous public comments that range from urging the Commission to draft legislation reforming California Antitrust law to comments questioning the need for any reform.[42]

Comments urging reform generally assert that it is essential to reign in the market power of many dominant companies not only in our digital markets but in our many other market

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[36] Memorandum 2024-15, pp. 6-7; see also Senate Judiciary Committee Analysis of ACR 95 (June 24, 2022).
[37] Memoranda 2024-15, pp. 6-7; 2024-34, p. 12-13.
[38] Memorandum 2024-15, p. 6, citing *Brooke Group v. Brown & Williamson Tobacco* (1993) 509 U.S. 209.
[39] 2022 Cal. Stat. res. Ch. 147 (ACR 95, Cunningham & Wicks).
[40] Memorandum 2024-15, p. 6, referring to *Brooke Group v. Brown & Williamson Tobacco* (1993) 509 U.S. 209.
[41] Memorandum 2024-33, p. 1.
[42] See Antitrust Law Study webpage, Index of Public Comments.

sectors including food, agriculture, gasoline, health care, labor and entertainment and to address the barriers that thwart new entry and business opportunities for many.[43] Labor organizations generally agreed that antitrust law has ignored and failed labor while allowing employers to increase their market power and secure advantages denied them by the labor laws.[44]

Comments arguing for no reform or very limited reform often referred to economic uncertainties that could result from any change in the law.[45] One commenter repeatedly objected that "there has been no empirical or analytical analysis showing that California consumers or businesses are suffering from reduced competition, higher prices or lessened innovation because of gaps in California law."[46] They also argue that changes in the law produces uncertainty for the business community that could in turn chill innovation.[47]

Need for a SFC Provision in California Law

Congress has not made any substantive changes to the Sherman Act since it was enacted in 1890. California adopted the Cartwright Act in 1907, and despite the fact that case law has determined that it does not apply to SFC, the Act has not been amended to add an explicit SFC provision. The vertical integration[48] of some of California's largest industries,[49] as well as the sheer scale of certain digital platforms[50] present unique competitive challenges not foreseen by the original antitrust law drafters. While successful challenges by the government against market malfeasants do occur under the current legal framework,[51] these successes are rare and require considerable resources to surmount the hurdles favoring the status quo.[52] Indeed, representatives in the federal government[53] and

[43] Memorandum 2024-46; see also the First, Second, and Third Supplements thereto.

[44] Id.

[45] See e.g. Memorandum 2025-30 EX. 12, EX. 102.

[46] See Memorandum 2025-30, EX. 12. Other commentators expressed similar views; see e.g. Memorandum 2025-30, EX 102-104; Second Supplement to Memorandum 2024-13, EX 34; First Supplement to Memorandum 2024-13, EX 47; First Supplement to Memorandum 2025-11, EX. 12-13, 35; Second Supplement to Memorandum 2024-46, EX 19.

[47] Id.

[48] The Mergers and Acquisitions Working Group defines a vertical merger as "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." Memorandum 2024–25, p. 7.

[49] See, e.g., Memorandum 2024-14.

[50] See Memorandum 2024-26, pp. 2-3.

[51] See e.g., *U.S. v. Microsoft* (D.C. Cir. 2001) 253 F.3d 34; United States et al. v. Google (D.D.C. Sept. 2, 2025) No. 1:2020cv03010, ---F.Supp. 3d ---, 2025 WL 2523010.

[52] See Memorandum 2024-33, pp. 5-6, in which the Consumer Welfare Working Group states "There is a broad consensus among scholars that these presumptions have eroded the capacity of the antitrust enterprise to protect competition." See also Seventh Supplement to Memorandum 2024-24, EX 2, in which Professor John M. Newman writes "In litigation, defendants can out-spend enforcers by orders of magnitude."

[53] See, e.g. Sen. No. 225, 117th Cong., 1st Sess. (2021).

states including New York,[54] New Jersey,[55] Minnesota,[56] and Pennsylvania[57] have recently attempted to augment their antitrust laws to address modern circumstances.

The Commission was persuaded by arguments, which echo majorities in the academic and enforcement communities,[58] that California should adopt legislation reaching SFC.[59]

Another motivating factor for developing a state SFC antitrust law is to allow California courts to adjudicate California antitrust matters. Currently, because California does not have its own SFC laws, any SFC claim is typically alleged under federal antitrust law and must be brought in federal courts. At a minimum, adopting a state law would allow such matters to be brought under state law, even if the claims are litigated in federal court,.[60]

The Commission then had to decide how to draft a state SFC law. Most other states with a SFC provision mirror federal law, but[61] multiple Working Groups cautioned against this.[62] By so doing, California would effectively import the decades of federal jurisprudence that has diluted the Sherman Act Section 2's original scope and strength.[63] Accordingly, many Working Groups recommended, and the Commission agreed, that California should adopt a SFC provision that distinguishes itself from federal law and those decisions that unduly hinder the competitive marketplace.[64]

The Commission, however, decided against adopting completely new antitrust language.[65] Many stakeholders argued that a new, untested antitrust framework could be risky and invite uncertainty, potentially chilling innovation and business growth.[66] Further, new antitrust provisions without federal precedent might also pose a significant challenge to state courts, who would be required to essentially build a new body of antitrust jurisprudence. As a result, the Commission settled on a hybrid approach that selectively draws on federal statutory and case law to ground the new California standard while reflecting California's values and enforcement priorities by tailoring guidelines, definitions, and presumptions to California's specific concerns.

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54 See, e.g. S6748B (Gianaris, 2023).

55 See, e.g. S3778 (Singleton, 2023).

56 See, e.g. HF 1563 (Greenman, 2023).

57 See, e.g. HB 2012 (Pisciottano, 2023).

58 See e.g., Memorandum 2024-15 and Seventh Supplement to Memorandum 2024-24, EX 7.

59 Minutes of Commission Meeting on January 23, 2025, pp. 3-4.

60 As indicated in n. 31, supra, the federal Class Action Fairness Act of 2005, Pub. L. 109.2, requires most consumer class actions brought under the Cartwright Act to be heard in federal court. Also, if the state antitrust claim is coupled with a federal claim, it must be filed in federal court.

61 Memorandum 2025-21, p. 3-4.

62 See e.g., Memoranda 2024–35, pp. 16, 21; 2024-15, pp. 1-2, 13. Other states with SFC provisions closely mirror the Sherman Act and/or contain harmonization provisions that require conformance with federal case law. See Memorandum 2025-21, EX A-2-3.

63 See Memorandum 2024-15, p. 13.

64 Memoranda 2024-15, pp. 6-7, 13; 2024-33, p. 8; 2024-26, pp. 7-8.

65 Minutes of Commission Meeting on June 26, 2025, p. 5.

66 See, e.g., Memorandum 2025-30, pp. 12-13.

Technology Companies and Firms with Substantial Market Power.

ACR 95 also asked the Commission to decide "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."[67] This question required an analysis of the current law's ability to rein in the negative competitive effects of major technology firms' conduct while preserving its benefits.

The Technology Platform Working Group report,[68] Congressional investigations and reports[69] and many public comments[70] detailed the unprecedented footprint of several digital platform companies, many of which are headquartered or have a substantial presence in California. These stakeholders shared concerns that certain practices by dominant companies such as self-preferencing,[71] discriminatory access,[72] exclusionary contracting,[73] restraints on data portability,[74] tying,[75] and killer acquisitions[76] may escape liability under Section 2's restrictive judicial interpretations.[77] The Commission was persuaded that current law is insufficient to curb current abuses among technology firms, but the law's failures are not unique to technology.[78] The Commission concluded that exclusionary practices by dominant companies in every industry have the capacity to harm competition, so any new law should not single out individual sectors but apply to all.[79]

The Commission also considered whether to create an adjusted SFC framework for companies holding significant market power.[80] Both proposed reforms noted in ACR 95,[81] the New York State Twenty-First Century Antitrust Act[82] and the Competition and Law Enforcement Reform Act,[83] contain "abuse of dominance" (AOD) provisions that makes it

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67 2022 Cal. Stat. res. ch. 147 (ACR 95, Cunningham & Wicks).

68 Memorandum 2024-26, p. 2; Technology Platforms Working Group Presentation transcript, June 20, 2024, p. 3.

69 These issues are discussed in the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets*, Majority Staff Report and Recommendations October 2020,, Pt. I at 391–98, and Pt. II, at 395-97 and Congressional Research Services, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, pp. 11, 22, 58.

70 See e.g., First Supplement to Memorandum 2024-32, EX 13; Seventh Supplement to Memorandum 2024-24, EX 7.

71 This generally refers to a company preferring its own products over those of competitors.

72 This generally refers to a company excluding potential competitors from access to their platforms. See Memorandum 2024-26, p. 2.

73 This generally refers to a company entering into exclusive contracts with customers or suppliers.

74 This generally refers to a company prohibiting, or making it quite difficult, for a customer to move their information between platforms.

75 Tying refers to the practice of requiring the purchase of a second item to purchase the first.

76 This refers to the practice of a company buying a competitor to prevent competition.

77 See Memoranda 2024-15, pp. 6-7, 14; 2024-33, pp. 6-7; 2024-26, pp. 7-8.

78 See e.g., Memorandum 2024-14, which discusses concentration in certain California markets.

79 Minutes of Commission Meeting on January 23, 2005, pp. 3-4.

80 The staff proposed the term "misuse of market power." Memorandum 2025-32.

81 2022 Cal. Stat. res. ch. 147 (ACR 95, Cunningham & Wicks).

82 S933 (Gianaris, 2021).

83 Sen. No. 225, 117th Cong., 1st Sess. (2021).

unlawful for a dominant entity to abuse that position to its competitive advantage. This concept is based upon a 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…."[84] Such a provision has long been a fixture of European and Canadian antitrust laws, which rest within very different legal, political, and enforcement frameworks from the United States.[85]

The Commission received numerous public comments arguing against adopting an abuse of dominance provision in California law.[86] The Commission ultimately decided against crafting separate laws for dominant companies, expressing concern about the vagaries and arbitrary nature of establishing thresholds for substantial market power, and differing standards of conduct and was wary of failed efforts in the United States.[87]

BACKGROUND ON TENTATIVE RECOMMENDATION

SINGLE FIRM CONDUCT OPERATIVE PROVISION

The staff presented the Commission three options to address SFC within the Cartwright Act. The first option used language similar to the Sherman Act,[88] but the Commission rejected this over concerns that tracking federal law too closely would risk implicitly endorsing its entire body of problematic jurisprudence.[89] The third option rejected by the Commission drew from the SFC Working Group's report,[90] which proposed language defining unlawful SFC in relation to its harm to trading partners, balanced against the benefits of the conduct. While attractive as a fresh alternative, this option received only support from its authors, with other commentators noting the risks inherent in pursuing a novel regulatory framework.[91]

The Commission instead supported the second option presented:

Section 16729 is added to the Business and Professions Code to read:

(a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events:

(1) In restraint of trade; or,

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84 *Treaty on the Functioning of the European Union*, Document 12008E102. 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." European Parliament, Fact Sheets on the European Union, *Competition Policy*.

85 See Memorandum 2024-26, p. 8.

86 See e.g. Memorandum 2025-43, pp. 3-5. First Supplement to Memorandum 2025-43, First Supplement to Memorandum 2025- 31 EX. 2.

87 Video of Commission Meeting on September 18, 2025.

88 Memorandum 2025-21, p. 2.

89 Video of Commission Meeting on September 18, 2025; see also Memoranda 2025-41, pp. 7-8; 2025-30, pp. 5-6; 2025-21, p. 3; 2024-15, p. 15.

90 Memorandum 2024-15, p. 16.

91 Memorandum 2025-30, pp. 10-13. The SFC Working Group submitted a public comment urging the Commission to adopt the third option. Id. at EX 110-111.

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

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

(c) Anticompetitive effects in one market from the challenged conduct may not be offset by purported benefits in a separate market; and the harm to a person or persons from the challenged conduct may not be offset by purported benefits to another person or persons.

Subdivision (a) describes the effects that make certain conduct illegal and clarifies that the law applies to conduct carried out both directly and indirectly.

Subdivision (a)(1) uses the phrase "restraint of trade" which is used both in the Cartwright Act[92] and in the federal Sherman Act § 1[93] and is intended to capture the full range of anticompetitive conduct by a single firm that may not fall within the currently restricted scope of federal or state law for multiple actors.[94] Some commentators asserted that the term "restraint of trade" could not be placed in a single firm context because it relates to multi-firm conduct.[95] However, the Commission did not find this argument compelling, as the "restraint of trade" language is intended to refer to a negative effect on competition[96] and the U.S. Supreme Court affirmed that restraints of trade can be performed by single firm actors as well as multiple companies.[97] Further, some argued that "restraint of trade" was too vague.[98] The Commission concluded, however, that while

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

[93] 15 U.S.C. § 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal…."

[94] *Cianci v. Superior Court* (1985) 40 Cal. 3d 903, 917-18.

[95] See Memoranda 2025-41, p. 41; 2024-34, p. 8 citing *Ben-E-Lect v. Anthem Blue Cross Life & Health Ins. Co.* (2020) 51 Cal. App. 5th 867, 872, as modified on denial of reh'g (July 22, 2020) ("The Cartwright Act prohibits all combinations created for or carrying out unreasonable restrictions in trade or commerce.") and *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2020) 55 Cal. App. 5th 381, 398–99, 269 ("The distinction between per se and rule of reason analysis stems from the fact that the Cartwright Act, like its federal counterpart the Sherman Act, prohibits not all agreements restraining trade, but rather agreements that unreasonably restrain trade.").

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

[97] *Copperweld Corp*. v. *Indep. Tube Corp.* (1984) 467 U.S. 752, 775. ("an unreasonable restraint of trade may be affected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints affected by a contract, combination, or conspiracy—it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability.") *Am. Needle, Inc. v. Nat'l Football League* (2010) 560 U.S. 183, 186.

[98] See Memorandum 2025-30, pp. 7-8.

"restraint of trade" is on its face broad and general, both the federal and California courts have substantial experience adjudicating this term.[99]

Subdivision (a)(2) uses language similar to Sherman Act §2[100] and adds "monopsony" and "to maintain monopoly or monopsony" to distinguish state law, highlight its application to all buyer-side transactions, including those in the context of employers and labor,[101] and prohibit the anticompetitive maintenance of monopoly power. [102]This structure, combining "restraint of trade" with Sherman Act § 2 language also borrows from other states that have both a SFC provision banning restraints of trade and a ban on monopoly conduct.[103]

Subdivision (b) clarifies that "restraints of trade" under this section includes but is not limited to any of the unlawful acts proscribed in the Cartwright Act, whether done by one person or multiple persons, directly or indirectly. *Copperweld Corp. v. Indep. Tube Corp.* (1984) 467 U.S. 752, 775 "an unreasonable restraint of trade may be affected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms."

Subdivision (c) was not originally included in staff drafts to the Commission,[104] but rather was suggested by multiple stakeholders[105] who argued that despite it being existing law,[106] courts sometimes permit an anticompetitive effect in one market to be offset by a pro-competitive benefit in another (also known as cross-market efficiencies) in SFC cases. The Commission included this provision to emphasize to the judiciary that anticompetitive effects may only be offset by benefits in the same market and to the same persons originally affected by the anticompetitive conduct.

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[99] See Memorandum 2025-41, pp. 9-10. "Restraint of trade" means "unreasonable" restraint of trade as recognized by the California Supreme Court in *In re Cipro Cases I & II* (2015) 61 Cal. 4th 116, 136.

[100] 15 U.S.C. § 2 states in part, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…."

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

[102] See e.g. *UFCW Local 1776 & Participating Employers Health and Welfare Fund v. Takeda Pharmaceutical Co. LTD.* (2nd Cir. 2021) 11 F. 4th 118; *Bloyer v. St. Clair County of Illinois* (S.D. Ill. 2016) 179 F. Supp. 3d 843;

[103] See e.g., Haw. Rev. Stat. Ann §§ 480-4, 480-9 and Idaho Code §§ 48-104, 48-105.

[104] Memoranda 2025-21, 2025-30.

[105] Memorandum 2025-41, EX 9.

[106] Cross-market efficiencies are prohibited in mergers, see *United States v. Philadelphia National Bank* (1963) 374 U.S. 321, but courts have sometimes permitted it in SFC cases. See e.g., *Epic Games, Inc. v. Apple, Inc.* (2023) 67 F.4th 946 at 989 (U.S. Supreme Court "precedent on cross-market balancing is unclear."); *NCAA v. Alston* (2021) 594 U.S. 69, 87 (declining to consider argument by amici that "review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury," when the parties had agreed in the trial court that cross-market balancing was appropriate). While the courts have refused to engage in cross-market balancing in cases of per se violations, *United States v. Topco Assocs., Inc.* (1972) 405 U.S. 596, 609-10 ("Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules.") one court considered with little discussion whether procompetitive benefits in one market justified anticompetitive conduct in a related one. See *NCAA v. Bd. of Regents of Univ. of Okla*. (1984) 468 U.S. 85, 104-108 (considering a procompetitive rationale regarding the college football tickets market when assessing anticompetitive conduct in the market for college football television).

PURPOSE STATEMENT

Many statutes, particularly those establishing a new legal framework,[107] begin with a statement of legislative findings and declarations to explain the purpose of enacting the law. These statements are not always codified in statute,[108] but are still relied on to interpret the statute. The Cartwright Act, within which the Commission's recommendation would be placed, presently has no such directive.

Although the Commission also drafts Comments that explain the reasoning behind each new or amended code section, these Comments are not available in all publicly accessible codes[109] and do not carry the same weight as codified law. Nor would a member of the public necessarily know how to research the bill underlying the code section to find uncodified law. For these reasons, the Commission recommended including language in the Business and Professions Code that establishes the Legislature's intent in revising California's antitrust laws and provides guidance for the new laws' interpretation.[110]

The Commission adopted this purpose statement:

Section 16730 is added to the Business and Professions Code to read:

(a) The purpose of this section and Sections 16729 and 16731 is the promotion and protection of free and fair competition, which is fundamental to a healthy marketplace that protects all trade participants, including workers and consumers, and to an environment that is conducive to the preservation of our democratic, political, and social institutions.

(b) Protecting competition includes protecting competition between businesses when they compete for workers by prohibiting anticompetitive business practices that impede workers' freedom to choose employment.

(c) The California Supreme Court has determined that the Cartwright Act is "broader in range and deeper in reach" than the federal Sherman Act;[111] courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors "maximizing" effective deterrence of antitrust violations;[112] and that the Cartwright Act is not modeled on the Sherman Act.[113] Further, California courts have recognized that the Cartwright Act departs from the Sherman Act in many respects, including, but not limited to, inclusion of indirect

[107] See e.g., the Digital Equity Bill of Rights, Civ. Code §§ 3120 - 3123; the California Whistleblower Protection Act, Gov't Code §§ 8547 – 8547.15.

[108] See e.g., 2025 Cal. Stat. ch. 782 (SB 720, Ashby).

[109] For example, the Office of Legislative Counsel's Legislative Information website provides public access to all of California codes, but it does not include relevant case law or Commission comments.

[110] The Commission also believed it was not necessary to preface the purpose statement with the phrase, "the Legislature finds and declares," because it is redundant, should the Legislature enact this recommendation as law.

[111] *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 920.

[112] *Clayworth v Pfizer, Inc.* (2010) 49 Cal. 4th 758.

[113] See Memorandum 2024-15, p. 8, n. 16, in which the SFC Working Group stated:

> As the California Supreme Court confirmed in the later case of *Aryeh v. Canon Bus. Sols., Inc*., 55 Cal. 4th 1185, 1195 (2013), '[i]nterpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal anti-trust statutes but instead on statutes enacted by California's sister states around the turn of the 20th Century.'

purchaser recovery,[114] use of a proximate cause test for Cartwright Act standing,[115] recognition of broader harms and per se conduct,[116] lower actionable market shares,[117] structured rule of reason analysis,[118] and differing burdens of proof.[119]

(d) Federal case law on the subject of this article is not binding on California courts, but courts may consider federal case law as persuasive authority to the extent they find it consistent with California law, including 16729.

(e) California agrees with the U.S. Department of Justice and Federal Trade Commission in recognizing that unilateral action and multiparty actions, horizontal and vertical relationships, and various forms of corporate entities can interfere with free and fair competition as reflected in the 2023 Federal Trade Commission and Department of Justice Merger Guidelines.

Subdivision (a) reiterates the fundamental goal of California's antitrust law, which is the promotion and protection of free and fair competition.[120] This subdivision also integrates portions of a California Supreme Court decision that describes the Cartwright Act as premised on the idea that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[121]

Subdivision (b) reiterates the law's dedication to worker's rights, also mentioned in (a), and as affirmed by the inclusion of "monopsony" in the statute containing the operative language.[122]

Subdivision (c) emphasizes the differences between the Cartwright Act and the Sherman Act. Although one of the goals in establishing a state SFC law is to allow state courts to adjudicate these cases, a case including a Cartwright Act claim may still be heard in federal court in some circumstances. For example a case may be litigated in federal courts if, it also includes a federal antitrust claim, is a class action, or is removable on diversity grounds.[123] Throughout the Antitrust Law study, the Commission heard from the working

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[114] Bus. & Prof. Code § 16720.

[115] Antitrust standing under the Cartwright Act requires a plaintiff show that an antitrust violation was the proximate cause of its injuries. See *Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723; Memorandum 2025-35, p. 7-10.

[116] Bus. & Prof. Code §§ 16720, 16750(a), 16600.1. Memorandum 2024-35, p.13-14.

[117] *Fisherman's Wharf Bay Cruise v. Superior Ct.* (2003) 114 Cal.App.4th 309, 326.a In this case addressing, among other things, exclusive dealing under the Cartwright Act , the court held that a 20% market foreclosure was enough to pursue a cause of action against a competitor.

[118] Memorandum 2024-35, p. 7; *In re Cipro Cases I & II*, (2015) 61 Cal. 4th 116, 147-148.

[119] *In re Cipro Cases I & II*, (2015) 61 Cal. 4th 116, 147-148.

[120] *See Clayworth v. Pfizer, Inc.* (2010) 49 Cal. 4th 758, 783.

[121] *In re Cipro Cases I & II* (2015) 61 Cal. 4th 116, 136.

[122] Proposed Bus. & Prof. Code §16729; see Memorandum 2025-21, p. 7; see also Memoranda 2024-14, pp. 4-6; 2024-25, p. 17. See also Bus. & Professions Code §§ 16600 – 16600.5 relating to California's broad prohibition on noncompete agreements.)

[123] See note 30 and Memorandum 2024-35, p. 3, 6, in which the Enforcement and Exemptions Working Group stated:

groups and multiple practitioners that federal courts frequently and incorrectly conflated the Cartwright Act with the Sherman Act.[124] This section is designed to address those circumstances by making it clear the state and federal antitrust laws are distinct in multiple ways.

Subdivision (d) clarifies that courts do not have to follow federal case law when interpreting California antitrust statutes, but they may consider federal case law persuasive to the extent it is consistent with California's laws and aligned with the Cartwright Act's purpose.

Subdivision (e) aligns California with themes in the 2023 Federal Trade Commission and Department of Justice Merger Guidelines.[125] Of note, the 2023 Guidelines "rely more on the theme of 'lessening competition' than on the language in the 1982, 1992, and 2010 Guidelines, which emphasized market power and its exercise."[126] The Commission was wary of including a specific reference to federal law and directed staff to delete the reference to the 2023 Guidelines in this section. The staff, however, recommends that the Commission include that reference so that the statute is not subject to differing interpretations if the Federal Trade Commission and the Department of Justice make changes in the future that depart from the Commission's intent in including this reference. Further, this avoids the potential concern that without such a reference the language is an unlawful delegation of legislative authority.[127]

JUDICIAL GUIDANCE

As noted above, California courts are not bound to federal antitrust case law, though the purpose statement notes they may use it as guidance to the extent the federal case law aligns with California state law. The Commission found certain federal precedents particularly

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> Private litigation has been the principal means of Cartwright Act enforcement for many decades, encouraged (intentionally) by Cartwright's provisions for treble damages and recovery of attorney's fees. Since passage of the federal Class Action Fairness Act of 2005, [Pub. L. 109.2] most consumer class actions to enforce Cartwright have been heard in federal court. This has had several unfortunate side effects. One such effect, because the claims often appear alongside Sherman Act claims, has been a tendency of federal judges to conflate Cartwright claims with federal ones, presuming that they are the same for all practical purposes even when they are not.

[124] See e.g. Memorandum 2024-35, p. 6, in which the Enforcement and Exemptions Working Group stated:

> One such effect, because the claims often appear alongside Sherman Act claims, has been a tendency of federal judges to conflate Cartwright claims with federal ones, presuming that they are the same for all practical purposes even when they are not.

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

[126] Federal Trade Commission and Department of Justice 2023 Merger Guidelines (December 18, 2023), p. 3.

[127] An unlawful delegation of legislative authority occurs when the Legislature improperly transfers its power to make fundamental policy decisions to another entity, such as an administrative agency, without providing adequate guidance or safeguards (see Cal. Const. Art. 3, §3; *Criminal Justice Legal Foundation v. Dept. of Corrections & Rehabilitation* (2025) 113 Cal.App. 5th 26, 38 ("'An unconstitutional delegation of authority occurs only when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy.'" (citing *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 190)).

restrictive, which could limit the effectiveness of state antitrust enforcement.[128] Accordingly, the Commission chose to include in statute a nonexclusive list of elements from various federal antitrust law cases that do not need to be proved to establish liability under California antitrust law.[129] This list also includes restatements of existing law, reminding that various types of evidence can substantiate an antitrust allegation, and that defining a relevant market is unnecessary when there is direct evidence of market effects or market power.

Section 16731 is added to the Business and Professions Code to read:

Although the following nonexclusive list may constitute evidence of a violation of Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code, California law does not require a finding of any of the following to establish liability:

(a) The unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct.

(b) The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons.

(c) The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or service.

(d) The defendant's conduct makes no economic sense apart from its tendency to harm competition.

(e) The conduct's risk of harming competition or actual harm must be proven with quantitative evidence.

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

(g) In a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue.

(h) The rivals whose ability to compete has been reduced or harmed are as efficient, or nearly as efficient, as the defendant's.

(i) A single firm or person has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power.

(j) A "relevant market" must be defined where there is direct evidence of market effects or power.

Most of these subdivisions reflect prior federal rulings outlining various criteria that must be met before a court determines a person has violated federal antitrust laws. Often, courts have interpreted these criteria as prerequisites for liability when instead they could be read

[128] Memoranda 2024-15, pp. 6-7, 14; 2024-33, pp. 6-7; 2024-26, pp. 7-8.

[129] Memoranda 2024-15, pp.1, 6, 7, 13, 14-18; subdivisions (a)-(g) are similar to those listed in Sen. No. 130 119th Cong. 1st Sess. (2025), Section 26A.

as possible, but not mandatory, indicators of anticompetitive conduct. By advising judicial officers that they are not required to make a finding of these elements to determine fault under California antitrust law, California is setting wider boundaries than federal case law to find unlawful conduct.

Subdivision (a) ("The unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct") addresses the ruling in *Verizon Communications v. Law Offices of Curtis V. Trinko (Trinko)*, a refusal to deal case.[130] *Trinko* was brought by telephone customers against a carrier who alleged that the carrier's failure to provide connection services violated the Sherman Act. In its opinion denying relief, the Court noted that *Trinko's* fact pattern did not match those of a prior case, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp. (Aspen Skiing)*.[131] *Aspen Skiing* was an action by a ski resort owner against a neighboring ski resort which had stopped participating in a multi-resort ski lift pass. In *Aspen Skiing*, the court found an antitrust violation because, among other elements, the defendant had previously participated in the multi-resort pass.[132]

Subdivisions (b) and (d) are also derived from *Aspen Skiing*. In addition to its previous participation, the defendant refused to provide lift tickets to the plaintiff when the tickets were commercially available to others[133] (subdivision (b): "The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons"), and the defendant's refusal to continue to participate in the multi-resort pass was not based on a reasonable business justification[134] (subdivision (d): "The defendant's conduct makes no economic sense apart from its tendency to harm competition"). *Trinko* and its progeny have, in many instances, elevated the distinguishing facts of *Aspen* to mandatory proof requirements, restricting the universe of actionable refusal-to-deal claims.[135]

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130 (2004) 540 U.S. 398.

131 (1985) 472 U.S. 585.

132 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (1985) 472 U.S. 585, 604.

133 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (1985) 472 U.S. 585, 607-608.

134 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (1985) 472 U.S. 585, 608-611.

135 *Verizon Communications v. Law Offices of Curtis V. Trinko* (2004) 540 U.S. 398, 407, 409-16; *New York v. Facebook, Inc.* (D.D.C. 2021) 549 F.Supp.3d 6, 27, aff'd sub nom. *New York v. Meta Platforms, Inc.* (D.C. Cir. 2023) 66 F.4th 288; Memoranda 2024-15, p. 7; 2024-26, pp. 7-8, referencing the Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary of the House of Representatives, Part I, *Investigation of Competition in Digital Markets*, July 2022, p. 336:

> The Subcommittee's investigation uncovered several instances in which a dominant platform used the threat of delisting or refusing service toa third party as leverage to extract greater value or more data or to secure an advantage in a distinct market. Because the dominant platforms do not face meaningful competition in their primary markets, their threat to refuse business with a third party is the equivalent of depriving a market participant of an essential input. This denial of access in one market can undermine competition across adjacent markets, undermining the ability of market participants to compete on the merits.
>
> To address this concern, the Subcommittee recommends that Congress consider... overriding judicial decisions that have treated unfavorably essential facilities and refusal to deal-based theories of harm. [citing *Trinko*.]

However, refusals to deal in today's economy can be anticompetitive for reasons beyond *Aspen Skiing's* fact pattern.[136] While *Aspen* and *Trinko* provide guidance when refusals to deal may be anticompetitive, they do not have to be read as establishing a mandatory list of conditions. Indicators of anticompetitive intent will vary depending on the circumstances, and rigid rules requiring specific fact patterns can unduly restrict enforcement.[137] Further, requiring a prior course of dealing or discriminatory treatment as necessary elements of liability leaves a large body of potential rivals and victims of anticompetitive refusals with no remedy.[138]

While the “no economic sense” requirement in section (d) may seem benign, in application, it can also insulate company's anticompetitive refusals to deal and exclusionary conduct from liability. While lack of economic justification may be useful as evidence of anticompetitive purpose or effect, requiring it as a necessary element of liability creates multiple problems.[139] First, there are many other kinds of evidence that can be used to show anticompetitive purpose. Conduct can be purposely anticompetitive without an immediate economic impact on the defendant. For instance, a "no economic sense" test doesn't work in cases where a monopolist offers products or services for free, which has or has little or no marginal cost to the monopolist. Additionally, this standard requires a court to distinguish between “legitimate” profits from “profits made by eliminating competition,” a potentially difficult and costly task. Finally, there may be multiple motivations for the conduct, requiring additional guidance to balance conflicting reasons.[140]

Subdivisions (c) and (g) are based on the ruling in *Brooke Group v. Brown & Williamson Tobacco*.[141] In this case, the plaintiff argued that the defendant introduced a rival brand of generic cigarettes and sold them below the defendant's cost, harming the plaintiff's sales. The court held that the plaintiff must show that the defendant’s prices were below cost in order to prove predatory pricing (subdivision (c): "The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or

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[136] Memorandum 2024-15, p. 7.

[137] *Steward Health Care System, LLC. v. Blue Cross & Blue Shield of Rhode Island* (D.R.I. 2018) 311 F. Supp. 3d 468, 485 (“*Aspen Skiing* and *Trinko*, properly read, provide useful guidance as to whether Blue Cross's conduct amounted to a refusal to deal motivated by anticompetitive animus. While the indicators of anticompetitive animus here vary somewhat from what the Supreme Court identified in *Aspen Skiing* and *Trinko*, those differences are reflective of the very different marketplaces at issue (healthcare and health insurance as opposed to ski resorts and regulated telecommunication. Potentially anticompetitive behavior by market participants is bound to manifest itself differently in different markets.").

[138] *Steward Health Care System, LLC v. Blue Cross & Blue Shield of Rhode Island* (D.R.I. Feb. 19, 2014) 997 F.Supp.2d 142, 160. “To permit the defendant in an unlawful exclusion case to hide behind the presumptive disfavoring of non-market participants would subject plaintiffs in such cases to an insurmountable Catch-22. Were courts to observe a blanket prohibition on claims brought by those excluded from the market by alleged anticompetitive conduct, those firms responsible for the exclusion might never be held accountable.”

[139] Congressional Research Service, *Antitrust Reform and Big Tech Firms* (Nov. 21, 2023), at 7; *Viamedia, Inc. v. Comcast Corp*. (7th Cir. 2020) 951 F. 3d 429, 457-58, 461-62; see also Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard* (2006) 73 Antitrust L.J. 311, 319-20, 355-57.

[140] The practical existence of multiple reasons for conduct runs contrary to case law that recognizes damaging competition as the only possible motivation. See *Federal Trade Commission v. Qualcomm Inc.* (2020) 969 F. 3d 974, 993 which says the predatory motivation is “the only conceivable rationale or purpose.”

[141] *Brooke Group v. Brown & Williamson Tobacco* (1993) 509 U.S. 209.

service") and the defendant has a reasonable probability of recouping its losses once its competitors are driven from the market (subdivision (g): "In a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue").

However, the below-cost and recoupment requirements have proven difficult to satisfy, and it is rare for a predatory pricing case to succeed under federal law.[142] These federal judicial restrictions on predatory pricing claims reflect outdated thinking that pricing predation was irrational and competition would enter the market during the recoupment period.[143] Moreover, these requirements make little sense when many digital products are offered for free or with very low marginal costs, as the requirements virtually immunize virtually all prices from predation claims.[144] These requirements also fail to recognize that prices set above defendant's costs can be anticompetitive, too.[145]

The directive that California courts need not follow these federal precedents aligns with existing state law, which expressly rejects federal standards of assessing costs and rejects any need to show recoupment.[146]

Subdivision (e) ("the conduct's risk of harming competition or actual harm must be proven with quantitative evidence") is a reminder that antitrust harm or the risk of harm can be proven by quantitative *or* qualitative evidence. California law, like much of federal law, recognizes that damages can be shown with a reasonable probability of a causal connection between the challenged conduct and loss, and that damages can be proven with probable and inferential proof.[147]

Subdivision (f) ("In cases where a defendant's business is a multi-sided platform, that the defendant's conduct presents harm to competition on more than one side of the multi-sided platform, or that the harm to competition on one side of the multi-sided platform outweighs any benefits to competition on any other side(s) of the multi-sided platform") is a response to the ruling in *Ohio v. American Express*.[148] This case held that American Express did not violate antitrust laws by prohibiting merchants from discouraging the use

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[142] First Supplement to Memorandum 2024-32, referencing Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 730 (2017).

[143] Congressional Research Service, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, p. 8 ("Economists have identified a variety of circumstances in which predation can, in theory, be a rational business strategy—for example, where entry entails large fixed costs, a dominant firm develops a predatory reputation, capital markets are imperfect, or predation can deny rivals minimum efficient scale.")

[144] Memoranda 2024-15, p. 6 ("…the continued usefulness of the federal predatory pricing rule is questionable when we observe that a rule created thirty years ago, when the digital economy was in its infancy, is poorly suited to products and services with very low or zero marginal costs, as it immunizes virtually all prices from predation claims for such products."); 2024-26, pp. 6-7 ("Advocates of this approach [not passing legislation to specifically target technology companies] may also assert that existing antitrust law is sufficient, so long as certain modern federal antitrust decisions are reversed through legislative action. For example, the House Antitrust Subcommittee recommended legislatively overriding...*Brooke Group* and *Weyerhauser* (to the extent those cases hold that proving predatory pricing or buying requires 'proof of recoupment')....")

[145] Memorandum 2024-15, p. 6; *ZF Meritor, LLC v. Eaton Corp* (3rd Cir. 2012) 696 F. 3d 254, 274-275.

[146] California Unfair Practices Act, Bus. & Prof. Code § 17403. See also *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal. App. 4th 438, 445; Memorandum 2024-15, p. 12.

[147] See *Suburban Mobile Homes, Inc. v. Amfac Communities, Inc*. (1950) 101 Cal. App. 3d 532.

[148] *Ohio v. American Express* (2018) 138 S. Ct. 2274.

of American Express cards in favor of methods of payment with lower transaction fees. In reaching this conclusion, the Supreme Court determined that a credit card network platform is a single market with a merchant services side and a consumer cardholder side (a multi-sided platform), and both sides must be analyzed for anticompetitive effects sufficient to establish a violation. This created a confusing precedent as to the type and amount of evidence needed to show harm in cases involving two sided platforms. This case also used assumptions about the interconnectedness of the two sides which may not translate to market realities in other circumstances, and could allow firms to escape antitrust liability for causing harm on one side of a platform and masking it with benefits on the other side.[149]

Subdivision (h) ("The rivals whose ability to compete has been reduced or harmed are as efficient, or nearly as efficient, as the defendant's") addresses *Ortho Diagnostic Sys., Inc. v. Abbott Labs, Inc.*[150] which involved rival drug testing firms. In its ruling, the court determined that the plaintiff must allege and prove that it was at least as efficient a producer of the competitive product as the defendant, but that the defendant's pricing made it unprofitable for the plaintiff to continue to produce. This was the court's attempt to ensure its analysis was truly about competitive practices and that the pricing was not due to poor systems control.[151]

However, requiring the plaintiff to be as efficient as the defendant as a precondition to liability in an exclusionary conduct claim has been criticized on multiple grounds, including that it favors dominant firms and requires burdensome and complex litigation about the parties' relative efficiencies. Most importantly, such a requirement denies antitrust protection for harm to plaintiffs without the scale or efficiency of the defendant.[152]

Subdivision (i) ("A single firm or person has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power") highlights the differences between state and federal law regarding market share and market power. While there is no federal consensus as to market shares that create antitrust concerns, the Federal Trade Commission notes, "Courts look at the firm's market share, but typically do not find monopoly power if the firm (or a group of firms acting in concert) has less than 50 percent of the sales of a particular product or service within a certain geographic area."[153] In contrast, in *Fisherman's Wharf Bay Cruise v. Superior Ct.*,[154] a California case addressing, among other things, exclusive dealing under the Cartwright

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[149] *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation* (E.D.N.Y. 2024) 714 F. Supp. 3d 65, 85 ("...*Amex* offers little guidance to lower courts in terms of what evidence (or how much) must be shown to demonstrate the existence of a triable question of fact as to harm to a two-sided transaction market."); *Epic Games, Inc. v. Apple Inc.* (9th Cir. 2023), 67 F. 4th 946, 985 ("*Amex* does not require a plaintiff to [show] harm to participants on both sides of the market."); fundamental antitrust law precludes justifying harmful restraints in one market with justifications from outside the harmed market. *United States v. Topco Assocs. Inc.* (1972) 405 U.S. 596, 610; *Law v. NCAA* (D. Kan. 1995) 902 F. Supp. 1394,1406; Congressional Research Service, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, p. 47-48.

[150] *Ortho Diagnostic Sys., Inc. v. Abbott Labs, Inc.* (SDNY 1996) 920 F. Supp. 455.

[151] Id at 465.

[152] Memorandum 2024-15, p. 17; Congressional Research Service, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, p. 7.

[153] Federal Trade Commission, Guide to Antitrust Laws, Single Firm Conduct, *Monopolization Defined*.

[154] *Fisherman's Wharf Bay Cruise v. Superior Ct.* (2003) 114 Cal.App.4th 309, 326. In a Cartwright Act case,

Act, the court held that a 20% market share foreclosure was enough to pursue an action against anticompetitive practices.

Subdivision (j) ("There is no need to define or prove a "relevant market" where there is direct evidence of market effects or power") restates existing case law,[155] because some cases get derailed by questions of relevant market when harm is already evident.[156] Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the *potential* for genuine adverse effects on competition, proof of *actual* detrimental effects can obviate the need for that inquiry.

CONCLUSION

Based on the foregoing review and analysis, the Commission concluded that California law should include a SFC provision that is tailored to reflect California's values and enforcement priorities. The Commission chose to emphasize that California courts are not bound to federal antitrust case law and concluded that codifying language that establishes the Legislature's intent in revising California's antitrust laws and provides guidance for their interpretation would ensure a durable framework for this new body of law. Finally, the Commission found certain federal precedents particularly restrictive, which could limit the effectiveness and enforcement of state law if followed by state or federal courts. Accordingly, it chose to include in statute a nonexclusive list of elements from various federal antitrust law cases that do not need to be proved to establish liability under California antitrust law.

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the court held that a 20% market foreclosure was enough to pursue a cause of action against a competitor.

[155] Memorandum 2024-35, pp. 6-7; *FTC v. Ind. Federation of Dentists* (1986) 476 U.S. 447, 460-61; *Diaz Aviation Corp. v. Airport Aviation Services, Inc.* (1st Cir. 2013) 716 F. 3d 256, 265; *In re Loestrin 24 Fe Antitrust Litigation* (2019) 433 F. Supp. 3d 274, 299; *In re Nexium III* (D.Mass. 2013) 968 F Supp. 2d 367, 388 n.19.

[156] See e.g., *Ohio v. American Express* (2018) 138 S. Ct. 2274, in which the Supreme Court ruled in favor of the defendants based on the government's failure to properly define the relevant market, despite the district court finding direct evidence of significant anticompetitive effects.

PROPOSED LEGISLATION

Bus. & Prof. Code § 16729 (added) Single Firm Conduct

SEC. ___. Section 16729 is added to the Business and Professions Code, to read:

(a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events:

(1) In restraint of trade; or

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

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

(c) Anticompetitive effects in one market from the challenged conduct may not be offset by purported benefits in a separate market; and the harm to a person or persons from the challenged conduct may not be offset by purported benefits to another person or persons.

Comment. Subdivision (a) describes the effects that make certain conduct by single persons illegal and clarifies that the law applies to conduct carried out both directly and indirectly.

Subdivision (a)(1) uses the phrase "restraint of trade" which is used in both the Cartwright Act (Bus. & and Prof. Code § 16721.5) and in the Sherman Act (15 U.S.C.§ 1) and is intended to capture the full range of anticompetitive conduct by a single person, consistent with the Cartwright Act's general framework. *Cianci v. Superior Court* (1985) 40 Cal. 3d 903, 917-18. "Restraint of trade" means "unreasonable" restraint of trade as recognized by the California Supreme Court. *In re Cipro Cases I & II* (2015) 61 Cal. 4th 116, 136.

Subdivision (a)(2) uses language similar to Section 2 of the Sherman Act (15 U.S.C. §2) and adds "monopsony" and "to maintain monopoly or monopsony" to distinguish state law, highlight its application to all buyer-side transactions, and prohibit the anticompetitive maintenance of monopoly power.

Subdivision (b) clarifies that "restraints of trade" under this section includes but is not limited to any of the unlawful acts proscribed in the Cartwright Act, whether done by one person or multiple persons, directly or indirectly. *Copperweld Corp. v. Indep. Tube Corp.* (1984) 467 U.S. 752, 775 ("an unreasonable restraint of trade may be affected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms.")

Subdivision (c) clarifies that anticompetitive effects may only be offset by benefits in the same market and to the same persons originally affected by the anticompetitive conduct.

Bus. & Prof. Code § 16730 (added) Purpose Statement

SEC. ___. Section 16730 is added to the Business and Professions Code, to read:

(a) The purpose of this section and Sections 16729 and 16731 is the promotion and protection of free and fair competition, which is fundamental to a healthy marketplace that protects all trade participants, including workers and consumers, and to an environment that is conducive to the preservation of our democratic, political, and social institutions.

(b) Protecting competition includes protecting competition between businesses when they compete for workers by prohibiting anticompetitive business practices that impede workers' freedom to choose employment.

(c) The California Supreme Court has determined that the Cartwright Act is "broader in range and deeper in reach" than the federal Sherman Act; courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors "maximizing" effective deterrence of antitrust violations; and that the Cartwright Act is not modeled on the Sherman Act. Further, California courts have recognized that the Cartwright Act departs from the Sherman Act in many respects, including, but not limited to, inclusion of indirect purchaser recovery, use of a proximate cause test for Cartwright Act standing, recognition of broader harms and per se conduct, lower actionable market shares, structured rule of reason analysis, and differing burdens of proof.

(d) Federal case law on the subject of this article is not binding on California courts, but courts may consider federal case law as persuasive authority to the extent they find it consistent with California law including Section 16729.

(e) California joins the U.S. Department of Justice and Federal Trade Commission in recognizing that unilateral action and multiparty actions, horizontal and vertical relationships, and various forms of corporate entities can interfere with free and fair competition as reflected in the 2023 Federal Trade Commission and Department of Justice Merger Guidelines.

Comment. Subdivision (a) expresses the fundamental goal of California's antitrust law, which is the promotion and protection of free and fair competition. *Clayworth v. Pfizer, Inc*. (2010) 49 Cal. 4th 758, 783. ("From its inception, the Cartwright Act has always been focused on the punishment of violators for the larger purpose of promoting free competition.") This subdivision also references *In re Cipro Cases I & II* (2015) 61 Cal. 4th 116, 136, which describes the Cartwright Act as premised on the idea that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

Subdivision (b) reiterates the law's dedication to worker's rights. (See e.g., Bus. & Professions Code §§ 16600 – 16600.5 relating to California's broad prohibition on noncompete agreements.)

Subdivision (c) emphasizes the differences between the Cartwright Act and the Sherman Act as established in California case law and statute: The California Supreme Court has determined that the Cartwright Act is "broader in range and deeper in reach" than the federal Sherman Act. (*Cianci v. Superior Court* (1985) 40 Cal.3d 903, 920); courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors 'maximizing' effective deterrence of antitrust violations. *Clayworth v Pfizer, Inc.* (2010) 49 Cal. 4th 758, 783. ("As the Cartwright Act's primary concern is with the elimination of restraints of trade and impairments of the free market, we can and should select the damages rule most consistent with that focus.… double and treble damages may overcompensate injured plaintiffs, but they do so in order to maximize deterrence."); that the Cartwright Act is not modeled on the Sherman Act. *Aryeh v. Canon Business Sols., Inc.* (2013) 55 Cal.4th 1185, 1195, ("Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was not modeled on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century."); inclusion of indirect purchaser recovery (Bus. & Prof. § 16720, 16750(a).); use of a proximate cause test for Cartwright Act standing. *Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723. ("The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries."); recognition of broader harms and per se conduct (Bus. & Prof. Code §§ 16720, 16750(a), 16600.1); lower actionable market shares. *Fisherman's Wharf Bay Cruise v. Superior Ct*. (2003) 114 Cal.App.4th 309, 326. (This case addresses, among other things, exclusive dealing under the Cartwright Act, holding that a 20% market foreclosure was enough to pursue a cause of action against a competitor.); structured rule of reason analysis. *In re Cipro Cases I & II,* (2015) 61 Cal. 4th 116, 162. ("By ferreting out anticompetitive agreements that limit generic market entry and sustain costly monopolies, a structured rule of reason serves those goals and poses no obstacle to congressional objectives."); and differing burdens of proof. *In re Cipro Cases I & II* (2015) 61 Cal. 4th 116 (This case discusses approaches to weighing the burdens of proof that differ from federal case law).

Subdivision (d) clarifies that courts do not have to follow federal case law when interpreting California antitrust statutes, but they may consider federal case law persuasive to the extent it is found to be consistent with California's laws, including the Cartwright Act's purpose statement.

Subdivision (e) is intended to align California with the 2023 Federal Trade Commission and Department of Justice Merger Guidelines in recognizing that unilateral action and multiparty actions, horizontal and vertical relationships, and various forms of corporate entities can interfere with free and fair competition.

Bus. & Prof. Code § 16731 (added) Judicial Guidance

SEC. ___. Section 16731 is added to the Business and Professions Code, to read:

Although the following nonexclusive list may constitute evidence of a violation of Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code, California law does not require a finding of any of the following to establish liability:

(a) The unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct.

(b) The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons.

(c) The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or service required under federal antitrust law.

(d) The defendant's conduct makes no economic sense apart from its tendency to harm competition.

(e) The conduct’s risk of harming competition or actual harm must be proven with quantitative evidence.

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

(g) In a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue.

(h) The rivals whose ability to compete has been reduced or harmed are as efficient, or nearly as efficient, as the defendant’s.

(i) A single firm or person has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power.

(j) A "relevant market" must be defined where there is direct evidence of market effects or power.

Comment. This section is intended to provide guidance to courts when interpreting this section and Business and Professions Code Sections 16729 and 16730 and includes in statute a nonexclusive list of elements from various federal antitrust law cases that do not need to be proved to establish liability under those sections.

Subdivision (a) addresses the ruling in *Verizon Communications v. Law Offices of Curtis V. Trinko* (1985) 472 U.S. 585 *(Trinko)*, a refusal to deal case. In its opinion denying relief, the Court noted that *Trinko's* fact pattern did not match those of a prior case, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (1985) 472 U.S. 585 *(Aspen Skiing)*. In *Aspen Skiing*, the court found an antitrust violation because, among other elements, the defendant had previously participated in the multi-resort pass. Id. at p. 604.

Subdivisions (b) and (d) address *Aspen Skiing*. In addition to its previous participation, the defendant refused to provide lift tickets to the plaintiff when the tickets were commercially available to others Id. at p. 607-608. Subdivision (b) draws from *Aspen Skiing,* pp. 608-611 ("The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons"), and that the defendant's refusal to continue to participate in the multi-resort pass was not based on a reasonable business justification references subdivision (d) ("The defendant's conduct makes no economic sense apart from its tendency to harm competition"). *Trinko* and its progeny have, in many instances, elevated the distinguishing facts of *Aspen Skiing* to mandatory proof requirements, restricting the universe of actionable refusal-to-deal claims. Subdivision (d) allows, but does not require, a plaintiff to prove lack of economic justification for a defendant's conduct because there may be multiple motivations for the conduct. Further, conduct can be purposely anticompetitive without an immediate economic impact on the defendant, and requiring a court to distinguish between "legitimate" profits from "profits made by eliminating competition," is a potentially difficult and costly task.

Subdivisions (c) and (g) address the ruling in *Brooke Group v. Brown & Williamson Tobacco* (1993) 509 U.S. 209. Subdivision (c) addresses the holding in that case that the plaintiff must show that the defendant's prices were below cost in order to prove predatory pricing ("The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or service"). Id. at p. 223. Subdivision (g) also addresses the requirement from the case that the plaintiff prove "In a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue." Id at p. 224. These federal judicial restrictions on predatory pricing claims reflect outmoded precepts that pricing predation was irrational and competition would enter the market during the recoupment period. See Congressional Research Service, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, p. 8. Moreover, these requirements make little sense when many digital products are offered for free or with very low marginal costs, as the requirements immunize virtually all prices from predation claims. Further, these requirements fail to recognize that prices set above defendant's costs can be anticompetitive, too. *ZF Meritor, LLC v. Eaton Corp* (3rd Cir. 2012) 696 F. 3d 254, 274-275. The directive that California courts need not follow these federal precedents aligns with existing state law, which expressly rejects federal standards of assessing costs and rejects any need to show recoupment. (Bus. & Prof. Code § 17403; *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal. App. 4th 438, 445).

Subdivision (e) recognizes that antitrust harm or the risk of harm can be proven by quantitative or qualitative evidence. California law, like much of federal law, acknowledges that damages can be shown with a reasonable probability of a causal connection between the challenged conduct and loss, and that damages can be proven with probable and inferential proof. *Suburban Mobile Homes, Inc. v. Amfac Communities, Inc*. (1950) 101 Cal. App. 3d 532.

Subdivision (f) addresses the ruling in *Ohio v. American Express Ohio v. American Express* (2018) 138 S. Ct. 2274. This ruling created a confusing precedent as to the type and amount of evidence needed to show harm in cases involving two sided platforms by assuming interconnectedness between the two sides which may not translate in other circumstances; this could allow firms to escape antitrust liability for causing harm on one side of a platform and masking it with benefits on the other side.

Subdivision (h) addresses *Ortho Diagnostic Sys., Inc. v. Abbott Labs, Inc.* (SDNY 1996) 920 F. Supp. 455, which involved rival drug testing firms. In its ruling, the court determined that the plaintiff must allege and prove that it was at least as efficient a producer of the competitive product as the defendant, but that the defendant's pricing made it unprofitable for the plaintiff to continue to produce. This was the court's attempt to ensure its analysis was truly about competitive practices and that the pricing was not due to poor systems control. However, requiring the plaintiff to be as efficient as the defendant as a precondition to liability in an exclusionary conduct claim has been criticized on multiple grounds, including that it favors dominant firms and requires burdensome and complex litigation about the parties' relative efficiencies. Most importantly, such a requirement denies antitrust protection for harm to plaintiffs without the scale or efficiency of the defendant. See Congressional Research Service, Antitrust Reform and Big Tech Firms, Nov. 21, 2023, p. 7.

Subdivision (i) highlights the differences between state and federal law regarding market share and market power. While there is no federal consensus as to market shares that create antitrust concerns, the Federal Trade Commission notes, "Courts look at the firm's market share, but typically do not find monopoly power if the firm (or a group of firms acting in concert) has less than 50 percent of the sales of a particular product or service within a certain geographic area." (Federal Trade Commission, Guide to Antitrust Laws, Single Firm Conduct, Monopolization Defined.) In contrast, in *Fisherman's Wharf Bay Cruise v. Superior Ct*. (2003) 114 Cal.App.4th 309, 326, a California case addressing, among other things, exclusive dealing under the Cartwright Act, the court held that a 20% market share foreclosure was enough to pursue an action against monopolist practices.

Subdivision (j) restates existing case law that proof of actual detrimental effects can obviate the need for inquiries into market definition and market power. *FTC v. Ind. Federation of Dentists* (1986) 476 U.S. 447, 460-61; *Diaz Aviation Corp. v. Airport Aviation Services, Inc.* (1st Cir. 2013) 716 F. 3d 256, 265; *In re*

Loestrin 24 Fe Antitrust Litigation (2019) 433 F. Supp. 3d 274, 299; *In re Nexium III* (D.Mass. 2013) 968 F Supp. 2d 367, 388 n.19.)