

**Comments of the International Center for Law & Economics on Memorandum 2025-21 on the Draft Language for Single-Firm Conduct Provision**

*California Law Revision Commission Study of Antitrust Law, Study B-750*

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## Introduction

We are grateful for the opportunity to respond to the California Law Revision Commission’s study of antitrust law with these comments on Memorandum 2025-21 on proposed policy options to address single-firm conduct (“the Memorandum”).<sup>1</sup> The International Center for Law & Economics (ICLE) is a nonprofit, nonpartisan global research and policy center based in Portland, Oregon. ICLE was founded with the goal of building the intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law & economics methodologies to inform public-policy debates, and has longstanding expertise in the evaluation of competition law and policy. ICLE’s interest is to ensure that competition law remains grounded in clear rules, established precedents, a record of evidence, and sound economic analysis.

We appreciate the Commission’s efforts to modernize California’s antitrust laws (the Cartwright Act) and its openness to public input during this process. Our comments address three critical issues raised by the Memorandum’s options for a new single-firm-conduct (SFC) provision, and we urge the Commission to proceed with caution and economic clarity.

As background, the Memorandum outlines three options for a Cartwright Act amendment targeting single-firm monopolistic conduct.

- Option One would mirror the traditional language of Section 2 of the federal Sherman Antitrust Act (prohibiting monopolization and attempts to monopolize) with an added reference to monopsony issues. It would also add interpretive guidance to “untether” California law from restrictive federal precedents.
- Option Two would expand the basic provision by incorporating a broader range of potential harms, and possibly a departure from the conventional rule-of-reason framework.
- Option Three, labeled an “Exclusionary Conduct” provision, represents the most dramatic break from U.S. antitrust norms: it uses novel terminology and defines unlawful single-firm conduct in terms of harm to a firm’s “trading partners” (customers or suppliers), rather than focusing primarily on harm to competition or consumers.

Each option is accompanied by proposed legislative findings and declarations that emphasize the Commission’s intent to distance California law from federal antitrust jurisprudence. Unfortunately, this change of course—particularly the sharp divergence from well-established U.S. antitrust principles—would be counterproductive.

There are important reasons to believe that it would be unwise to untether California antitrust law from U.S. antitrust law’s error-cost framework, effects-based analysis, and consumer welfare standard. Abandoning these principles in favor of a more interventionist (or European-inspired) approach would likely chill innovation and harm consumers in the long run, as we explained in our prior

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<sup>1</sup> Staff Memorandum, *2025-21 Draft Language for Single Firm Conduct Provision*, CALIF. LAW REVIS. COMM. (Mar. 24, 2025), available at <https://clrc.ca.gov/pub/2025/MM25-21.pdf> [hereinafter “Memorandum”].

comments to the Commission.<sup>2</sup> These comments further caution against expanding antitrust enforcement to protect “trading partners” (such as suppliers or workers) as a distinct objective. Using antitrust law to shield an idiosyncratic selection of rivals and other trading partners, rather than focusing on protecting competition and consumers, would risk politicizing enforcement and undermining economic efficiency.

Finally, we caution against incorporating monopsony (buyer-power) or novel “dominant buyer” considerations into a single-firm conduct rule, absent a sound empirical and legal framework. There is currently a lack of consensus on such fundamental issues as market definition, competitive effects, and how to balance harms to workers versus consumers.<sup>3</sup> It would therefore be premature to enact sweeping new prohibitions aimed at employer market power or other monopsonistic conduct before these complex economic and policy questions are resolved.

In the sections that follow, we elaborate on each of these points. First, we explain why California should retain alignment with the consumer-welfare-centric, effects-based approach of U.S. antitrust law, rather than adopt a “precautionary” European-styled regime that presumes harm from large firms. Second, we address the issues surrounding monopsony power in labor markets, arguing that regulators should not rush to impose broad new liabilities on single-firm conduct involving labor or other input markets without robust evidence and clear standards. Third, we discuss the dangers of shifting antitrust focus from consumers to “trading partners,” highlighting the potential for politicized enforcement and reduced efficiency. We conclude by urging the Commission to carefully calibrate any reforms so that California’s antitrust law remains a force for consumer welfare and innovation.

## **I. The Risks of Untethering California Antitrust Law from Established US Antitrust Principles**

The Memorandum indicates that California wishes to “free” itself from decades of restrictive jurisprudence by the U.S. federal courts. It would do so by nullifying rulings of the U.S. Supreme Court that limit its ability to find antitrust liability<sup>4</sup> and by disavowing the error-cost framework’s preference for false negatives over false positives in antitrust analysis.<sup>5</sup> This is misguided, as there are important reasons why the overenforcement of antitrust laws is likely more harmful than their underenforcement.

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<sup>2</sup> Geoffrey Manne & Dirk Auer, *Against the ‘Europeanization’ of California’s Antitrust Law* (Comments of the International Center for Law & Economics on the Single-Firm Conduct Expert Report California Law Revision Commission Study of Antitrust Law, Study B-750, May 7, 2024), available at <https://laweconcenter.org/resources/against-the-europeanization-of-californias-antitrust-law>.

<sup>3</sup> Geoffrey A. Manne, Brian C. Albrecht, & Dirk Auer, *Labor Monopsony and Antitrust Enforcement: A Distorting Mirror*, 74 DEPAUL L. REV. 1119 (2025).

<sup>4</sup> Memorandum, at 12-13.

<sup>5</sup> *Id.*, at 11.

Of course, no one believes that markets are perfect, or that antitrust enforcement can never be appropriate. The question is, instead, marginal and comparative: Given the realities of politics, economics, the limits of knowledge, and the errors to which they can lead, which imperfect response is preferable at the margin? Or, phrased slightly differently, should we give California antitrust enforcers and private plaintiffs more room to operate, or should we continue to cabin their operation in careful, economically grounded ways that are aimed squarely at optimizing (not minimizing) the extent of antitrust enforcement?

This may be a question about changes at the margin, but it is far from marginal. It goes to the heart of the market's role in the modern economy.

While there are many views on this subject, arguments that markets have failed us in ways that more extensive antitrust enforcement would correct are poorly supported.<sup>6</sup> We should certainly continue to look for conditions where market failures of one kind or another may justify intervention, but we should not make policy on the basis of mere speculation. And we should certainly not do so without considering the likelihood and costs of regulatory failure, as well. In order to reliably adopt a sound antitrust policy that might improve upon the status quo (which has evolved over a century of judicial decisions, generally alongside the field's copious advances in economic understanding), we would need much better information about the functioning of markets and the consequences of regulatory changes than is currently available.

To achieve this, antitrust law and enforcement policy should, above all, continue to adhere to the error-cost framework, which informs antitrust decisionmaking by comparing the relative costs of mistaken intervention with mistaken nonintervention.<sup>7</sup> Specific cases should be addressed as they arise, with an implicit understanding that, particularly in digital markets, precious few generalizable presumptions can be inferred from a prior case. The overall stance should be one of restraint, reflecting the state of our knowledge.<sup>8</sup> We may well be able to identify anticompetitive harms in certain

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<sup>6</sup> Among other things, the expert report leading up to the current memorandum argued that antitrust should be used to address alleged policy concerns broader than protecting competition, and should accept reductions in competition to do so. See *Antitrust Law – Study B-750*, CALIF. LAW REVIS. COMM. at 2, available at <http://www.clrc.ca.gov/B750.html> (last revised Apr. 26, 2024) (“Nonetheless, these important values [‘broader social and political goals’] can influence the evidentiary standards that the Legislature instructs the courts to apply when handling individual antitrust cases. For example, the California Legislature could instruct the courts to err on the side of enforcement when the effect of the conduct at issue on competition is uncertain.”). But as one of the authors of the expert report has noted elsewhere: “while antitrust enforcement has a vital role to play in keeping markets competitive, antitrust law and antitrust institutions are ill suited to directly address concerns associated with the political power of large corporations or other public policy goals such as income inequality or job creation.” Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT’L J. INDUS. ORG. 714, 714 (2018).

<sup>7</sup> Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMP. L. & ECON. 153 (2010).

<sup>8</sup> See Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSP. 3, 4 (2003) (“[T]he economics profession should conclude that until it can provide some hard evidence that identifies where the antitrust authorities are significantly improving consumer welfare and can explain why some enforcement actions and remedies are helpful and others are not, those authorities would be well advised to prosecute only the most egregious anticompetitive violations.”).

cases, and when we do, we should enforce the current laws. But we should not overestimate our ability to fine-tune market outcomes without causing more harm than benefit.

Allegations that the modern antitrust regime is insufficient take as a given that there is something wrong with antitrust doctrine or its enforcement, and cast about for policy “corrections.” The common flaw with these arguments is that they are not grounded in robust empirical or theoretical support. Indeed, as one of the influential papers that (ironically) is sometimes cited to support claims for more antitrust puts it:

An alternative perspective on the rise of [large firms and increased concentration] is that they reflect a diminution of competition, due to weaker U.S. antitrust enforcement. *Our findings on the similarity of trends in the United States and Europe, where antitrust authorities have acted more aggressively on large firms, combined with the fact that the concentrating sectors appear to be growing more productive and innovative, suggests that this is unlikely to be the primary explanation, although it may be important in some industries.*<sup>9</sup>

Rather, such claims are little more than hunches that something must be wrong, conscripted to serve a presumptively interventionist agenda. Because they are merely hypotheses about things that could go wrong, they do not determine—and rarely even ask—if heightened antitrust scrutiny and increased antitrust enforcement are actually called for in the first place.

Implicitly shunning the evidence demonstrating that markets have become more, not less, competitive,<sup>10</sup> the Memorandum proposes that California adopt a firm stance in favor of false positives over false negatives—in other words, that it tolerate erroneously condemning procompetitive behavior in exchange for avoiding the risk of erroneously accepting anticompetitive conduct:

The Commission can nullify these principles by asserting in that it favors overdeterrence and need not follow federal law.

The Legislature hereby finds and declares all of the following:

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<sup>9</sup> David Autor, David Dorn, Lawrence F. Katz, Christina Patterson, & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q.J. ECON. 645, 651 (2020) (citations omitted) (emphasis added).

<sup>10</sup> See e.g., Sharat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity*, 13 AM. ECON. J. MICRO. 309, 323-24 (2021). (“[C]oncentration increases do not correlate to price hikes and correspond to increased output. This implies that oligopolies are related to an offsetting and positive force—these oligopolies are likely due to technical innovation or scale economies. My data suggest that increases in market concentration are strongly correlated with innovations in productivity”); Chang-Tai Hsieh & Esteban Rossi-Hansberg, *The Industrial Revolution in Services*, 1 J. POL. ECON. MACRO. 3 (2023). (“Market concentration at the local level has decreased in all US cities, particularly in cities that were initially small. These facts are consistent with the availability of new fixed-cost-intensive technologies that yield lower marginal costs in service sectors. The entry of top service firms into new local markets has led to substantial unmeasured productivity growth, particularly in small markets”); David Berger, Kyle Herkenhoff, & Simon Mongey, *Labor Market Power*, 112 AM. ECON. REV. 1147, 1148-49 (2022), (finding that most labor markets are more competitive today than they were in the 1970s).

(a) Courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors the risk of over-enforcement of antitrust laws over the risk of under-enforcement.<sup>11</sup>

This presupposes that the risk of antitrust underenforcement is greater than the risk of overenforcement. Of course, it is possible that, in some markets, there are harms that are missed for which enforcers should have been better equipped. But advocates of reform have yet to adequately explain much of what we would need to know to make such determinations, let alone to craft the right approach if we did. Antitrust law should be refined based on an empirical demonstration of harms, as well as a careful weighing of those harms against the losses to social welfare that would arise if procompetitive conduct were deterred alongside anticompetitive conduct.

Dramatic new statutes to undo decades of antitrust jurisprudence or reallocate burdens of proof with the stroke of a pen are unjustified. Suggesting that antitrust law should uniformly err on the side of enforcement, when the effect of the conduct at issue on competition is uncertain, would be an unsupported statement of a political preference, not one rooted in sound economics or evidence.

The primary evidence adduced to support the claim that underenforcement (and thus, the risk of Type II errors) is more significant than overenforcement (and thus, the risk of Type I errors) is that there are not enough cases brought and won. But even if this is superficially true, such a conclusion is just as consistent with a belief that the current regime is functioning well as it is with a belief that it is functioning poorly.

At the same time, some critics (including the Memorandum's authors) contend that a heightened concern for Type I errors stems from a faulty concern that Type 2 errors are not really problematic, as the market itself will correct the situation, which they view as naïve.<sup>12</sup>

But Judge Frank Easterbrook's famous argument for enforcement restraint is not based on the assertion that markets are perfectly self-correcting. Rather, his claim is that the (undeniable) incentive of new entrants to compete for excess profits in monopolized markets operates to limit the social costs of Type II errors more effectively than the legal system's ability to correct or ameliorate the costs of Type I errors. The logic is quite simple, and not dependent on the strawman notion of market perfection:

If the court errs by condemning a beneficial practice, the benefits may be lost for good. Any other firm that uses the condemned practice faces sanctions in the name of stare decisis, no matter the benefits. If the court errs by permitting a deleterious practice, though, the welfare loss decreases over time. Monopoly is self-destructive. Monopoly prices eventually attract entry. True, this long run may be a long time coming, with loss to society in the interim. The central purpose of antitrust is to speed up the arrival of the

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<sup>11</sup> Memorandum, at 11.

<sup>12</sup> *Id.*

long run. But this should not obscure the point: judicial errors that tolerate baleful practices are self-correcting while erroneous condemnations are not.<sup>13</sup>

Moreover, anticompetitive conduct that is erroneously excused may be subsequently corrected, either by another enforcer, a private litigant, or another jurisdiction. Ongoing anticompetitive behavior will tend to arouse someone's ire, whether it be competitors, potential competitors, customers, or input suppliers. That means such behavior will be noticed and potentially brought to the attention of enforcers. And for the same reason—identifiable harm—it may also be actionable.

By contrast, procompetitive conduct that does not occur because it is prohibited or deterred by legal action has no constituency and no visible evidence on which to base a case for revision. Nor does a firm improperly deterred from procompetitive conduct have any standing to sue the government for erroneous antitrust enforcement, or the courts for adopting an improper standard. Of course, over-enforcement can sometimes be corrected, but the institutional impediments to doing so are formidable.

The claim that concern for Type I errors is overblown further rests on the assertion that “more up-to-date economic analysis” has undermined that position.<sup>14</sup> But that learning is, for the most part, entirely theoretical—constrained to “possibility theorems” divorced from realistic complications and the real institutional settings of decisionmaking. Indeed, the proliferation of such theories may actually increase—rather than decrease—uncertainty by further complicating the analysis, and asking generalist judges to choose from among competing theories without any realistic means to do so.<sup>15</sup>

Unsurprisingly, “[f]or over thirty years, the economics profession has produced numerous models of rational predation. Despite these models and some case evidence consistent with episodes of predation, little of this Post-Chicago School learning has been incorporated into antitrust law.”<sup>16</sup> Nor is it likely that the courts are making an erroneous calculation in the abstract. Evidence of Type I errors is hard to come by. But for a wide swath of conduct called into question by the “post-Chicago School” and other theories, the evidence of systematic problems is virtually nonexistent.<sup>17</sup>

Moreover, contrary to the Memorandum's implications, U.S. antitrust law has not ignored potentially anticompetitive harm, and courts certainly aren't blindly deferential to conduct undertaken by

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<sup>13</sup> Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3 (1984).

<sup>14</sup> Herbert J. Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PENN. L. REV. 1843, 1849 (2020).

<sup>15</sup> See Geoffrey A. Manne, *Error Costs in Digital Markets*, in GLOBAL ANTITRUST REPORT IN THE DIGITAL ECONOMY (Joshua D. Wright & Douglas H. Ginsburg eds., 2020), available at <https://gaidigitalreport.com/wpcontent/uploads/2020/11/Manne-Error-Costs-in-Digital-Markets.pdf>.

<sup>16</sup> Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 147, 166 (2012).

<sup>17</sup> *Id.* at 166 (“[T]here is very little empirical evidence based on in-depth industry studies that RRC is a significant antitrust problem.”); *id.* at 148 (“Because of [the Post-Chicago School] literature's focus on theoretical possibility theorems, little evidence exists regarding the empirical relevance of these theories.”).

large firms. It is impossible to infer from the general “state of the world” or from perceived “wrong” judicial decisions that the current antitrust regime has failed, or that California, in particular, would benefit from a wholesale shift of its antitrust error-cost presumptions.

The Memorandum seeks to overturn these presumptions by nullifying three pillars of U.S. antitrust law: the U.S. Supreme Court’s decisions in *Trinko*, *Amex*, and *Brooke Group*.<sup>18</sup> As we explain in the following subsections, this approach is misguided on both legal and economic grounds.

### **A. *Trinko* Prevents Inefficient Free Riding that Risks Chilling Innovation**

In dispensing with *Trinko*, the Memorandum brings the Cartwright Act closer to the EU’s approach to “refusals to deal.” U.S. and EU antitrust laws differ greatly when it comes to refusals to deal, however, and for good reason. While the United States has imposed strenuous limits on enforcement authorities or rivals seeking to bring such cases, EU competition law sets a far lower threshold for liability, thereby facilitating free riding by self-interested parties.

The U.S. approach is firmly rooted in the error-cost framework and, in particular, the conclusion that avoiding Type I (false-positive) errors is more important than avoiding Type II (false-negative) errors. As the Supreme Court held in *Trinko*:

[Enforced sharing] may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited.<sup>19</sup>

In that case, the Supreme Court was unwilling to extend the reach of Section 2, cabining it to a very narrow set of circumstances:

*Aspen Skiing* is at or near the outer boundary of §2 liability. The Court there found significance in the defendant’s decision to cease participation in a cooperative venture. The unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end.<sup>20</sup>

This highlights two key features of U.S. antitrust law concerning refusals to deal. To start, U.S. antitrust law generally does not apply the “essential facilities” doctrine—indeed, as the Court held in *Trinko*, “we have never recognized such a doctrine.”<sup>21</sup> Accordingly, in the absence of exceptional

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<sup>18</sup> Memorandum, at 4, 12.

<sup>19</sup> *Verizon Comm. v. Law Offices of Trinko*, 540 U.S. 398, 408 (2004)

<sup>20</sup> *Trinko*, 540 U.S. at 409.

<sup>21</sup> *Trinko*, 540 U.S. at 411. See also Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989).

facts, upstream monopolists are rarely required to supply their product to downstream rivals, even if that supply is “essential” for effective competition in the downstream market.

As in most areas of antitrust policy, EU competition law is much more interventionist. Refusals to deal are a central theme of EU enforcement efforts, and there is a relatively low threshold for liability.<sup>22</sup> In theory, for a refusal to deal to infringe EU competition law, it must meet a set of fairly stringent conditions: the input must be indispensable, the refusal must eliminate all competition in the downstream market, and there must not be objective reasons that justify the refusal.<sup>23</sup> In practice, however, all of these conditions have been significantly relaxed by EU courts and the Commission’s decisional practice.<sup>24</sup> This is best evidenced by the lower court’s *Microsoft* ruling. As John Vickers notes:

[T]he Court found easily in favor of the Commission on the *IMS Health* criteria, which it interpreted surprisingly elastically, and without relying on the special factors emphasized by the Commission. For example, to meet the “new product” condition it was unnecessary to identify a particular new product... thwarted by the refusal to supply but sufficient merely to show limitation of technical development in terms of less incentive for competitors to innovate.<sup>25</sup>

The “coup de grace” to the limiting principles laid down in *Bronner* was arguably the European Court of Justice’s ruling in *Android Auto*, in which the court refused to apply *Bronner* in the context of digital platforms. The court discarded the indispensability criterion and found that mere convenience was sufficient to create an access obligation on the part of the dominant undertaking.<sup>26</sup> In general, but especially after the *Android Auto* ruling, it is apparent that EU competition law is far less concerned about the potential chilling effect on firms’ investments than is U.S. antitrust law.

The Memorandum’s additional proposal that liability should not turn on whether a defendant treated particular parties differently in exercising exclusionary conduct (including refusal to deal)<sup>27</sup> is a further move away from effects-based analysis and toward the European model. As Einer Elhauge has noted, there is an important distinction between unconditional and discriminatory exclusionary conduct:

Efforts to simply improve a firm’s own efficiency and win sales by selling a better or cheaper product at above-cost prices should enjoy per se legality without any general requirement to share that greater efficiency with rivals. But exclusionary conditions that

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<sup>22</sup> See Joined Cases 6/73 & 7/73, *Instituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Comm’n*, 1974 E.C.R. 223, [1974] 1 C.M.L.R. 309.

<sup>23</sup> See Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs*, EU:C:1998:569, §41.

<sup>24</sup> Niamh Dunne, *Dispensing with Indispensability*, 16 J. C. L. E. 74 (2020).

<sup>25</sup> John Vickers, *Competition Policy and Property Rights*, 120 ECON. J. 390 (2010).

<sup>26</sup> Case C-233/23 *Alphabet Inc. and Others v. Autorità Garante della Concorrenza e del Mercato (Android Auto)* ECLI:EU:C:2025:110, §40, 52.

<sup>27</sup> Memorandum, at 13.

discriminate on the basis of rivalry by selectively denying property or products to rivals (or buyers who deal with rivals) are not necessary to further ex ante incentives to enhance the monopolist's efficiency, and should be illegal when they create a marketwide foreclosure that impairs rival efficiency.<sup>28</sup>

By seeking to impose liability, regardless of whether conduct is exercised in a discriminatory fashion, the Memorandum would remove the general protection under U.S. antitrust law for unconditional refusals to deal, and would instead apply the conditional standard to all exclusionary conduct.

## **B. Amex Correctly Updates Antitrust Law for Two-Sided Markets**

In the face of evolving facts, procedural consistency and substantive accuracy require that legal doctrines change. Two-sided markets present novel business arrangements, the competitive dynamics and implications of which are incompletely captured by existing antitrust doctrines. In this context, the Supreme Court's decision in *Amex* is uniquely important for the antitrust analysis of firms in the modern platform economy.<sup>29</sup> In a nutshell, *Amex* held that, in cases involving two-sided markets, plaintiffs must show harm on both sides of the market.

The Memorandum attempts to reverse the Supreme Court's holding on platform vertical restraints in *Amex* by positing instead that showing harm on only one side of a multi-sided market suffices to prove antitrust liability.<sup>30</sup> As Greg Werden notes, however, "[a]lleging the relevant market in an antitrust case does not merely identify the portion of the economy most directly affected by the challenged conduct; it identifies the competitive process alleged to be harmed."<sup>31</sup>

Particularly where novel conduct or novel markets are involved—and the relevant economic relationships are therefore poorly understood—market definition is crucial to determine “what the nature of [the relevant] products is, how they are priced and on what terms they are sold, what levers [a firm] can use to increase its profits, and what competitive constraints affect its ability to do so.”<sup>32</sup> This is the approach the Supreme Court employed in *Amex*.

The Memorandum's proposal to overrule *Amex* in California is deeply misguided. The economics of two-sided markets are such that “there is no meaningful economic relationship between benefits and costs on each side of the market considered alone.... [A]ny analysis of social welfare must account for the pricing level, the pricing structure, and the feasible alternatives for getting all sides on board.”<sup>33</sup> Assessing anticompetitive harm with respect to only one side of a two-sided market will

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<sup>28</sup> Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 343 (2003).

<sup>29</sup> *Ohio v. American Express* (“*Amex*”), 138 S. Ct. 2274 (2018).

<sup>30</sup> Memorandum, at 13.

<sup>31</sup> Gregory J. Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 ANTITRUST L.J. 729, 741 (2013).

<sup>32</sup> Geoffrey A. Manne, *In Defence of the Supreme Court's 'Single Market' Definition in Ohio v. American Express*, 7 J. ANTITRUST ENFORCEMENT 104, 106 (2019).

<sup>33</sup> David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. REG. 325, 355-56 (2003). See also Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990, 1018 (2003).

arbitrarily include and exclude various sets of users and transactions, and incorrectly assess the extent and consequences of market power.<sup>34</sup>

Indeed, evidence of a price effect on only one side of a two-sided platform can be consistent with either neutral, anticompetitive, or procompetitive conduct.<sup>35</sup> Only when output is defined to incorporate the two-sidedness of the product, and where price and quality are assessed on both sides of a sufficiently interrelated two-sided platform, is it even possible to distinguish between procompetitive and anticompetitive effects. In fact, “[s]eparating the two markets allows legitimate competitive activities in the market for general purposes to be penalized no matter how output-enhancing such activities may be.”<sup>36</sup>

Notably, while some scholars have opposed the *Amex* holding that both sides of a two-sided market must be included in the relevant market in order to assess anticompetitive harm, some of these critics appear to note that the problem is not that both sides should not be taken into account at all, but only that they should not be included in the same relevant market (thus, permitting a plaintiff to make out a *prima-facie* case by showing harm to just one side).<sup>37</sup> The language proposed in the Memorandum, however, would go even further, seemingly permitting a finding of liability based solely on harm to one side of a multi-sided market, regardless of countervailing effects on the other side:

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.<sup>38</sup>

As in the *Amex* case itself, such an approach would confer benefits on certain platform-business users (in *Amex*, retailers) at the direct expense of consumers (in *Amex*, literal consumers of retail goods purchased by credit card).

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<sup>34</sup> See, e.g., Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Cost of Free Goods*, 80 ANTITRUST L.J. 521, 557 (2016)

<sup>35</sup> See, e.g., *Brief of Amici Curiae Prof. David S Evans and Prof. Richard Schmalensee in Support of Respondents in Ohio et al. v. American Express Co.*, No. 16-1454 (Sup. Ct. Jan. 23, 2018), at 21, available at [https://www.supremecourt.gov/DocketPDF/16/16-1454/28972/20180123160215215\\_16-1454%20State%20of%20Ohio%20v%20American%20Express%20Brief%20for%20Amici%20Curiae%20Antitrust%20Law%20in%20Support%20of%20Respondents.pdf](https://www.supremecourt.gov/DocketPDF/16/16-1454/28972/20180123160215215_16-1454%20State%20of%20Ohio%20v%20American%20Express%20Brief%20for%20Amici%20Curiae%20Antitrust%20Law%20in%20Support%20of%20Respondents.pdf) (“The first stage of the rule of reason analysis involves determining whether the conduct is anticompetitive. The economic literature on two-sided platforms shows that there is no basis for presuming one could, as a general matter, know the answer to that question without considering both sides of the platform.”).

<sup>36</sup> *United States et al. v. Am. Express Co. et al.*, 838 F.3d 179, 198 (2nd Cir. 2016).

<sup>37</sup> See, e.g., Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2161 (2018) (“[I]t is essential to account for any significant feedback effects and possible changes in prices on both sides of a platform when assessing whether a particular firm has substantial market power.”).

<sup>38</sup> Memorandum, at 13.

Adopting such an approach in California—whose economy is significantly dependent on multisided digital-platform firms, including both incumbents and startups—would imperil the state’s economic prospects<sup>39</sup> and exacerbate the incentives for such firms to take jobs, investments, and tax dollars elsewhere.<sup>40</sup>

At a higher level, the Memorandum’s hostility toward the *Amex* ruling appears to be a function of a more generalized rebuke of vertical integration. According to the Memorandum, federal antitrust law has been distorted by the misguided presumption that vertical arrangements and unilateral conduct are unlikely to harm competition.<sup>41</sup> There are, however, sound empirical reasons why U.S. antitrust law treats vertical restraints more favorably than horizontal ones.

On the one hand, ever since the Supreme Court’s *Leegin* ruling, even price-related vertical restraints (such as resale price maintenance, or “RPM”) are assessed under the rule of reason in the United States.<sup>42</sup> The previous *per-se* condemnation of vertical agreements was economically (and, thus, legally) unsustainable. As Patrick Rey and Jean Tirole (hardly the most free market of economists) saw as long ago as 1986: “Another major contribution of the earlier literature on vertical restraints is to have shown that *per se* illegality of such restraints has no economic foundations.”<sup>43</sup>

While there is theoretical literature (rooted in so-called “possibility theorems”) that suggests firms could engage in anticompetitive vertical conduct, the empirical evidence strongly suggests that, even though firms do impose vertical restraints, it is exceedingly rare that they have net anticompetitive effects. Nor is the relative absence of such evidence for a lack of looking: countless empirical papers have investigated the competitive effects of vertical integration and vertical contractual arrangements and found predominantly procompetitive benefits or, at worst, neutral effects.<sup>44</sup> Accordingly, neither

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<sup>39</sup> See Joseph Politano, *California Is Losing Tech Jobs*, APRICITAS ECONOMICS (Apr. 14, 2024), <https://www.apricitas.io/p/california-is-losing-tech-jobs> (“[California’s] GDP fell 2.1% through 2022, the second-biggest drop of any state over that period, driven by a massive deceleration across the information sector. That allowed states like Texas to overtake California in the post-pandemic GDP recovery, creating a gap that California still hasn’t been able to close despite its economic rebound in 2023.”).

<sup>40</sup> *Id.* (“[T]he Golden State has been bleeding tech jobs over the last year and a half—since August 2022, California has lost 21k jobs in computer systems design & related, 15k in streaming & social networks, 11k in software publishing, and 7k in web search & related—while gaining less than 1k in computing infrastructure & data processing. Since the beginning of COVID, California has added a sum total of only 6k jobs in the tech industry—compared to roughly 570k across the rest of the United States.”).

<sup>41</sup> Memorandum, at 11.

<sup>42</sup> *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

<sup>43</sup> Patrick Rey & Jean Tirole, *The Logic of Vertical Restraints*, 76 AM. ECON. REV. 921, 937 (1986).

<sup>44</sup> These papers are collected and assessed in several literature reviews, including Global Antitrust Institute, Comment Letter on Federal Trade Commission’s Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers (George Mason Law & Econ. Research Paper No. 18-27, Sep. 6, 2018). Even the reviews of such conduct that purport to be critical are only tepidly so. See, e.g., Marissa Beck & Fiona Scott Morton, *Evaluating the Evidence on Vertical Mergers* 59 REV. INDUS. ORG. 273 (2021) (“[M]any vertical mergers are harmless or procompetitive, but that is a far weaker statement than presuming every or even most vertical mergers benefit competition regardless of market structure.”).

the change of stance toward vertical conduct nor the abandonment of *Amex* are justified on the basis of empirical evidence.

### C. Forfeiting *Brooke Group* Risks Castigating Procompetitive Conduct

There is a reason why the evidentiary bar for proving predatory pricing is so high: antitrust law encourages high output and low prices. Reflecting a proper reading of the error-costs framework, U.S. antitrust law errs on the side of underenforcement due to a justified concern that castigating low prices may deter precisely the sort of conduct that antitrust law is meant to promote. As such, the standard of proof for predatory pricing—*i.e.*, claims of exclusionary conduct resulting from pricing below cost—is rightly set high. This is, in part, to dissuade self-interested plaintiffs who may look to shield themselves from a more efficient competitor.

In *Brooke Group*, the Supreme Court thus subjected allegations of predatory pricing to two strict conditions: 1) monopolists must charge prices that are below some measure of their incremental costs; and 2) there must be a realistic prospect that they will be able to recoup these first-period losses.<sup>45</sup> In laying out its approach to predatory pricing, the Supreme Court identified the risk of false positives and the clear cost of such errors to consumers. It therefore particularly stressed the importance of the recoupment requirement because, without recoupment, “predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced.”<sup>46</sup>

Accordingly, in the United States, authorities must prove that there are constraints that prevent rival firms from entering the market after the predation scheme, or that the scheme itself would effectively foreclose rivals from entering in the first place.<sup>47</sup> Otherwise, competitors would undercut the predator as soon as it attempts to charge supracompetitive prices to recoup its losses. In such a situation—without, that is, the strong likelihood of recouping the lost revenue from underpricing—the overwhelming weight of economic learning (to say nothing of simple logic) makes clear that predatory pricing is not a rational business strategy.<sup>48</sup> Thus, apparent cases of predatory pricing—in the absence of the likelihood of recoupment—are most likely not, in fact, predatory. Deterring or punishing them would likely actually *harm* consumers.

Once again, the Memorandum attempts to approximate EU competition law, where the standard applied to predatory pricing is much laxer and therefore more likely to injure consumers. Authorities must prove only that a company has charged a price below its average variable cost, in which case its behavior is presumed to be predatory.<sup>49</sup> Even when a firm imposes prices that are between average

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<sup>45</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-27 (1993).

<sup>46</sup> *Id.*, at 224.

<sup>47</sup> On entry deterrence, see Steven C. Salop, *Strategic Entry Deterrence*, 69 AM. ECON. REV. 335 (1979).

<sup>48</sup> See generally John S. McGee, *Predatory Pricing Revisited*, 23 J. L. ECON 289 (1980).

<sup>49</sup> Case C-62/86, *AKZO v Comm'n*, EU:C:1991:286, ¶¶ 71-72.

variable and average total cost, it can be found guilty of predatory pricing if authorities show that its behavior was part of “a plan to eliminate competition.”<sup>50</sup> Most significantly, in neither case is it necessary for authorities to show that the scheme would allow the monopolist to recoup its losses.<sup>51</sup>

By affirmatively dispensing with the limitations laid down in *Brooke Group*,<sup>52</sup> the Memorandum effectively recommends that California legislators shift California predatory-pricing law toward the European model. Unfortunately, such a standard has no basis in economic theory or evidence—not even in the “strategic” economic theory that arguably challenges the dominant “Chicago School” understanding of predatory pricing.<sup>53</sup> Indeed, strategic predatory pricing still requires some form of recoupment and the refutation of any convincing business justification offered in response.<sup>54</sup> As Bruce Kobayashi and Tim Muris emphasize, the introduction of new possibility theorems, particularly uncorroborated by rigorous empirical reinforcement, does not necessarily alter the implementation of the error-cost analysis:

While the Post-Chicago School literature on predatory pricing may suggest that rational predatory pricing is theoretically possible, such theories do not show that predatory pricing is a more compelling explanation than the alternative hypothesis of competition on the merits. Because of this literature’s focus on theoretical possibility theorems, *little evidence exists regarding the empirical relevance of these theories. Absent specific evidence regarding the plausibility of these theories, the courts... properly ignore such theories.*<sup>55</sup>

The case of predatory pricing illustrates a crucial distinction between European and American competition law. The recoupment requirement embodied in U.S. antitrust law essentially differentiates aggressive pricing behavior that improves consumer welfare by leading to overall price decreases from predatory pricing that reduces welfare due to ultimately higher prices. In other words, it is entirely focused on consumer welfare.

The European approach, by contrast, reflects structuralist considerations that are far removed from a concern for consumer welfare. Its underlying fear is that aggressive pricing by dominant companies—even to the benefit of consumers—could, by their very success, engender more concentrated market structures. It is simply presumed that these less-atomistic markets are invariably detrimental to consumers. Both the *Tetra Pak* and *France Télécom* cases (and the recent *Qualcomm* judgment) offer clear illustrations of the European Court of Justice’s reasoning on this point:

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<sup>50</sup> *Id.* at ¶ 72 (“[P]rices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor.”).

<sup>51</sup> Case C-333/94 P, *Tetra Pak v Comm’n*, EU:C:1996:436, ¶ 44. See also, Case C-202/07 P, *France Télécom v Comm’n*, EU:C:2009:214, ¶ 110.

<sup>52</sup> Memorandum, at 13-14.

<sup>53</sup> *Id.* at ¶ 107.

<sup>54</sup> Patrick Bolton, Joseph F. Brodley, & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L. J. 2239 (2000).

<sup>55</sup> Kobayashi & Muris, *supra* note 16 (emphasis added).

[I]t would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated... The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors.<sup>56</sup>

In short, the European approach leaves much less room for analysis of a pricing scheme's concrete effects, making it much more prone to false positives than the *Brooke Group* standard in the United States. It ignores not only the benefits that consumers may derive from lower prices, but also the chilling effect that broad predatory-pricing standards may exert on firms that attempt to attract consumers with aggressive pricing schemes. There is no basis for enshrining such an approach in California law.

## II. The Broken Mirror of Monopoly and Monopsony Power

The potential amendments described in the Memorandum suggest that antitrust law has traditionally obviated monopsony power.<sup>57</sup> They also appear to assume that there is no reason to treat monopsony power any differently than monopoly power.<sup>58</sup> Indeed, in many parts of the Memorandum, “monopoly” and “monopsony” are placed on equal footing. For instance, Option One includes the following provision:

Section 16720.1 is added to read: It is unlawful for a person 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.<sup>59</sup>

There are, however, important differences between monopoly and monopsony power that militate against their equivalent treatment under antitrust law. Indeed, despite the growing interest among economists, lawyers, and policymakers in the concept of monopsony power—particularly in labor markets—significant empirical and conceptual challenges remain in the use of antitrust law to address labor monopsony.

On the empirical front, the evidence on the extent and impact of labor monopsony is mixed.<sup>60</sup> While some studies have found evidence of labor-market concentration and its effects on wages, these studies often rely on indirect measures that have limited applicability to antitrust cases.<sup>61</sup> More direct

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<sup>56</sup> *Tetra Pak*, *supra* note 51, at ¶ 44. See also Case T-671/19 *Qualcomm, Inc. v European Commission* ECLI:EU:T:2024:626 ¶ 441 & 594.

<sup>57</sup> Memorandum, fn. 7.

<sup>58</sup> See, e.g., Memorandum, at 2.

<sup>59</sup> *Id.* Option Two contains similar wording.

<sup>60</sup> Manne, Albrecht, & Auer, *supra* note 3, at 1129-1141.

<sup>61</sup> *Id.* at 1136-1141.

estimates of monopsony power are rare, and often rely on stylized economic models that may not capture the complexities of real-world labor markets.<sup>62</sup> Moreover, the economics literature has not reached a clear consensus on the appropriate framework to assess labor-market power in antitrust contexts.<sup>63</sup>

Conceptual challenges also abound. Unlike monopoly (seller power), which directly affects final consumer prices, monopsony power is exerted upstream (e.g., an employer paying lower wages, or a buyer paying lower input prices). This means any assessment of competitive harm must grapple with effects at multiple levels of the supply chain. For instance, if a dominant buyer (like a large employer) uses its power to push wages down, while there is direct harm to workers, downstream consumers might benefit, at least in part, from lower costs (through lower product prices). Traditional antitrust doctrine and existing enforcement tools are not (yet) well-equipped to balance these cross-market effects. In a recent law-review article about monopsony issues and antitrust, ICLE scholars explain:

All supply chains end with final consumers, and antitrust policy must grapple with how to balance effects at different levels of the distribution chain.<sup>64</sup>

As a result, when applying antitrust law to monopsony situations, policymakers must consider the “pass through” of upstream cost savings to downstream prices. This complexity is not present in-run-of-the-mill monopoly cases. There is also no established consensus on how to weigh a dollar of harm to workers against a dollar of benefit to consumers, or how much pass through might be sufficient to offset a monopsony harm. This is an area of ongoing economic debate, which is one reason courts have been cautious in pure labor-monopsony cases.<sup>65</sup>

Defining the relevant labor or input market also poses thorny issues. Defining a labor market involves drawing boundaries around job types, skills, industries, and geographic areas, which can be highly “blurry” and fact-dependent. Is an assembly-line worker at a grocery warehouse in the same market as an assembly-line worker at a car factory? Does a tech engineer in San Francisco compete in the same labor market as one in Los Angeles or Bangalore? These questions illustrate why labor markets do not always map neatly onto product markets, and why antitrust law’s conventional tools may not translate cleanly.

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<sup>62</sup> See, e.g., Suresh Naidu, Eric A. Posner, & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018). See also Douglas O. Staiger, Joanne Spetz, & Ciaran S. Phibbs, *Is There Monopsony in the Labor Market? Evidence from a Natural Experiment*, 28 J. LAB. ECON. 211 (2010); Arindrajit Dube, Laura Giuliano, & Jonathan Leonard, *Fairness and Frictions: The Impact of Unequal Raises on Quit Behavior*, 109 AM. ECON. REV. 620 (2019).

<sup>63</sup> Manne, Albrecht, & Auer, *supra* note 3, at 1124.

<sup>64</sup> *Id.* at 1119.

<sup>65</sup> See, e.g., *Kartell v. Blue Shield of Mass. Inc.*, 749 F.2d 922 (1st Cir. 1984); see also Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 342–43 (2010) (“However, Judge Breyer treated Blue Cross essentially as an agent for the customers it insured, rather than as an intermediary firm that purchased inputs and sold outputs as a monopolistic reseller. The court apparently assumed (perhaps wrongfully) that Blue Cross would pass on its lower input costs to its customers in the form of lower insurance premiums.”).

Recent enforcement efforts tend to gloss over the unsettled state of the economics literature on these points. For example, novel market definitions, such as the Federal Trade Commission’s proposed “unionized grocery workers” labor market in a recent merger case, have raised eyebrows about whether such definitions align with economic reality.<sup>66</sup> The fact that agencies are experimenting in this area underscores that methodologies are still in flux.

Crucially, there remains no clear legal standard for how to treat harms to workers or suppliers *vis-à-vis* consumers under the antitrust laws. Under the prevailing consumer welfare standard, antitrust plaintiffs must typically show that the challenged conduct harms consumers or overall competition, not just that it harms a subset of suppliers or workers. In practice, this has meant that cases purely alleging harm to workers (like wage-fixing or no-poach agreements) often struggle unless they can connect that harm to reduced output or quality in a consumer market.

Indeed, recent criminal cases against naked no-poach agreements have faced difficulties in court, and even civil monopsony cases run into the requirement to demonstrate downstream harm. Some advocates argue that the law should be changed to explicitly recognize harm to workers as sufficient by itself. But doing so would be a major departure from the consumer welfare principle, essentially redefining the goal of antitrust. If California were to outlaw single-firm conduct that harms workers (e.g., wage suppression) without regard to consumer impact, it would need to confront how to trade off these interests. Should a practice that moderately harms workers but greatly benefits consumers be unlawful, or vice versa? There is no consensus on this normative question. The Commission’s Memorandum does not provide an answer, and neither does the academic literature on the topic.

Given these uncertainties, it would be premature to explicitly incorporate monopsony considerations into a new SFC. This is not to say antitrust should ignore labor issues entirely—rather, the state of economic knowledge militates against a rush to condemn conduct based on simplistic models or incomplete evidence. While concerns about labor monopsony are real and worth studying, “they are not supported by empirical and theoretical foundations sufficient to bear the weight of these galvanized efforts” at aggressive enforcement.<sup>67</sup>

The academic literature on the extent of labor-market power is mixed and sometimes contradictory, with estimates of wage-setting power varying widely by industry and methodology.<sup>68</sup> The effects of employer concentration on wages and employment are likewise debated. Some data suggest higher concentrations depress wages but that literature is difficult to interpret. As Steven Berry, Martin Gaynor, and Fiona Scott Morton write:

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<sup>66</sup> Complaint ¶ 8-9, Kroger Co./Albertsons Cos., Inc., FTC Docket No. 9428 (Feb. 26, 2024), <https://www.ftc.gov/legal-library/browse/cases-proceedings/krogercompanyalbertsons-companies-inc-matter>.

<sup>67</sup> Manne, Albrecht, & Auer, *supra* note 3, at 1123.

<sup>68</sup> Manne, Albrecht, & Auer, *supra* note 3, at 1132 (discussing some of the implausible implications of estimates of labor-market power).

A main difficulty in [the monopsony power literature] is that most of the existing studies of monopsony and wages follow the structure-conduct-performance paradigm; that is, they argue that greater concentration of employers can be applied to labor markets and then proceed to estimate regressions of wages on measures of concentration. For the same reasons we discussed above, studies like this may provide some interesting descriptions of concentration and wages *but are not ultimately informative about whether monopsony power has grown and is depressing wages*.<sup>69</sup>

In short, the evidence base is still being developed.

Furthermore, remedies for monopsony are not straightforward. In monopoly cases, a successful suit can result in lower prices for consumers or structural changes that foster competition. In monopsony (e.g., labor) cases, a remedy might involve raising wages. But regulators must ensure that such remedies don't unintentionally harm downstream consumers or induce other distortions. There's also the question of whether antitrust is the optimal tool: labor issues can often be addressed by labor-specific regulation (minimum-wage laws, collective-bargaining rights, job-mobility policies like non-compete-clause bans), which may target the problem more directly than antitrust litigation could.

All of this suggests that California should not jump ahead of the evolving research and federal enforcement efforts by embedding unproven monopsony theories into its law. At this juncture, developing better measures of labor-market power, studying specific instances of monopsony harm, refining economic models, and clarifying enforcement priorities would be more productive policy avenues. The inclusion of monopsony or "dominant buyer" language in a single-firm conduct provision should not outpace the empirical and legal consensus. California can play a constructive role in this area by fostering further study and perhaps by testing cautiously in individual cases, rather than by enacting sweeping statutory mandates before the requisite analysis is in place.

### III. Protecting 'Trading Partners' Instead of Consumers

Protecting "trading partners"—defined as "parties with which the defendant deals, either as a customer or supplier"—has attracted growing interest in antitrust law in recent years.<sup>70</sup> While this approach may reflect legitimate concerns about power imbalances, it risks undermining the coherence, neutrality, and effectiveness of antitrust enforcement centered on the consumer welfare standard.

The consumer welfare standard, long the cornerstone of U.S. antitrust policy, focuses on such economic outcomes as lower prices, higher output, improved quality, and innovation. It offers a relatively objective and administrable framework for courts and agencies.<sup>71</sup> In contrast, protecting trading partners introduces a pluralistic and often conflicting set of aims. Suppliers may benefit from

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<sup>69</sup> Steven Berry, Martin Gaynor, & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSPS. 44, 57 (2019), <http://dx.doi.org/10.13140/RG.2.2.24964.99201> (emphasis added).

<sup>70</sup> Memorandum, at 6. There are also suggestions that "suppliers" include "suppliers of labor," or workers. In that case, the comments included in the previous section (on monopsony power) apply here as well.

<sup>71</sup> *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

higher input prices, while consumers suffer; protecting business customers may enhance their profits, but at the expense of costs to consumers. These tradeoffs make it difficult to formulate a consistent enforcement standard.

One major risk is the politicization of antitrust law. Antitrust law depends on a stable and principled basis for meaningful and effective enforcement. Broadening its purpose to protect trading partners opens the door to more discretionary and potentially more politicized decisionmaking. Imbuing antitrust with open-ended objectives would risk creating a sort of “meta-legislation” that, as a result, increases the returns to influencing enforcement policy and outcomes. In turn, this raises firms’ incentives to expend their resources on “destructive” rather than “productive” entrepreneurship—*i.e.*, rent seeking.<sup>72</sup>

Another major risk that flows from the politicization of antitrust relates to protecting inefficient firms at the expense of consumer welfare. Pursuing the welfare of firms under the rubric of “trading partner welfare” may provide a lifeline to less-efficient firms, who may be encouraged to acquire through litigation what they could not through competition.<sup>73</sup> But antitrust law is not meant to insulate businesses from competition simply because they are small or disadvantaged—quite the contrary. Under a trading-partner theory, enforcement actions could target practices like aggressive pricing or exclusive dealing—not because they harm competition, but because they harm specific upstream or downstream partners. This would represent a dramatic and unjustified break from established antitrust principles.

Finally, incorporating trading-partner protection into antitrust enforcement risks conflating it with other legal domains better suited to address such concerns. Contract law and regulatory policy already provide avenues to address imbalances in supplier or customer relationships. Antitrust law is “comparatively disadvantaged” to adjudicate questions in these legal domains, especially when such cases involve difficult questions that may prejudice consumer welfare.

To be clear, existing antitrust frameworks that protect consumers are often perfectly adequate to address practices that may also harm trading partners. For instance, the rule-of-reason analysis under antitrust law frequently incorporates considerations on trading partners *when consumer harm is also present*. Expanding the scope of antitrust to protect trading partners *in isolation* would dilute its doctrinal rigor and increase the risk of regulatory and judicial overreach.<sup>74</sup>

Reorienting antitrust law around the protection of trading partners may appear appealing when combined with (misguided) perceptions about rising corporate concentration. Besides lacking a solid empirical basis, however, such a shift would destabilize the objective foundation of antitrust enforcement, politicize regulatory discretion, and entangle antitrust with redistributive aims, rather than

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<sup>72</sup> William J. Baumol, *Entrepreneurship: Productive, Unproductive, and Destructive*, 11 J. BUS. & VENTUR. 3 (1996).

<sup>73</sup> Ann P. Bartel & Lacy G. Thomas, *Predation through Regulation: The Wage and Profit Effects of the Occupational Safety and Health Administration and the Environmental Protection Agency*, 30 J. L. & ECON. 239 (1987).

<sup>74</sup> Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT. J. IND. ORG. 714 (2018).

policing inefficient conduct that harms consumers. A more prudent approach would retain the consumer welfare standard while using complementary policies—such as tax reforms or contract law—to address broader concerns.

#### **IV. Conclusion**

ICLE appreciates the opportunity to provide input on the CLRC’s single-firm conduct policy options. In this comment letter, we have articulated three core recommendations:

1. Maintain California’s antitrust alignment with the fundamental U.S. framework—grounded in the consumer welfare standard, effects-based analysis, and error-cost caution—and resist calls to “Europeanize” monopolization law in a way that would diminish innovation and consumer benefits.
2. Be cautious in addressing monopsony or buyer-side dominance in any new statute, acknowledging current economic uncertainties and the need for a clear framework. It is better to proceed incrementally, guided by evidence from both economics and actual cases, than to impose broad prohibitions that could overshoot or conflict with the consumer welfare goal.
3. Refrain from expanding antitrust to protect “trading partners” (suppliers, workers, or other stakeholders) as an end in itself, as this would politicize enforcement, protect less-efficient competitors, and divert antitrust from its pro-consumer mission. Competition, not competitors or contracting parties, should remain the focus of the law.

California’s antitrust laws can and should evolve to address modern economic realities. That evolution must, however, be informed by rigorous analysis and respect for the lessons learned over decades of antitrust enforcement. The consumer welfare standard and error-cost framework are not antiquated relics; they are safeguards that ensure antitrust intervention helps, rather than harms, the public. Departing from them, whether by embracing presumptions of guilt for large firms or by turning antitrust into a multipurpose tool for various interest groups, would risk repeating historical mistakes.

As we have previously observed, “once antitrust is expanded beyond its economic constraints and imbued with political content, it ceases to be a uniquely valuable tool for addressing real economic harms to consumers, and becomes a tool for routing around legislative and judicial constraints,”<sup>75</sup> undermining its legitimacy and effectiveness. We urge the Commission to avoid that path.

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<sup>75</sup> Geoffrey Manne, *Why US Antitrust Law Should Not Emulate European Competition Policy*, 10 (Written Statement from A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU, Hearing of the U.S. Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, Dec. 19, 2018), available at <https://www.judiciary.senate.gov/imo/media/doc/Manne%20Testimony.pdf>.