

## Comments of the International Center for Law & Economics

*RE: Department of Justice Anticompetitive Regulations  
Task Force, Docket No. ATR2025-0001*

*Federal Trade Commission Request for Public  
Comment Regarding Reducing Anti-Competitive  
Regulatory Barriers*

May 27, 2025

### Authored by:

**Eric Fruits** (Senior Scholar, International Center for Law & Economics)

**Daniel Gilman** (Senior Scholar, Competition Policy, International Center for Law & Economics)

**Ben Sperry** (Senior Scholar, Innovation Policy, International Center for Law & Economics)

**Kristian Stout** (Director of Innovation Policy, International Center for Law & Economics)

**Mario Zúñiga** (Senior Scholar, Competition Policy, International Center for Law & Economics)

**I. Introduction ..... 4**

    A. The Forgotten Strand of the Anti-Monopoly Tradition in Anglo-American Law ..... 5

    B. Building on Historic Competition Advocacy ..... 8

**II. Certificates of Convenience and Necessity: The Quintessential Anticompetitive Entry Barrier ..... 11**

    A. CCNs Are Anticompetitive by Design..... 12

    B. CCNs Erect Anticompetitive Entry Barriers ..... 13

    C. CCNs’ Anticompetitive Effects ..... 14

    D. Recommendation: Eliminate Federal and State CCNs ..... 14

**III. Occupational Licensing..... 16**

    A. Occupational Licensing Is Anticompetitive by Design ..... 17

    B. Occupational Licensing’s Anticompetitive Effects ..... 18

    C. Recommendation: Eliminate or Scale Back Occupational-Licensing Laws..... 19

**IV. Legalized Cartels and Antitrust Exemptions and Immunities..... 20**

**V. State Action and Sovereign Immunity ..... 24**

    A. Clarifying the Boundaries of State-Action Immunity..... 24

    B. The Problem of State-Owned Enterprises..... 25

    C. Case Study: TVA and Local Power Companies ..... 26

    D. Recommendation: Subject the TVA and Government-Owned LPCs to Antitrust Law..... 30

**VI. Prevailing Wages ..... 31**

    A. Prevailing Wage’s Anticompetitive Roots ..... 31

    B. Wage-Determination Mechanisms: Methodological Flaws and Market Distortions ..... 32

    C. Prevailing Wage’s Anticompetitive Effects ..... 33

    D. Recommendations ..... 34

**VII. Energy Transmission..... 34**

    A. The Contradiction at Order No. 1000’s Core ..... 34

    B. The Central-Planning Problem: Information Deficiencies and Misaligned Incentives ..... 35

    C. Federal ROFR Removal: Undermined by State Barriers and Exemptions ..... 36

    D. ‘Competition’ Under Order No. 1000: Perverse Incentives and Failed Outcomes..... 36

    E. Distorting Investment Through Flawed Cost Allocation..... 39

    F. Recommendations ..... 39

**VIII. Anticompetitive *Cy-Pres* Practices..... 40**

    A. *Cy-Pres* Practice’s Anticompetitive Effects ..... 41

    B. Compelled ‘Charitable’ Speech..... 42

    C. Recommendation: End *Cy-Pres* Payments to Third Parties ..... 42

- IX. Recommendations for DOJ and FTC Rules, Guidelines, and Enforcement Actions .... 43
  - A. Refocus on the Consumer Welfare Standard.....43
  - B. Rescind the FTC’s Noncompete Agreements Rule.....45
  - C. Review and Revise HSR Rules and Form .....47
  - D. Review and Revise Horizontal Merger Guidelines .....48
  - E. Develop a Real Section 5 Common Law of Data Security..... 50
    - 1. The LabMD Case: A Cautionary Tale .....50
    - 2. The Need for Article III Court Enforcement .....52
  - F. Review of COPPA Rules .....53
    - 1. Economic Framework: Transaction Costs and Market Effects.....54
    - 2. Empirical Evidence: The YouTube Case Study.....55
- X. Conclusion..... 56

## I. Introduction

We thank the U.S. Justice Department (DOJ) and Federal Trade Commission (FTC) for the opportunity to offer comments regarding eliminating or reducing anticompetitive regulations. The DOJ seeks comments on the “elimination of anticompetitive state and federal laws and regulations that undermine free market competition and harm consumers, workers, and businesses,” with a focus on “unnecessary laws and regulations that raise the highest barriers to competition.”<sup>1</sup> The FTC has asked which federal regulations hinder free-market competition by promoting monopolies, creating entry barriers, restricting competition, imposing excessive licensure or accreditation requirements, burdening procurement processes, or otherwise distorting market dynamics.<sup>2</sup>

We write in support of these twin endeavors. As we note below, they build on agency expertise in the enforcement of competition law, as well as pertinent economic research. They also build on both agencies’ experience and staff expertise in competition advocacy with federal and state policymakers, and with economic research that directly informs such advocacy. Moreover, the long-recognized effectiveness of FTC and DOJ competition advocacy is highly likely to be enhanced by President Donald Trump’s April 9 “Executive Order on Reducing Anticompetitive Regulatory Barriers.”<sup>3</sup> Because both agencies indicated they will coordinate their review of submitted comments, we are submitting a combined set of comments for these matters.

The International Center for Law & Economics (ICLE) is a nonprofit, nonpartisan research center whose core mission is to promote the application of law & economics methodologies to inform public-policy discussion. Our work focuses on developing intellectually rigorous, data-driven analyses to foster efficient policy solutions that enhance consumer welfare and global economic growth.

In this introductory section, we discuss the legal roots of competition advocacy in the Anglo-American anti-monopoly tradition and, in particular, the oft-overlooked observation that government is frequently the source of monopoly power. We also discuss the considerable experience and expertise the agencies can bring to bear in identifying, analyzing, and ultimately ameliorating undue government-established market power. In subsequent sections, we identify categories of regulations that raise competition concerns, as well as specific regulations that may be ripe for procompetitive reform. Throughout, we recognize that procompetitive regulatory reform implicates rules that are ripe for amendment as well as rescission.

---

<sup>1</sup> Press Release, *Justice Department Launches Anticompetitive Regulations Task Force*, U.S. DEP. JUSTICE (Mar. 27, 2025), available at <https://downloads.regulations.gov/ATR-2025-0001-0002/content.pdf>.

<sup>2</sup> *Request for Public Comment Regarding Reducing Anti-Competitive Regulatory Barriers*, FED. TRADE COMM’N. (Apr. 13, 2025), available at <https://downloads.regulations.gov/FTC-2025-0028-0001/content.pdf>.

<sup>3</sup> Donald J. Trump, *Executive Order 14267, Reducing Anticompetitive Regulatory Barriers*, WHITE HOUSE (Apr. 9, 2025), <https://www.presidency.ucsb.edu/documents/executive-order-14267-reducing-anti-competitive-regulatory-barriers>.

## A. The Forgotten Strand of the Anti-Monopoly Tradition in Anglo-American Law

Admirers of the late Supreme Court Justice Louis Brandeis and other antitrust populists often trace the history of American anti-monopoly sentiments from the Founding Era through the Progressive Era's passage of laws to fight the scourge of 19th-century monopolists. Unfortunately, this framing leaves little room for disagreements about economic theory or evidence. One is either anti-monopoly or pro-monopoly, anti-corporate power or pro-corporate power.

This story also muddles the dominant anti-monopoly strain from English common law, which continued well into the late 19th century and was opposed specifically to *government-granted monopoly*.<sup>4</sup> By contrast, many of today's "anti-monopolists" focus myopically on alleged monopolies that often benefit consumers, while largely ignoring monopoly power granted by government. The FTC and DOJ do well to refocus on anti-competitive regulations in these public inquiries.

Scholars like Timothy Sandefur of the Goldwater Institute have written about the right to earn a living that arose out of English common law and was inherited by the United States.<sup>5</sup> This anti-monopoly stance was aimed at government-granted privileges, not at successful business ventures that gained significant size or scale.

For instance, 1602's *Darcy v. Allein*, better known as the "Case of Monopolies," dealt with a "patent" originally granted by Queen Elizabeth I in 1576 to Ralph Bowes, and later bought by Edward Darcy, to make and sell playing cards. Darcy did not innovate playing cards; he merely had permission to be the sole purveyor. Thomas Allein, who attempted to sell playing cards he created, was sued for violating Darcy's exclusive rights. Darcy's monopoly ultimately was held to be invalid by the court, which refused to convict Allein.

Edward Coke, who argued on behalf of the patent in *Darcy v. Allen*, wrote that the case stood for the proposition that:

All trades, as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labour, for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen when occasion shall require, are profitable for the commonwealth, and *therefore the grant to the plaintiff to have the sole making of them is against the common law*, and the benefit and liberty of the subject.<sup>6</sup>

---

<sup>4</sup> See Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARVARD J. L. & POL'Y 983, 984 (2013) ("The original meaning of the word 'monopoly' was an exclusive grant of power from the government—in the form of a 'license' or 'patent'—to work in a particular trade or to sell a specific good.").

<sup>5</sup> See, e.g., TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW* (2010); Timothy Sandefur, *The Common Law Right to Earn a Living*, 7(1) INDEPENDENT REV. 69 (2002), available at [https://www.independent.org/pdf/tir/tir\\_07\\_1\\_sandefur.pdf](https://www.independent.org/pdf/tir/tir_07_1_sandefur.pdf).

<sup>6</sup> *The Case of Monopolies*, Trinity Term 44 Elizabeth I, in the Court of King's Bench (1602), [https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/911/0462-01\\_LFeBk.pdf#page=488](https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/911/0462-01_LFeBk.pdf#page=488) (emphasis added).

In essence, Coke's argument was more closely linked to a "right to work" than to market structures, business efficiency, or firm conduct.

The courts largely resisted royal monopolies in 17th century England, finding such grants to violate the common law. For instance, in *The Case of the Tailors of Ipswich*, the court cited *Darcy* and found:

...at the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil... especially in young men, who ought in their youth, (which is their seed time) to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age; and therefore the *common law abhors all monopolies*, which prohibit any from working in any lawful trade.<sup>7</sup>

The principles enunciated in these cases were eventually codified in the Statute of Monopolies, which prohibited the crown from granting monopolies in most circumstances.<sup>8</sup> This was especially the case where the monopoly prevented the right to otherwise lawful work.

American law largely inherited the English common-law system. It also inherited the anti-monopoly tradition the common law embodied. The founding generation of American lawyers were trained on Edward Coke's commentary in "The Institutes of the Laws of England," wherein he strongly opposed government-granted monopolies.<sup>9</sup>

This sentiment can be found in the 1641 Massachusetts Body of Liberties, which stated: "No monopolies shall be granted or allowed amongst us, but of such new Inventions that are profitable to the Countrie, and that for a short time."<sup>10</sup> In fact, the Boston Tea Party itself was, in part, a protest of the monopoly granted to the East India Co., which included a special refund from duties by Parliament that no other tea importers enjoyed.<sup>11</sup>

This anti-monopoly tradition can also be seen in the debates at the Constitutional Convention.<sup>12</sup> A proposal to give the federal government power to grant "charters of incorporation" was voted down on fears it could lead to monopolies.<sup>13</sup> Thomas Jefferson, George Mason, and several Anti-Federalists

---

<sup>7</sup> *The Case of the Tailors of Habits & of Ipswich*, Michaelmas Term, 12 Jame I, In the Court of the King's Bench (1614), [https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/911/0462-01\\_LFeBk.pdf#page=483](https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/911/0462-01_LFeBk.pdf#page=483) (emphasis added).

<sup>8</sup> Statute of Monopolies (1623).

<sup>9</sup> Edward Coke, *The Institutes of the Laws of England*, in THE SELECTED WRITING AND SPEECHES OF SIR EDWARD COKE 851-52, vol. 2 (Steve Sheppar, ed. 2003) ("[I]f a graunt be made to any man, to have the sole making of Cards, or the sole dealing with any other trade, that graunt is against the liberty, and freedome of the Subject, that before did, or lawfully might have used that trade, and consequently against this great Charter. Generally all monpolies are against this great Charter, because they are against he liberty and feedome of the Subject, and against the Law of the Land.").

<sup>10</sup> Massachusetts Body of Liberties (1641), <https://oll.libertyfund.org/pages/1641-massachusetts-body-of-liberties>.

<sup>11</sup> For more see *Boston Tea Party*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Boston\\_Tea\\_Party](https://en.wikipedia.org/wiki/Boston_Tea_Party) (last accessed May 19, 2025); see also, *The Tea Act*, BOSTON TEA PARTY SH. MUS. (n.d.), <https://www.bostonteapartyship.com/the-tea-act> (last accessed May 21, 2025).

<sup>12</sup> See Calabresi & Leibowitz, *supra* note 4, at 1009.

<sup>13</sup> See *id.* at 1011.

expressed concerns about the new national government's ability to grant monopolies, arguing that an anti-monopoly clause should be added to the Constitution.<sup>14</sup> For example, in a letter to Thomas Jefferson, James Madison concluded, "With regard to Monopolies they are justly classed among the greatest nuisances in Governments which establish them."<sup>15</sup> Six states wanted to include provisions that would ban monopolies and grants of special privileges in the Constitution.<sup>16</sup>

The American anti-monopoly tradition remained largely an anti-government tradition throughout much of the 19th century, rearing its head in debates about the Bank of the United States,<sup>17</sup> publicly funded internal improvements,<sup>18</sup> and government-granted monopolies over bridges<sup>19</sup> and the seas.<sup>20</sup> Pamphleteer Lysander Spooner even tried to start a rival to the U.S. Post Office by appealing to the strong American impulse against monopoly.<sup>21</sup>

Coinciding with the Industrial Revolution, liberalization of corporate law made it easier for private persons to organize firms that were not simply grants of exclusive monopoly. But discontent with industrialization and other social changes contributed to the birth of a populist movement, and later to progressives like Brandeis, who focused on private combinations and corporate power, rather

---

<sup>14</sup> See *id.* at 1009-10.

<sup>15</sup> Letter from James Madison to Thomas Jefferson n. 7 (Oct. 17, 1788), <https://founders.archives.gov/documents/Jefferson/01-14-02-0018>.

<sup>16</sup> See Calabresi & Leibowitz, *supra* note 3, at 1013.

<sup>17</sup> See *President Jackson's Veto Message Regarding the Bank of the United States*, AVALON PROJ. (Jul. 10, 1832), [https://avalon.law.yale.edu/19th\\_century/ajveto01.asp](https://avalon.law.yale.edu/19th_century/ajveto01.asp).

<sup>18</sup> See *Internal improvements*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Internal\\_improvements](https://en.wikipedia.org/wiki/Internal_improvements) (last accessed May 19, 2025) (noting "While the Federalist strand of republicanism defended internal improvements as agents of the 'general welfare' or 'public good', another strand unraveled from the republican tapestry to denounce such schemes as 'corruption', taxing the many to benefit the few. Critics of internal improvement schemes did not have to dig deep under the veneer of 'public good' to uncover self-interest.").

<sup>19</sup> See *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 545-46 (1837) ("[I]t would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter; the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavourably to the public, and to the rights of the community, than would be done in a like case in an English court of justice.").

<sup>20</sup> See *Gibbons v. Ogden*, 22 U.S. 1 (1824) (deciding whether a state license allowing for monopoly on steamboat navigation could stop a federal licensee from competing in the same waters, with the Court ruling in favor of the federal government's right to regulate interstate commerce in navigable waters).

<sup>21</sup> See *Lysander Spooner on Why Government Monopolies like the Post Office Are Inherently Inefficient* (1844), LIB. FUND, <https://oll.libertyfund.org/quotes/541> (last accessed May 19, 2025) ("Universal experience attests that government establishments cannot keep pace with private enterprise in matters of business – (and the transmission of letters is a mere matter of business.) Private enterprise has always the most active physical powers, and the most ingenious mental ones. It is constantly increasing its speed, and simplifying and cheapening its operations. But government functionaries, secure in the enjoyment of warm nests, large salaries, official honors and power, and presidential smiles – all of which they are sure of so long as they are the partisans of the President – feel few quickening impulses to labor, and are altogether too independent and dignified personages to move at the speed that commercial interests require. They take office to enjoy its honors and emoluments, not to get their living by the sweat of their brows.").

than government-granted privileges. This is the strand of anti-monopoly sentiment that continues to dominate the rhetoric today.

Modern anti-monopoly advocates have largely forgotten the lessons of the long Anglo-American tradition that found government often to be the source of monopoly power. Indeed, American law privileges government's ability to grant favors to businesses through licensing, the tax code, subsidies, and even regulation. The state-action doctrine from *Parker v. Brown*<sup>22</sup> shields anticompetitive state policies from federal antitrust scrutiny. It does so very generally when the policies in question are those of the state acting in its role "as sovereign" (paradigmatically, in legislation duly enacted by state legislators) and, subject to conditions, when the anticompetitive policies are those of lesser state actors. And subject to limited exceptions, the Noerr-Pennington doctrine<sup>23</sup> protects the rights of industry groups to petition the government to pass anticompetitive laws and regulations.

As a result, government is still often used to harm competition, with no remedy outside of the political process that created the monopoly. Antitrust law is used instead to target businesses built by serving consumers well in the marketplace. In the limit, and not infrequently, putatively consumer protection regulations exemplify the sort of rent-seeking described by George Stigler, Sam Peltzman, and others in the "economic theory of regulation" developed in the 1970s.<sup>24</sup> Recovering this foundational anti-monopoly tradition would help focus the FTC and DOJ on some of the most pernicious and durable examples of anticompetitive conduct: state and federal regulation.

## **B. Building on Historic Competition Advocacy**

As noted in the FTC's call for comments, "[a]ppropriately tailored economic regulations can play an important role in ensuring that markets function efficiently." Regulations can, for example, address likely or demonstrated market failure;<sup>25</sup> and they can, in principle, be well-tailored to do so. At the same time, there is a strong economic basis for believing that many government regulations tend to reduce consumer welfare. As one paper from veterans of the FTC put it:

The economic theory of regulation ("ETR") posits that because of relatively high organizational and transaction costs, consumers will be disadvantaged relative to

---

<sup>22</sup> 317 U.S. 341 (1943).

<sup>23</sup> See, e.g., *Easter Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

<sup>24</sup> See, e.g., George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. LAW & ECON. 211 (1976). For a brief overview, see Daniel J. Gilman, *Advocacy*, in SAGE ENCYCLOPEDIA OF POLITICAL BEHAVIOR 8 (Fathali M. Moghaddam, ed. 2017). For more recent investigations along these lines, see JOHN M. VERNON, JOSEPH E. HARRINGTON JR., & W. KIP VISCUSI, *ECONOMICS OF REGULATION AND ANTITRUST* (3d. ed. 2000).

<sup>25</sup> See, e.g., Carolyn Cox & Susan Foster, *The Costs and Benefits of Occupational Regulation*, FED. TRADE COMM'N (1990), available at [https://www.ftc.gov/system/files/documents/reports/costs-benefits-occupational-regulation/cox\\_foster\\_-\\_occupational\\_licensing.pdf](https://www.ftc.gov/system/files/documents/reports/costs-benefits-occupational-regulation/cox_foster_-_occupational_licensing.pdf); Cf. Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328, 1329 (1979).

businesses in securing favorable regulation. This situation tends to result in regulations—such as unauthorized practice of law rules or per se prohibitions on sales-below-cost—that protect certain industries from competition at the expense of consumers. Competition advocacy helps solve consumers’ collective action problem by acting within the political system to advocate for regulations that do not restrict competition unless there is a compelling consumer protection rationale for imposing such costs on citizens. Furthermore, advocacy can be the most efficient means to pursue the FTC’s mission, and when antitrust immunities are likely to render the FTC impotent to wage ex post challenges to anticompetitive conduct, advocacy may be the only tool to carry out the FTC’s mission.<sup>26</sup>

All levels of government are subject to these perverse incentives, but federalism has allowed states and localities in particular to become laboratories of anticompetitive regulations. Moreover, as former FTC Commissioner and Acting Chair Maureen Ohlhausen pointed out, government-imposed (or shielded) restraints on competition can prove “more durable than any private conduct could be.”<sup>27</sup>

Both the FTC and DOJ have a nearly half-century-long history of engaging with anticompetitive state and federal regulations.<sup>28</sup> In the FTC’s case, that engagement has, since the agency’s establishment, been part of the commission’s statutory mission under Section 6 of the FTC Act.<sup>29</sup> The breadth of such engagement is suggested by the account of “policy R&D,” as it is described in a 2009 report by then-FTC Chairman William Kovacic. Policy R&D by both the FTC and the DOJ comprises not

---

<sup>26</sup> James C. Cooper, Paul A. Pautler, & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1092 (2005). See also DOJ Press Release, *supra* note 1 (“Regulatory capture is a well-studied phenomenon in which agencies become ‘captured’ by special interests and big businesses, rather than serving the interests of the American people. But when regulations serve the few and impose undue burdens on small businesses, private enterprise, and entrepreneurs, they also harm competition and ultimately hurt American consumers, workers, and businesses. For example, regulations can increase compliance costs, preventing businesses from competing on a level playing field with powerful corporations. Regulations can also discourage or even intentionally prohibit small businesses and new products from entering markets and lowering prices for American families. In contrast, eliminating unnecessary anticompetitive regulations makes it easier for businesses to compete. More competition empowers the American people – not government regulators – to drive economic progress and innovation. When every American has a fair opportunity to enjoy the benefits of competitive free markets, every American has an opportunity to realize the American dream.”).

<sup>27</sup> Maureen K. Ohlhausen, *An Ounce of Antitrust Prevention Is Worth a Pound of Consumer Welfare: The Importance of Competition Advocacy and Premerger Notification* (11<sup>th</sup> Annual Competition Day, Fiscalía Nacional Económica, Santiago, Chile, Nov. 5, 2013).

<sup>28</sup> For an overview, see Cooper, Pautler, & Zywicki, *supra* note 25. For additional treatment of the history and substance of FTC competition advocacy, see WILLIAM E. KOVACIC, FED. TRADE COMM’N, *THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY THE CONTINUING PURSUIT OF BETTER PRACTICES 91-99* (Jan. 2009), available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf); Maureen K. Ohlhausen, *Identifying, Challenging, and Assigning Political Responsibility for State Regulation Restricting Competition*, 2 COMP. POL’Y INT. 151 (2006); Andrew I. Gavil, *The FTC’s Study and Advocacy Authority in Its Second Century: A Look Ahead*, 83 GEO. WASH. L. REV. 1902 (2016); Arnold C. Celnicker, *The Federal Trade Commission’s Competition and Consumer Advocacy Program*, 33 ST. LOUIS U. L.J. 379 (1988-89); Gilman, *supra* note 24.

<sup>29</sup> See, e.g., 15 U.S.C. § 46(f) (publication of information; reports).

just enforcement matters<sup>30</sup> and the submission of *amicus* briefs,<sup>31</sup> but diverse economic and policy research studies and reports,<sup>32</sup> workshops,<sup>33</sup> and communications with state and federal policymakers in the form of testimony,<sup>34</sup> formal comments to regulatory proceedings,<sup>35</sup> and correspondence submitted by the agencies, both separately<sup>36</sup> and jointly.<sup>37</sup>

Throughout, the agencies have recognized that procompetitive regulatory reform may sometimes involve the wholesale repeal or rescission of regulations or specific regulatory provisions that are substantially anticompetitive in their effect. It also may sometimes involve amendments that lower

---

<sup>30</sup> See, e.g., *Fed. Trade Comm'n v. Phoebe Putney Health Sys. Inc.*, 568 U.S. 216 (2013).

<sup>31</sup> *Legal Library: Amicus Briefs*, FED. TRADE COMM'N, <https://www.ftc.gov/legal-library/browse/amicus-briefs> (last accessed May 21, 2025).

<sup>32</sup> See, e.g., *Research in the Bureau of Economics*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/research-bureau-economics> (last accessed May 21, 2025); see also Paul A. Pautler, *A History of the FTC Bureau of Economics*, AM. ANTITRUST INST. (2015), available at [https://www.antitrustinstitute.org/wp-content/uploads/2018/08/FTC-Bureau-of-Economics-History\\_0.pdf](https://www.antitrustinstitute.org/wp-content/uploads/2018/08/FTC-Bureau-of-Economics-History_0.pdf). For additional policy studies, see, e.g., *Broadband Connectivity Competition Policy: An FTC Staff Report*, FED. TRADE COMM'N (2007), available at <https://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf>.

<sup>33</sup> See, e.g., *Public Workshop on Promoting Competition in Labor Markets*, U.S. DEP. JUSTICE (Dec. 6, 2021), <https://www.justice.gov/atr/event/public-workshop-promoting-competition-labor-markets> (regarding joint FTC/DOJ workshop held Dec. 6-7, 2021); *FTC Roundtable: The Effects of Occupational Licensure on Competition, Consumers, and the Workforce: Empirical Research and Results*, FED. TRADE COMM'N (Nov. 7, 2017), <https://www.ftc.gov/news-events/events/2017/11/effects-occupational-licensure-competition-consumers-workforce-empirical-research-results>.

<sup>34</sup> See, e.g., Maureen K. Ohlhausen, *Prepared Statement of the Federal Trade Commission on Competition and Occupational Licensure Before the Subcomm. on Regulatory Reform, Commercial, and Antitrust Law of the H. Comm. on the Judiciary*, FED. TRADE COMM'N (115<sup>th</sup> Cong., Sep. 12, 2017), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1253073/house\\_testimony\\_licensing\\_and\\_rbi\\_act\\_sept\\_2\\_017\\_vote.pdf](https://www.ftc.gov/system/files/documents/public_statements/1253073/house_testimony_licensing_and_rbi_act_sept_2_017_vote.pdf); *Statement of the Federal Trade Commission to the Alaska Senate Committee on Health & Social Services on Certificate of Need Laws and SB 1*, FED. TRADE COMM'N (2019), available at [https://www.ftc.gov/system/files/documents/advocacy\\_documents/statement-federal-trade-commission-alaska-senate-committee-health-social-services-certificate-need/v0800007\\_commission\\_testimony\\_re\\_alaska\\_senate\\_committee\\_032719.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/statement-federal-trade-commission-alaska-senate-committee-health-social-services-certificate-need/v0800007_commission_testimony_re_alaska_senate_committee_032719.pdf).

<sup>35</sup> See, e.g., *FTC Staff Letter to Department of Health and Human Services Concerning the 21st Century Cures Act: Interoperability, Information Blocking and the ONC Health IT Certification Program Rule*, FED. TRADE COMM'N (Mar. 2020), available at [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-letter-department-health-human-services-concerning-21st-century-cures-act-interoperability/v190002hhsinfoblockingletter.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-letter-department-health-human-services-concerning-21st-century-cures-act-interoperability/v190002hhsinfoblockingletter.pdf); *FTC Staff Comment Before the Massachusetts Department of Public Health Concerning Proposed Regulation of Limited Service Clinics*, FED. TRADE COMM'N (Oct. 2007), available at <http://www.ftc.gov/os/2007/10/v070015massclinic.pdf>.

<sup>36</sup> Advocacy work, including letters, comments, and testimony by the FTC and its staff can be found at *Legal Library: Advocacy Filings*, FED. TRADE COMM'N, <https://www.ftc.gov/legal-library/browse/advocacy-filings> (last accessed May 21, 2025).

<sup>37</sup> For examples of joint FTC/DOJ advocacies, see, e.g., *Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice on Certificate-of-Need Laws and South Carolina House Bill 3250*, U.S. DEP. JUSTICE (Jan. 11, 2016), <https://www.justice.gov/atr/file/812606/download>; *Fed. Trade Comm'n & Dept. Justice Comment to Gov. Jennifer M. Granholm Concerning Michigan H.B. 4416 to Impose Certain Minimum Requirements on Real Estate Brokers*, FED. TRADE COMM'N (2007), <https://www.ftc.gov/legal-library/browse/advocacy-filings/ftc-department-justice-comment-governor-jennifer-m-grahholm-concerning-michigan-hb-4416-impose>.

excessive regulatory costs or more narrowly and efficiently tailor regulations to meet legitimate regulatory goals, while minimizing undue competitive costs.

The depth and breadth of FTC and DOJ policy R&D efforts should provide a firm foundation for new efforts to combat anticompetitive regulation, not least because of the developed institutional resources available to the agencies, including staff expertise and, on certain topics, applicable research and policy analyses. At the same time, neither the issues nor the tools deployed in prior agency competition advocacy need constrain the identification of new issues and tools with which to promote competition. Both agencies should use all the tools at their disposal to combat anticompetitive regulations.

What follows are descriptions of a number of regulations at either the state or federal level that could be targeted for competition advocacy by the FTC and DOJ. Some are in areas the agencies have already identified as priorities, or even engaged in the past. Others are regulations the agencies themselves have promulgated or practices they follow. All are worthy of deeper investigation.

## **II. Certificates of Convenience and Necessity: The Quintessential Anticompetitive Entry Barrier**

Certificates of convenience and necessity (CCNs) represent one of the most formidable government-imposed barriers to market entry across numerous federally regulated industries.<sup>38</sup> Sometimes called certificates of public convenience and necessity (CPCNs), CCNs are formal authorizations that permit companies to initiate operations or construct facilities in specific geographic areas, effectively create government-sanctioned monopolies or oligopolies that undermine basic economic principles of competition. They are commonly required for private firms to provide various utilities—such as electric, gas, and water services—but may also be required to provide various services deemed to be common carriers. The antitrust agencies have considerable experience with health-care-facilities regulations such as certificates of need (CONs)<sup>39</sup> and certificates of public advantage (COPAs),<sup>40</sup> which may also be considered CCN-type regulations.

While CCNs are ostensibly designed to serve the public interest by ensuring service quality and reliability, or by managing unproductive “arms race” scenarios, proponents have long maintained

---

<sup>38</sup> CCNs may also be classified as certificates of public convenience and necessity (CPCNs) or certificates of need (CONs).

<sup>39</sup> See, e.g., *Joint Statement of the Fed. Trade Comm’n and the Antitrust Div. of the U.S. Dep’t Justice Regarding Certificate-of-Need (CON) Laws and Alaska Senate Bill 62, Which Would Repeal Alaska’s CON Program*, FED. TRADE COMM’N (2017), available at [https://www.ftc.gov/system/files/documents/advocacy\\_documents/joint-statement-federal-trade-commission-antitrust-division-us-department-justice-regarding/v170006\\_ftc-doj\\_comment\\_on\\_alaska\\_senate\\_bill\\_re\\_state\\_con\\_law.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-us-department-justice-regarding/v170006_ftc-doj_comment_on_alaska_senate_bill_re_state_con_law.pdf); *Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice on Certificate-of-Need Laws and South Carolina House Bill 3250*, U.S. DEP. JUSTICE (Jan. 11, 2016), <https://www.justice.gov/atr/file/812606/download>.

<sup>40</sup> See generally, *FTC Policy Perspectives on Certificates of Public Advantage: Staff Policy Paper*, FED. TRADE COMM’N (Aug. 15, 2022), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/COPA\\_Policy\\_Paper.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/COPA_Policy_Paper.pdf).

that such regulations are needed to prevent “unnecessary and wasteful competition.”<sup>41</sup> CCNs may have diverse effects, but they inevitably comprise barriers to entry and expansion that protect incumbent firms at the expense of consumers, innovation, and economic efficiency.

With certain species of CCNs, evidence of countervailing consumer-protection benefits may be minor, thin, or simply unavailing. That is, some CCN regulations and many specific CCN provisions are explicitly *designed* to stifle or eliminate competition. Not incidentally, regulatory processes for granting CCNs may be designed to give incumbents a voice in managing the entry or expansion of their actual or potential competitors. That is, they exemplify what Maureen Ohlhausen and Gregory Luib termed “brother, may I” regulations.<sup>42</sup>

### A. CCNs Are Anticompetitive by Design

The historical roots of CCNs trace to the late 19th and early 20th Centuries, coinciding with industries once perceived as “natural monopolies.” The Interstate Commerce Commission, established in 1887, provided the regulatory model that was subsequently expanded during the New Deal Era. When utilities, transportation, and telecommunications were considered “natural” monopolies, CCNs were seen as necessary to foster cost efficiencies by exploiting the single provider’s economies of scale. With the entry of competing firms, it was argued that such economies could not be achieved. In competitive industries, it was claimed that CCNs would staunch “ruinous” competition.<sup>43</sup> For example, trucking and airlines were subject to strict common-carrier regulation and CCNs over the first half of the 20<sup>th</sup> century, when firms complained of excessive or “wasteful” competition.<sup>44</sup>

Beginning in the 1970s, significant deregulation was undertaken in sectors like railroads, airlines, trucking, and telecommunications, driven by a growing consensus that traditional economic regulation, including CCNs, often failed to serve the public interest. Research, including by the FTC,<sup>45</sup> concluded the deregulation of these sectors generally led to increased competition, lower

---

<sup>41</sup> IRSTON R. BARNES, *ECONOMICS OF PUBLIC UTILITY REGULATION* (1942), 229 (“The requirement of a certificate of convenience and necessity may enable the commission to prevent the needless multiplication of companies serving the same territory, and at the same time to avoid a wasteful duplication of capital facilities, thus keeping the investment at the lowest figure consonant with satisfactory service. By protecting the utility from unnecessary competition, the risks inherent in utility investments are reduced and the cost of capital is thereby kept as low as the conditions of the investment market permit.”)

<sup>42</sup> Maureen K. Ohlhausen & Gregory P. Luib, *Brother, May I?: The Challenge of Competitor Control over Market Entry*, 4 J. ANTITRUST ENFORCEMENT 111 (2016) (discussing CONs, as well as occupational regulations as examples of “brother may I” regulations).

<sup>43</sup> For a discussion of the theory of “ruinous competition,” see HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION*, 311 (2005).

<sup>44</sup> For example, the chair of American Airlines wrote in 1947: “There is need for reasonable competition, but there is a limit to reasonable competition and there is such a thing as wasteful competition.” C. R. Smith, *Air Transportation, Its Status, Trend and Prospect*, 14 J. AIR L. & COM. 150, 154 (1947). See also STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982) 222, 240.

<sup>45</sup> For a list of FTC research supporting deregulation, see *Letter from C. Steven Baker, Dir., FTC Chicago Regional Office to Glen McKay, Ass’t Dir., Tennessee Comptroller of the Treasury*, FED. TRADE COMM’N (Jun. 28, 1990), available at [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-tennessee-comptroller-treasury](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-tennessee-comptroller-treasury)

prices, and greater consumer choice. Yet despite this clear evidence, CCNs and CCN-like regulations persist in many sectors, including natural-gas pipelines, broadcasting, telecommunications, and—at the state level—health-care facilities.

## **B. CCNs Erect Anticompetitive Entry Barriers**

From an economic perspective, CCNs create substantial inefficiencies by shielding incumbents from competitive pressures that would otherwise drive cost minimization and productivity improvements. As Greg Mankiw notes in his economics textbook: “The fundamental cause of monopoly is barriers to entry.”<sup>46</sup> Government-mandated CCNs represent perhaps the steepest of such barriers.

Firms protected by CCNs have fewer incentives to operate efficiently. They operate with the expectation that they can pass higher costs on to captive consumers, because they know competing entrants who might otherwise offer lower prices will be slowed or halted from entry. Moreover, when entry barriers are high, regulators may tolerate some degree of inefficiency on the part of incumbents, recognizing the challenges of operating in a capital-intensive industry.<sup>47</sup> The resulting operational slack and inflated prices constitute a deadweight loss to the economy and a direct financial burden on consumers and downstream businesses.

The vague “public interest, convenience, and necessity” standard grants regulators excessive discretion, creating conditions ripe for regulatory capture. As Paul Krugman and Robin Wells observe in their economics textbook: “For a profitable monopoly to persist, something must keep others from going into the same business.”<sup>48</sup> In this case, that “something” is the captured CCN process itself. Incumbent firms, with concentrated interests in regulatory outcomes and substantial resources, can effectively influence regulatory agencies to protect their market positions. The resulting regulations serve industry interests, rather than broader public welfare, while perpetuating anticompetitive structures that primarily benefit established players.

The application process for CCNs systematically disadvantages new market entrants, while benefiting incumbents. Applicants face substantial fees, specialized legal and engineering requirements, and significant compliance burdens that disproportionately affect smaller businesses that lack the resources and regulatory experience of established firms. The anticompetitive effects

---

[concerning-trucking-regulation/v900042.pdf](#) (“The staff of the FTC has studied the deregulation of trucking and the benefits resulting from an increased reliance on market forces at both the federal and state levels. In addition, the Bureau of Economics of the FTC has published a report on trucking deregulation. The Bureau of Economics has published additional studies concerning the effects of regulating the entry of competitors into other industries.”)

<sup>46</sup> N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 312 (4<sup>th</sup> ed., 2007).

<sup>47</sup> Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1401 (Oct. 1998) (noting “cost-of-service rate regulation creates an incentive for utilities to make excessive capital investments in order to boost their rate of return” and “extensive cross-subsidies that characterize regulation of natural monopolies are inherently inefficient”).

<sup>48</sup> PAUL KRUGMAN & ROBIN WELLS, *ECONOMICS* 289 (4<sup>th</sup> ed., 2015).

are even more pronounced when incumbent firms are “grandfathered” and do not (and have not) faced the same CCN burdens.

### C. CCNs’ Anticompetitive Effects

CCNs’ central requirement to demonstrate “public convenience and necessity” often becomes an insurmountable hurdle, as applicants must prove existing services are inadequate. This task is made nearly impossible when incumbents can exercise a “competitor’s veto” to oppose new entry by asserting that the market is already adequately served.<sup>49</sup> While traditional regulation seeks—or at least *hopes*—to avoid regulatory capture, CCN regulations that provide for a “competitor’s veto” are explicitly *designed* for regulatory capture.

Innovation suffers significantly under CCN regimes. By protecting incumbents from price competition and the threat of disruptive innovation, these entry barriers slow technological progress and delay the adoption of efficiency-enhancing advancements. Secure in their regulated positions, incumbents lack strong incentives to invest in research and development, or to adopt potentially costly innovations.<sup>50</sup> This technological stagnation represents a significant opportunity cost for the economy and undermines long-term productivity growth that would otherwise benefit consumers through improved services and lower prices.

The common justification that CCNs ensure safety and reliability or preserve national security fails under scrutiny. Direct safety regulations implemented by specialized agencies like the Pipeline and Hazardous Materials Safety Administration or the Federal Aviation Administration provide more targeted and less anticompetitive means of achieving these goals without restricting market entry. These agencies can mandate specific safety standards, operational procedures, and insurance requirements applicable to all market participants without barring potentially safer or more reliable new firms. The interagency Committee on Foreign Investment in the United States (CFIUS) provides robust mechanisms to vet foreign-investment and supply-chain risks. Competition itself can drive safety improvements, as firms strive to differentiate themselves and avoid costly failures.

### D. Recommendation: Eliminate Federal and State CCNs

FTC Commissioner Mark Meador recently noted, quoting James Madison, “Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the

---

<sup>49</sup> Timothy Sandefur, *State Competitor’s Veto Laws and the Right to Earn a Living: Some Paths to Federal Reform*, 38 HARV. J. L. & PUB. POL’Y 1009 (2015) (“Because CPCN laws enable established firms to file an objection that triggers the hearing requirement—a barrier to entry that in practice is often insurmountable to the applicant—these laws have sometimes been called ‘the Competitor’s Veto.’ Like the more famous ‘Heckler’s Veto’ in First Amendment jurisprudence, which enables an audience member to silence a speaker whose message he or she does not want to hear, the ‘Competitor’s Veto’ enables existing firms to disallow their potential competition.”)

<sup>50</sup> See, e.g., J. R. Hicks, *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 ECONOMETRICA 1, 8 (1935) (“It seems not at all unlikely that people in monopolistic positions will very often be people with sharply rising subjective costs; if this is so, they are likely to exploit their advantage much more by not bothering to get very near the position of maximum profit, than by straining themselves to get very close to it. The best of all monopoly profits is a quiet life.”)

many to their own partialities and corruptions.”<sup>51</sup> The persistence of CCNs represents a triumph of special interests over consumer welfare—a regulatory anachronism that undermines the very public interest it purports to protect.

Eliminating federal CCN requirements would align regulatory policy with sound economic principles by removing artificial barriers to entry and allowing markets to function more efficiently. The evidence from deregulated sectors demonstrates that competition typically leads to lower prices, greater innovation, and improved service quality. Rather than protecting firms from competition, federal regulation should focus on addressing genuine market failures through targeted interventions that preserve competitive dynamics, while ensuring essential public-interest objectives are met.

Toward that end, we recommend the federal government eliminate all CCN laws and regulations regarding entry, exit, or the transfer of assets, including:

- 15 U.S.C. 717, regarding the construction, extension, or abandonment of natural-gas facilities; and
- 47 U.S.C. 214, regarding the extension of telecommunications lines or discontinuance of service.

In addition, in comments submitted to the Federal Communications Commission (FCC), ICLE noted that, in today’s digital environment, almost none of the legacy ownership restrictions established by Section 202(h) of the Telecommunications Act of 1996 are needed.<sup>52</sup> In fact, as *de-facto* CCN-like barriers to entry, they are more likely to stifle competition, rather than foster it.

State-level CCN regimes often exhibit even more pronounced anticompetitive effects than their federal counterparts. The narrower geographic scope of state regulations creates particularly problematic entry barriers in industries that would benefit from economies of scale across multiple jurisdictions. This fragmentation forces potential competitors to navigate a patchwork of inconsistent requirements across different states, dramatically increasing compliance costs and regulatory uncertainty. Small state regulatory agencies frequently lack the resources, specialized expertise, and political insulation of federal counterparts, making them particularly susceptible to capture by well-resourced local incumbent monopolists, who can deploy superior legal and lobbying resources. The resulting regulatory asymmetry creates a virtually impenetrable moat around established firms operating within state boundaries.

Moreover, state-level CCNs often incorporate explicit “protection from competition” provisions that would be politically untenable at the federal level, directly enshrining incumbent protection into

---

<sup>51</sup> Mark R. Meador, *Antitrust Policy for the Conservative*, FED. TRADE COMM’N (May 1, 2025), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/antitrust-policy-for-the-conservative-meador.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/antitrust-policy-for-the-conservative-meador.pdf), citing *Letter from James Madison to Thomas Jefferson* (Oct. 17, 1788), <https://founders.archives.gov/documents/Jefferson/01-14-02-0018>.

<sup>52</sup> *Comments of International Center for Law & Economics, In Re: Delete, Delete, Delete* (FCC GN Docket No. 25-133, Apr. 11, 2025), <https://www.fcc.gov/ecfs/document/10411193772947/1>.

regulatory standards. For example, several states require new entrants to demonstrate not only that a service is needed, but that it won't materially affect existing providers' revenues—effectively codifying prevention of competition as a regulatory goal. For example, Matthew Mitchell reports:

In all but 6 [of 35] CON states, incumbent providers are allowed to participate in the process and object to the application of a would-be competitor. Opposition can trigger an expensive and time-consuming process with hearings that are akin to legal proceedings. Incumbents may drop their objections after the applicant agrees not to encroach on the territory of the incumbent, a type of territorial collusion that would be a per se violation of the Sherman Antitrust Act were it not facilitated by the state.<sup>53</sup>

This problem is compounded by reduced media scrutiny and public attention at the state level, allowing anticompetitive regulatory decisions to escape meaningful oversight. The collective impact of these state-specific barriers creates significant interstate-commerce inefficiencies, as firms that could efficiently serve multiple regions are prevented from expanding across artificial bureaucratic boundaries, fragmenting what would otherwise be integrated national or regional markets into inefficient local monopolies protected by state regulatory barriers.

We urge the agencies to advocate for the elimination of CCNs at the state level, including those relating to:

- Health care and related facilities, including hospitals, nursing homes, ambulatory centers, mental and behavioral-health facilities, and substance-use-disorder treatment centers;
- Intrastate transportation, including passenger, freight, and the moving of household goods;
- Taxicabs and transportation network companies; and
- Electricity transmission.

### III. Occupational Licensing

Occupational regulations—especially occupational-licensing regulations—have been an area of longstanding concern for both the FTC and DOJ.<sup>54</sup> Occupational licensing is the most common and, in most instances, the most burdensome form of occupational regulation.<sup>55</sup> Licensing generally requires that individuals obtain government permission to work in a particular profession.<sup>56</sup>

---

<sup>53</sup> Matthew D. Mitchell, *Certificate of Need Laws in Health Care: Past, Present, and Future*, 61 INQUIRY 1, 4 (2024).

<sup>54</sup> Many of the FTC's efforts to combat anticompetitive restrictions on occupations are described or linked on the agency's webpage for the Economic Liberty Task Force, formed in 2017 by then-Acting Chair Maureen K. Ohlhausen. See *Economic Liberty*, FED. TRADE COMM'N, <https://www.ftc.gov/policy/advocacy-research/advocacy/economic-liberty> (last accessed May 21, 2025); see also Maureen K. Ohlhausen, *Advancing Economic Liberty* (Remarks at George Mason Law Reviews 20<sup>th</sup> Annual Antitrust Symposium, Feb. 23, 2017), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1098513/ohlhausen\\_-\\_advancing\\_economic\\_liberty\\_2-23-17.pdf](https://www.ftc.gov/system/files/documents/public_statements/1098513/ohlhausen_-_advancing_economic_liberty_2-23-17.pdf).

<sup>55</sup> See, e.g., Cox & Foster, *supra* note 25, at 3; see also Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSPECTIVES 189 (2000).

<sup>56</sup> Cox & Foster, *id.*; Kleiner, *id.*

Commonly imposed at the state level, “[i]n a licensing system, boards sanctioned by the state typically set entry requirements, enact rules governing conduct, and discipline individuals for rule violations.”<sup>57</sup> In many professional-services markets, licensure requirements have become a significant impediment to free-market competition, imposing substantial costs on consumers, workers, and businesses alike. For one thing:

professional licensure works as a barrier to entry when it works at all. That is not necessarily a bad thing: not all barriers to entry are substantial or durable, much less excessive or unlawful, and it does not follow from the very nature of licensure that it necessarily is anticompetitive, fails to provide consumer benefits, or fails, on balance, to be cost-justified. On the other hand, any particular licensing regime or provision may evidence any or all of those failings.<sup>58</sup>

Licensing often is justified as a means to protect public health and safety.<sup>59</sup> However, a growing body of evidence suggests that many licensing regimes create unnecessary barriers to entry, restrict competition, and primarily serve the interests of incumbent practitioners, rather than the public. In some instances, they do so where some licensing restriction may be justified to address market failure, but where specific entry or supervision requirements far exceed any demonstrable consumer-protection benefits. In other cases, whole occupations are unduly restricted by the imposition of licensure requirements where no credible defense of licensure exists.<sup>60</sup> In addition, because state-level licensure regimes often lack interstate reciprocity, licensing can impede the efficient allocation of skilled labor to meet consumer demand across state lines.

### **A. Occupational Licensing Is Anticompetitive by Design**

Occupational licensing can serve legitimate purposes in certain professions where consumer and public safety are paramount.<sup>61</sup> The challenge, however, lies in distinguishing between licensing that

---

<sup>57</sup> Cox & Foster, *id.* at 3.

<sup>58</sup> Daniel J. Gilman & Julie Fairman, *Antitrust and the Future of Nursing: Federal Competition Policy and the Scope of Practice*, 24 HEALTH MATRIX 143, 163 (2014).

<sup>59</sup> As a report from staff at the FTC’s Bureau of Economics explains, well-designed licensing requirements *can* be an efficient response to several types of potential market failure—addressing, *e.g.*, substantial and durable information asymmetries between professionals and consumers; agency problems; and when externalities are striking. See Cox & Foster, *supra* note 23, at 5-11. Such concerns may be especially pressing in cases where consumer health, safety, or financial well-being are at stake.

<sup>60</sup> For example, FTC competition advocacy has addressed, *inter alia*, licensing restrictions on casket sales and interior design. See, *e.g.*, Letter from Thomas B. Carter, FTC, to Hon. O.H. Harris, Chairman, Senate Economic Development Comm. State of Texas, FED. TRADE COMM’N (May 3, 1989), available at

[https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-hon.o.h.harris-concerning-texas-s.b.454-license-interior-designers/v890045.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.o.h.harris-concerning-texas-s.b.454-license-interior-designers/v890045.pdf) (regarding proposal to establish licensure requirements on interior designers); *St. Joseph Abbey v. Castille*, 5<sup>th</sup> Cir. 2011, Amicus Curiae Brief on Behalf of the United States Federal Trade Commission in Support of Neither Party, FED. TRADE COMM’N (Dec. 16, 2011), available at [https://www.ftc.gov/sites/default/files/documents/amicus\\_briefs/st.joseph-abbey-et-al.v.castille-et-al./111216stjosephamicusbrief.pdf](https://www.ftc.gov/sites/default/files/documents/amicus_briefs/st.joseph-abbey-et-al.v.castille-et-al./111216stjosephamicusbrief.pdf) (regarding Louisiana state licensing restrictions on casket sales).

<sup>61</sup> See Cox & Foster, *supra* note 23, at 5-11; Kathy Sanchez, Elyse Smith Pohl, & Lisa Knepper, *Too Many Licenses?*, INST. JUSTICE (Feb. 24, 2022), <https://ij.org/report/too-many-licenses> (“Occupational and professional associations initiated at

serves essential public-safety functions, such as for medical professionals or airline pilots, and regulations that may inadvertently restrict competition without commensurate consumer benefits. As noted above, that may be a challenge for entire licensing codes for certain occupations, or it may be a challenge for specific licensing requirements even when some form of licensure serves an important consumer protection purpose. When licensing requirements are excessive relative to the actual risks involved, they can add undue costs to training, limit entry into the professions to excess, allow incumbents to maintain higher prices, and reduce consumer access to professional services.

Licensing laws create substantial barriers for aspiring professionals.<sup>62</sup> These can include costly and time-consuming educational prerequisites, extensive training hours, expensive examination fees, and vague “good moral character” clauses. As noted by the Mercatus Center, “incumbent providers may use licensure to limit competition. By limiting supply and raising prices, these rules allow incumbent providers to earn artificially high profits.”<sup>63</sup> This directly contravenes the principles of a free market, where competition should drive efficiency and innovation.

## **B. Occupational Licensing’s Anticompetitive Effects**

Licensing artificially constrains the number of practitioners by making it more difficult and expensive to enter a profession.<sup>64</sup> The FTC has itself acknowledged that occupational licensing “inherently restricts entry into a profession and limits the number of workers,” which “can restrain competition.”<sup>65</sup> This reduced supply not only limits consumer choice, but can also stifle innovation in service delivery, as incumbents face less pressure to adapt and improve.<sup>66</sup>

The anticompetitive effects of occupational licensing translate directly into tangible harms for consumers, primarily through higher prices and reduced access to services, without a consistent

---

least 83% of sunrise reviews, while consumer advocates were behind just 4%.” A *sunrise review* is a process used by state legislatures to evaluate the potential impact of proposed new occupational regulations before they are enacted.).

<sup>62</sup> See, e.g., Kleiner, *supra* note 55 (“The most generally held view on the economics of occupational licensing is that it restricts the supply of labor to the occupation and thereby drives up the price of labor as well as of services rendered.”).

<sup>63</sup> Patrick A. McLaughlin, Matthew D. Mitchell, & Anne Philpot, *The Effects of Occupational Licensure on Competition, Consumers, and the Workforce*, at 3, MERCAT. CTR. (Nov. 2017), available at [https://www.mercatus.org/system/files/mclaughlin\\_mitchell\\_and\\_philpot\\_-\\_mop\\_-\\_the\\_effects\\_of\\_occupational\\_licensure\\_comments\\_for\\_the\\_ftc\\_-\\_v1.pdf](https://www.mercatus.org/system/files/mclaughlin_mitchell_and_philpot_-_mop_-_the_effects_of_occupational_licensure_comments_for_the_ftc_-_v1.pdf).

<sup>64</sup> Kleiner, *supra* note 55.

<sup>65</sup> *Policy Perspectives: Options to Enhance Occupational License Portability*, at 1, FED. TRADE COMM’N (Sep. 2018), available at [https://www.ftc.gov/system/files/documents/reports/options-enhance-occupational-license-portability/license\\_portability\\_policy\\_paper\\_0.pdf](https://www.ftc.gov/system/files/documents/reports/options-enhance-occupational-license-portability/license_portability_policy_paper_0.pdf) [hereinafter “FTC Policy Perspectives”].

<sup>66</sup> See *Occupational Licensing: A Framework for Policymakers*, U.S. DEP. TREAS. OFF. ECON. POLICY, COUNC. ECON. ADVIS., & U.S. DEP. LABOR (Jul. 2015), available at [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf).

corresponding increase in quality.<sup>67</sup> These increased costs are borne by all consumers but disproportionately affect low-income households.<sup>68</sup>

Workers—especially those seeking entry-level positions, changing careers, or relocating—bear significant burdens imposed by occupational licensing.<sup>69</sup> In this way, licensing requirements function as a direct barrier to employment. Estimates suggest that occupational licensing results in millions fewer jobs nationwide—a 2015 study estimated 2.85 million lost jobs annually.<sup>70</sup> Individuals who cannot afford the time or money for required training and fees, or who cannot pass exams that may not be relevant to job performance, are excluded from their chosen fields. Because licensing requirements vary significantly between states and often lack reciprocity, workers find it difficult and costly to move and continue practicing their profession. This impedes the efficient allocation of labor and creates hardship for those who need to relocate.<sup>71</sup>

The current landscape of occupational licensing in the United States extends far beyond what is necessary to protect public health and safety. Instead, it frequently serves as a tool to limit competition, raise prices, restrict worker mobility, and stifle economic dynamism. The harms to consumers, workers, and businesses are substantial and well-documented, with estimated annual costs to the U.S. economy in the hundreds of billions of dollars due to misallocated resources and lost jobs.

### **C. Recommendation: Eliminate or Scale Back Occupational-Licensing Laws**

To foster a more competitive and dynamic economy, we recommend a fundamental overhaul of occupational-licensing regimes. Rather than viewing all occupational licensing as inherently problematic, policymakers should evaluate each profession's licensing requirements based on

---

<sup>67</sup> *Id.* at 14 (“[T]he evidence on licensing’s effects on prices is unequivocal: many studies find that more restrictive licensing laws lead to higher prices for consumers. In 9 of the 11 studies we reviewed... significantly higher prices accompanied stricter licensing” and “Stricter licensing was associated with quality improvements in only 2 out of the 12 studies reviewed.”). See also Morris M. Kleiner, *Reforming Occupational Licensing Policies*, at 6, BROOK. INST. (Mar. 2015), available at [https://www.brookings.edu/wp-content/uploads/2016/06/THP\\_KleinerDiscPaper\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/THP_KleinerDiscPaper_final.pdf) (“There is little evidence to show that the licensing of many different occupations has improved the quality of services received by consumers, although in many cases it has increased prices and limited economic output.”)

<sup>68</sup> Matthew D. Mitchell, *Policy Spotlight: Occupational Licensing and the Poor and Disadvantaged*, at 1, MERCAT. CTR. (Sep. 2017), <https://www.mercatus.org/media/65091/download?attachment> (“licensing laws hit the poor twice—once in the form of limiting job opportunities and then again in the form of higher prices”).

<sup>69</sup> FTC Policy Perspectives, *supra* note 61, at iv (“Based on recent studies, the burdens of excessive occupational licensing—especially for entry- and mid-level jobs—may fall disproportionately on our nation’s most economically disadvantaged citizens.”)

<sup>70</sup> Kleiner, *supra* note 67, at 6. See also Christos A. Makridis & Patrick A. McLaughlin, *Re-Evaluating the Labor Market Effects of Occupational Licensing: Longitudinal Evidence Across States*, 12 HUMANIT. SOC. SCI. COMMUN. 240 (2025) (reporting a finding that a 10% rise in state occupational regulatory restrictions is associated with a 4% decrease in employment).

<sup>71</sup> FTC Policy Perspectives, *supra* note 61, at 25 (“A key barrier imposed by licensing is the inability of qualified professionals licensed by one state to work in another state. There is little justification for the burdensome, costly, and redundant licensing processes that many states impose on qualified, licensed, out-of-state applicants. Such requirements likely inhibit multistate practice and delay or even prevent licensees from working in their occupations upon relocation to a new state.”)

evidence of genuine public risk and consumer-protection needs. The goal should be to ensure that licensing serves its intended protective function without creating unnecessary barriers that stifle beneficial competition and innovation in the marketplace. Specifically, we urge the DOJ and FTC to encourage and support the following reforms at the federal and state levels:

- **Eliminate unnecessary licenses:** States should systematically review existing licenses and repeal those that do not address a clearly identified and significant threat to public health or safety that cannot be mitigated by less-restrictive means. Many occupations currently licensed in some states are safely practiced without licenses in others, demonstrating the lack of necessity.
- **Adopt a “least-restrictive regulation” approach:** Before imposing or renewing licensing, policymakers should be required to demonstrate that no less-restrictive alternative—such as market competition, voluntary private certification, bonding, registration, or inspections—would suffice to protect consumers.
- **Narrowly tailor remaining licenses:** Where licensing is deemed essential, requirements should be strictly limited to those directly related to protecting public health and safety. This includes aligning training and education requirements with demonstrable risks, evaluating the benefits of reducing those risks against the costs of licensing requirements, and eliminating overly burdensome or irrelevant mandates.
- **Enhance interstate mobility:** States should be strongly encouraged to adopt universal license recognition or enter into interstate compacts for licensed occupations in order to allow qualified workers to practice across state lines without undergoing duplicative and costly re-licensing procedures.
- **Scrutinize the role of licensing boards:** Oversight of licensing boards is crucial, particularly when they are dominated by active market participants who may have incentive to limit competition. Independent review and accountability mechanisms should be strengthened.

By significantly reducing and reforming occupational licensing, we can unlock substantial economic benefits, enhance consumer welfare, expand opportunities for American workers, and create a more vibrant and competitive marketplace.

#### **IV. Legalized Cartels and Antitrust Exemptions and Immunities**

Federal antitrust law rests on economic principles that promote consumer welfare, allocative efficiency, and dynamic competition. The Sherman Antitrust Act, Clayton Act, and Federal Trade Commission Act collectively embody the policy judgment that competitive markets deliver optimal economic outcomes.

Yet paradoxically, Congress and courts have carved out numerous sector-specific antitrust exemptions that permit precisely the anticompetitive conduct these laws were designed to prevent. These include agricultural cooperatives (Capper-Volstead Act), agricultural marketing orders, export trade associations, and professional sports leagues. These exemptions represent market distortions that generate substantial deadweight losses, misallocate resources, privilege rent seeking over

productive activity, and create negative externalities across the broader economy. Their continuation reflects not economic rationality but regulatory capture and path dependency.

The economic costs of these exemptions manifest in three primary dimensions: (1) consumer harm through higher prices and reduced output; (2) labor-market distortions that suppress wages and limit mobility; and (3) dynamic inefficiency through reduced innovation and entrepreneurship. Each exemption allows conduct that would otherwise constitute *per-se* violations of antitrust law, including price fixing, output restrictions, and market-allocation schemes.

In its final report in 2007, the Antitrust Modernization Commission recommended a re-evaluation, if not elimination, of antitrust exemptions. The commission concluded that traditionally exempt industries likely do not need the antitrust immunities of the past:

57. Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability and is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.<sup>72</sup>

The American Bar Association Section of Antitrust Law recommended a four-part test to determine when exemptions are appropriate:

*First*, Congress should grant antitrust exemptions and immunities rarely and only after rigorous consideration of the impact of the proposed exemption or immunity on consumer welfare. *Second*, Congress should only grant those exemptions and immunities that are drafted narrowly, so that competition is reduced only to the minimum extent necessary to achieve the intended goal. *Third*, Congress should enact antitrust exemptions and immunities only when the proposed exemption or immunity achieves a Congressional goal that significantly outweighs the aims of the antitrust laws in a particular situation. *Finally*, the Section proposes that no exemption or immunity should be granted or renewed unless it contains a sunset provision.<sup>73</sup>

The Antitrust Modernization Commission identified numerous antitrust exemptions spanning a wide range of industries.<sup>74</sup> Each of these exemptions should be evaluated for reform or elimination.

### **Statutory exemptions from the antitrust laws:**

---

<sup>72</sup> ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 20 (Apr. 2007), available at [https://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf); see also *Findings and Recommendations of the Antitrust Modernization Commission: Hearing Before the Antitrust Task Force of the Comm. on the Judiciary*, 110<sup>th</sup> Cong., 110-23 (May 8, 2007) (statement of Deborah Garza, chair, Antitrust Modernization Commission), available at <https://www.congress.gov/110/chrg/CHRG-110hhrg35243/CHRG-110hhrg35243.pdf> (“[R]ecognizing how difficult it can be to take away an immunity that has been granted, we decided rather than to attack specific immunities and exemptions, to try to offer you all a framework that you might be able to use in considering whether to adopt immunities and exemptions in the future, but also to use in considering perhaps the repeal of existing exemptions.”)

<sup>73</sup> ABA SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 217 (2007).

<sup>74</sup> ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, *supra* note 68, Annex A.

- Agricultural Marketing Agreement Act, 7 U.S.C. §§ 608b–608c;<sup>75</sup>
- Anti-Hog-Cholera Serum and Hog-Cholera Virus Act, 7 U.S.C. § 852;
- Capper-Volstead Act, 7 U.S.C. §§ 291–92;
- Charitable Donation Antitrust Immunity Act, 15 U.S.C. §§ 37–37a;
- Defense Production Act exemption, 50 U.S.C. app. § 2158;
- Export Trading Company Act, 15 U.S.C. §§ 4001–21;
- Fishermen’s Collective Marketing Act, 15 U.S.C. §§ 521–22;
- Health Care Quality Improvement Act, 42 U.S.C. §§ 11101–52;
- Labor exemptions (statutory and non-statutory), 15 U.S.C. § 17; 29 U.S.C. §§ 52, 101–15, 151–69; (and common law);
- Local Government Antitrust Act, 15 U.S.C. §§ 34–36;
- Medical resident matching program exemption, 15 U.S.C. § 37b;
- National Cooperative Research and Production Act, 15 U.S.C. §§ 4301–06;
- Need-Based Educational Aid Act, 15 U.S.C. § 1 note;
- Newspaper Preservation Act, 15 U.S.C. §§ 1801–04;
- Non-profit agricultural cooperatives exemption, 15 U.S.C. § 17;
- Small Business Act exemption, 15 U.S.C. §§ 638(d), 640;
- Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3501–03;
- Sports Broadcasting Act, 15 U.S.C. §§ 1291–95;
- Standard Setting Development Organization Advancement Act, 15 U.S.C. §§ 4301–05, 4301 note;
- Webb-Pomerene Export Act, 15 U.S.C. §§ 61–66

**Statutory exemptions created as part of a regulatory regime:**

- Air-transportation exemption, 49 U.S.C. §§ 41308–09, 42111
- McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15
- Motor-transportation exemption, 49 U.S.C. §§ 13703, 14302–03
- Natural Gas Policy Act exemption, 15 U.S.C. § 3364(e)
- Railroad-transportation exemption, 49 U.S.C. §§ 10706, 11321(a)
- Shipping Act, 46 U.S.C. app. §§ 1701–19

---

<sup>75</sup> See also Darren Filson, Edward Keen, Eric Fruits, & Thomas Borchering, *Market Power and Cartel Formation: Theory and an Empirical Test*, 44 J. L. ECON. 465 (2001).

### Judicially created exemptions

- Baseball exemption
- Filed-rate/*Keogh* doctrine
- *Noerr-Pennington* immunity
- State action doctrine

While rolling back existing exemptions and immunities should be an administration priority, we urge the DOJ and FTC to be vigilant against attempts to expand these provisions. In the years since the Antitrust Modernization Commission's report, several bills have been introduced to exempt sectors or business activities from antitrust enforcement, including:

- Credit Card Fair Fee Act of 2008, H.R. 5546, 110<sup>th</sup> Cong. (2008). Would create a broad immunity under the antitrust laws for merchants and issuers jointly to negotiate interchange fees and terms of access to a credit- and/or debit-card network above a certain size.<sup>76</sup>
- Quality Health Care Coalition Act of 2011, H.R. 1409, 112<sup>th</sup> Cong. (2011); Community Pharmacy Fairness Act of 2011, H.R. 1839, 112<sup>th</sup> Cong. (2011); and Preserving Our Hometown Independent Pharmacies Act of 2011, 112<sup>th</sup> Cong. (2011). Would permit health-care providers to negotiate collectively with insurers and group-health plans.<sup>77</sup>
- Journalism Competition and Preservation Act of 2019, H.R. 2054, 116<sup>th</sup> Cong. (2019); and Journalism Competition and Preservation Act of 2021, H.R. 1735, 117<sup>th</sup> Cong. (2021). Would provide a safe harbor from antitrust laws for publishers to negotiate collectively with internet platforms.<sup>78</sup>
- Protect the BALL Act of 2024, H.R. 8304, 118<sup>th</sup> Cong. (2024). Would provide schools, conferences, and associations immunity from coordinating on student-athlete compensation.

---

<sup>76</sup> See Letter from Keith B. Nelson, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to Lamar Smith, Ranking Member, H. Comm. on the Judiciary, U.S. DEP. JUSTICE (Jun. 23, 2008), available at <https://www.justice.gov/archive/ola/views-letters/110-2/06-23-08-hr5546-credit-card-fair-fee-act.pdf> (arguing in opposition to the Credit Card Fair Fee Act of 2008, noting "the bill seeks to counter perceived market power on the part of large credit card networks by establishing market power on the part of merchants negotiating with those networks.").

<sup>77</sup> See Letter from Richard M. Steuer, Chair, Section of Antitrust Law, to the House Judiciary Committee, "Re: H.R. 1409, H.R. 1839, and H.R. 1946: Antitrust Exemptions to Legalize Collusion Among Health Care Providers", AM. BAR ASSOC. (Oct. 20, 2011), available at [https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/v3/at\\_comments\\_20111020.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v3/at_comments_20111020.pdf) ("The evidence is that provider cartels lead to higher reimbursement rates and higher insurance premiums for consumers. This result is just as likely in those markets in which payor market power is a genuine problem, as in markets in which payors lack market power: legalized collusion can introduce bilateral monopoly. Where a market is dominated on each side by a powerful seller and a powerful purchaser, there is little incentive to reduce prices for consumers." [emphasis in original, citations omitted]).

<sup>78</sup> See Alden Abbott, *Congress Should Not Legalize a News Media Cartel*, TRUTH MARK. (Mar. 16, 2021), <https://truthonthemarket.com/2021/03/16/congress-should-not-legalize-a-news-media-cartel> (concluding the bills "would specifically authorize hard-core price fixing") (citing John Yun, *News Media Cartels are Bad News for Consumers*, COMPETITION POL'Y INT'L (Apr. 15, 2019), <https://www.pymnts.com/cpi-posts/news-media-cartels-are-bad-news-for-consumers> (H.R. 2054 "expressly allows price fixing.")).

As John Roberti, Kelse Moen, and Jana Steenholdt noted in their submission to a DOJ roundtable, “The consensus view now holds that consumers benefit most when competitors freely compete, and that economic regulation is better suited to preserving a competitive marketplace than to structuring the market around deliberately anticompetitive cartels.”<sup>79</sup> To preserve competitive marketplaces, Congress and the courts should be skeptical of industry pleas to continue or expand antitrust exemptions and immunities. Carl Sagan popularized the expression “extraordinary claims require extraordinary evidence.”<sup>80</sup> In regulation, the corollary is “extraordinary demands require extraordinary evidence.” Antitrust exemptions and immunities should be treated as extraordinary demands that require extraordinary evidence demonstrating that the benefits of such proposals exceed the costs, and that the policy goals cannot be achieved with a more targeted approach that does not compromise competition policy.

## V. State Action and Sovereign Immunity

While antitrust law is aimed at private anticompetitive conduct, it often allows governmental entities—as well as private entities given the imprimatur of government actors—to engage in similarly anticompetitive conduct, due to several doctrines. The FTC and DOJ should do more to clarify these doctrines through strategic litigation and *amicus* briefs.

State-action immunity and the Noerr-Pennington doctrine often encourage private cartels to lobby for government regulation or licensure through boards they end up controlling in order to become immune from antitrust scrutiny. As referenced above, occupational licensing and certificate-of-need laws are major examples of incumbents essentially controlling the level of competition in a particular market.

### A. Clarifying the Boundaries of State-Action Immunity

The FTC has consistently sought to clarify and constrain the boundaries of the state-action immunity doctrine, which exempts certain anticompetitive actions from federal antitrust scrutiny if they are genuinely undertaken as part of state policy, rather than private conduct. The Supreme Court has established two essential criteria to limit misuse of this immunity: first, the anticompetitive policy must be clearly articulated and affirmatively expressed as state policy; second, it must be actively supervised by the state itself.<sup>81</sup>

---

<sup>79</sup> John Roberti, Kelse Moen, & Jana Steenholdt, *The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law* (Dep’t of Justice Roundtable Discussion Series on Competition & Deregulation 2018), available at <https://www.govinfo.gov/content/pkg/GOVPUB-J-PURL-gpo114204/pdf/GOVPUB-J-PURL-gpo114204.pdf>.

<sup>80</sup> Patrizio E Tressoldi, *Extraordinary Claims Require Extraordinary Evidence: The Case of Non-Local Perception, a Classical and Bayesian Review of Evidences*, 2 FRONT. PSYCHOL. 117 (2011).

<sup>81</sup> See *California Retail Liquor Dealers Ass’n v. Midcal Aluminum Inc.*, 445 U.S. 97, 105 (1980) (internal quotation marks omitted).

For instance, in *FTC v. Phoebe Putney Health Sys.*,<sup>82</sup> the Court addressed the “clear articulation” part of the test. There, the court held that the Hospital Authority of Albany-Dougherty County, which was a public authority with power to act in the marketplace, was not clearly authorized to make acquisitions that would substantially lessen competition. The Court found:

Grants of general corporate power that allow substate governmental entities to participate in a competitive marketplace should be, can be, and typically are used in ways that raise no federal antitrust concerns... Thus, while the Law does allow the Authority to acquire hospitals, it does not clearly articulate and affirmatively express a state policy empowering the Authority to make acquisitions of existing hospitals that will substantially lessen competition.<sup>83</sup>

In *North Carolina Dental Board v. FTC*,<sup>84</sup> the Court considered the “active supervision” element. There, the Court held that, when market participants control a regulatory board, a politically accountable government actor must actively supervise its actions. This is important, because “established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern... In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.”<sup>85</sup>

The FTC and DOJ should also continue to make sure that government entities acting in the marketplace do not abuse their positions beyond what immunities allow.<sup>86</sup>

## **B. The Problem of State-Owned Enterprises**

State-owned enterprises (SOEs) may also be immune from antitrust scrutiny due to the state-action doctrine or sovereign immunity. This is particularly problematic, as such enterprises have different incentives than privately owned businesses acting in the marketplace. Most notably, while a private business must pass the profit-and-loss test, SOEs often are not subject to the same constraints.

This difference may manifest through setting up legal SOE monopolies against which no other firm can compete; exempting SOEs from otherwise generally applicable laws; extending explicit subsidies to SOEs, whether in the form of taxpayer-financed appropriations or government-backed bonds (which the government explicitly or implicitly promises to repay, if necessary); or cross-subsidies from other government-owned monopoly businesses. Therefore, SOEs do not need to maximize profits, and can pursue other goals. SOEs may even provide ostensibly high-quality products and services at

---

<sup>82</sup> 568 U.S. 216 (2013).

<sup>83</sup> *Id.* at 228.

<sup>84</sup> 574 U.S. 494 (2015).

<sup>85</sup> *Id.* at 505.

<sup>86</sup> Much of the rest of this section is adapted from Ben Sperry, Geoffrey A. Manne, & Kristian Stout, *The Role of Antitrust and Pole-Attachment Oversight in TVA Broadband Deployment*, INT’L. CTR. LAW ECON. (Aug. 2, 2023), available at <https://laweconcenter.org/wp-content/uploads/2023/08/TVA-Pole-Attachments-Issue-Brief.pdf>.

what are often below-market prices—perhaps one of the few instances where a predatory pricing scheme can actually occur.

Due to the lack of ordinary market principles governing their behavior, SOEs arguably have greater incentive to abuse their positions in the marketplace than private entities. As David E.M. Sappington and J. Gregory Sidak put it:

[W]hen an SOE values an expanded scale of operation in addition to profit, it will be less concerned than its private, profit-maximizing counterpart with the extra costs associated with increased output. Consequently, even though an SOE may value the profit that its anticompetitive activities can generate less highly than does a private profit-maximizing firm, the SOE may still find it optimal to pursue aggressively anticompetitive activities that expand its own output and revenue. To illustrate, the SOE might set the price it charges for a product below its marginal cost of production, particularly if the product is one for which demand increases substantially as price declines. If prohibitions on below-cost pricing are in effect, an SOE may have a strong incentive to understate its marginal cost of production or to over-invest in fixed operating costs so as to reduce variable operating costs. A public enterprise may also often have stronger incentives than a private, profit-maximizing firm to raise its rivals' cost and to undertake activities designed to exclude competitors from the market because these activities can expand the scale and scope of the SOE's operations.<sup>87</sup>

The FTC and DOJ should do more to clarify (or ask Congress to clarify) the extent of SOEs' immunities from antitrust scrutiny.

### C. Case Study: TVA and Local Power Companies

In a 2022 letter to then-Assistant U.S. Attorney General Jonathan Kanter, Sen. Mike Lee (R-Utah) put forth the argument that the DOJ should take action to address abuses of the pole-attachment process by local power companies (LPCs) regulated by the Tennessee Valley Authority (TVA).<sup>88</sup> His concern was that such abuses threaten to slow broadband deployment, especially to rural areas served by the TVA and the LPCs.<sup>89</sup> Among the abuses he details are:

- Delaying or refusing to negotiate pole-attachment agreements with competitive broadband-service providers, including when a TVA LPC provides broadband service (itself or through a joint-venture agreement) or is interested in doing so;
- Initially refusing to negotiate pole-attachment agreements that would enable competitive broadband-service providers to obtain permits in sufficient time to meet federal grant deadlines;

---

<sup>87</sup> David E.M. Sappington & J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, 71 ANTITRUST L.J. 479, 499 (2003).

<sup>88</sup> See Mike O'Rielly (@MPORielly), X.com (Jul. 17, 2023), <https://x.com/MPORielly/status/1680963879331938310> [Lee Letter].

<sup>89</sup> *Broadband Assessment Report*, TENN. VAL. AUTH. (Dec. 2022), <https://www.tva.com/energy/technology-innovation/connected-communities/broadband-assessment-report>.

- Refusing to review pole-attachment applications on a scale or at the pace necessary to complete broadband projects in a timeframe required by federal grant programs;
  - Refusing to follow the standard industry practice of approving a contractor to process pole-access applications in a timely manner when the utility’s staff is insufficient to do the work, even when the broadband-service provider is willing to pay the entire bill for the contractor; and
1. Refusing to process pole-attachment applications at all, and failing to respond to provider outreach regarding the processing of applications for months on end.<sup>90</sup>

Normally, the federal government is immune from lawsuit under the ancient doctrine of sovereign immunity, except where explicitly waived by statute. The TVA is a wholly owned corporate agency and instrumentality of the federal government. Thus, federal courts have typically found that the TVA and other federal entities operating in the marketplace are exempt from antitrust.<sup>91</sup> This is despite the fact that the TVA’s enabling statute states: “Except as otherwise specifically provided in this chapter, the Corporation... may sue and be sued in its corporate name.”<sup>92</sup>

There is nothing in the chapter that actually says the agency can’t be sued for antitrust violations. The older cases finding the TVA exempt from antitrust are likely to be found wrongly decided under the logic of the Supreme Court’s most recent case dealing with the TVA’s immunity. In 2019, the Court took up *Thacker v. TVA*,<sup>93</sup> which asked whether the TVA was immune from lawsuits for negligence. The Court rejected the lower court’s reasoning that the TVA was immune for torts arising from its “discretionary functions,” substituting a new test as to whether the TVA was acting pursuant to its governmental function or a commercial function. As the Court stated:

Under the clause—and consistent with our precedents construing similar ones—the TVA is subject to suits challenging any of its commercial activities. The law thus places the TVA in the same position as a private corporation supplying electricity. But the TVA might have immunity from suits contesting one of its governmental activities, of a kind not typically carried out by private parties.<sup>94</sup>

The Court also gave examples to help distinguish the two:

When the TVA exercises the power of eminent domain, taking landowners’ property for public purposes, no one would confuse it for a private company. So too when the TVA exercises its law enforcement powers to arrest individuals. But in other operations—and over the years, a growing number—the TVA acts like any other company producing and supplying electric power. It is an accident of history, not a difference in function, that explains why most Tennesseans get their electricity from a public enterprise and most

---

<sup>90</sup> See Lee Letter, *supra* note 84, at 1-2.

<sup>91</sup> See, e.g., *Webster Cty. Coal v. Tennessee Valley Authority*, 476 F.Supp. 529 (W.D. Ky. 1979) (finding the TVA is exempt from antitrust law); *Sea-Land Serv. Inc. v. Alaska R.R.*, 659 F.2d 243 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982) (finding the Alaska Railroad exempt from antitrust law).

<sup>92</sup> 16 U.S.C. §831c(b).

<sup>93</sup> 139 S. Ct. 1435 (2019).

<sup>94</sup> *Id.* at 1439.

Virginians get theirs from a private one. Whatever their ownership structures, the two companies do basically the same things to deliver power to customers.<sup>95</sup>

The test to be applied, therefore, is “whether the conduct alleged to be negligent is governmental or commercial in nature... if the conduct is commercial—the kind of thing any power company might do—the TVA cannot invoke sovereign immunity.”<sup>96</sup> Here, that arguably means that, when the TVA is acting pursuant to its commercial function, it should not receive immunity from antitrust suit.

On the other hand, Congress gave the TVA broad ratemaking authority and contractual powers. One federal court (previous to *Thacker*) rejected an antitrust challenge to the TVA’s ratemaking formula because it was a “valid governmental action and [therefore] exempt from the antitrust laws of the United States.”<sup>97</sup>

As noted above, some LPCs have entered the municipal-broadband market and function as competitors to private broadband companies who want to attach to poles owned by LPCs. Thus, even though competition economics would suggest that LPCs would have a greater incentive to raise rivals’ costs by charging a monopoly price, the TVA would likely argue that it is acting in its governmental function when it sets those rates.<sup>98</sup> If courts agree, then antitrust law would not be able to reach that problem.

Consistent with the Court’s reasoning in *Thacker*, however, courts could find that antitrust law reaches agreements between wholesalers (like the TVA) and retailers (like the LPCs) to charge certain rates for pole attachments to competitors in an adjacent market. This would arguably be an example of the TVA acting as any other power generator would, pursuant to its commercial function, through some type of price-maintenance agreement. As it stands, it isn’t clear which way the courts would go.

---

<sup>95</sup> *Id.* at 1443-44.

<sup>96</sup> *Id.* at 1444.

<sup>97</sup> *City of Loudon v. TVA*, 585 F.Supp. 83, 87 (E.D. Tenn. Jan. 30, 1984).

<sup>98</sup> The TVA could also argue that the rate formula it sets for pole attachments is subject to the filed-rate doctrine and thus exempt from antitrust scrutiny. The filed-rate doctrine does not allow courts to second guess agency determinations of rates. See *Keogh v. Chicago & Northwest Railway Co.*, 260 U.S. 156 (1922). While the original case on the filed-rate doctrine dealt with the literal situation of regulated entities filing regulator-approved rates, courts have extended the doctrine to other situations where a regulator uses its authority to set rates. Cf. *Wortman v. All Nippon Airways*, 854 F.3d 606, 611 (9th Cir. 2017) (“While the filed rate doctrine initially grew out of circumstances in which common carriers filed rates that a federal agency then directly approved, we have applied the doctrine in contexts beyond this paradigmatic scheme.”) The TVA’s unique situation is that there is no clear statutory ratemaking authority over pole attachments, but they have asserted the ability to do so under their contract powers, raising the same issue of whether this is a governmental function or market function. See TVA DETERMINATION OF REGULATION ON POLE ATTACHMENTS 2 (Jan. 22, 2016), available at <https://tva-azr-eastus-cdn-ep-tvawcm-prd.azureedge.net/cdn-tvawcma/docs/default-source/about-tva/guidelinesreports/determination-on-regulation-of-pole-attachments-7-12-2023.pdf>. Even if the filed-rate doctrine applies, however, it would not prevent a DOJ enforcement action aimed at an injunction or declaratory relief—just treble damages sought by a private litigant. See *Keogh*, 260 U.S. at 162 (“[T]he fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government.”).

Even if the commercial versus governmental distinction is clarified with respect to the TVA, there is a further wrinkle as it relates to antitrust scrutiny of LPCs. This concerns how the TVA's actions interact with state-action immunity in antitrust law. When it comes to municipalities, the Supreme Court altered the "active supervision" requirement: "Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function."<sup>99</sup>

The Court has, however, also left open the possibility of an exception to state-action immunity when government entities function as market participants.<sup>100</sup> In one case dealing with a local municipally owned power plant in Louisiana, the Supreme Court did not grant broad immunity from antitrust laws, in part because:

Every business enterprise, public or private, operates its business in furtherance of its own goals. In the case of a municipally owned utility, that goal is likely to be, broadly speaking, the benefit of its citizens. But the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interest of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.<sup>101</sup>

While there are a few cases that apply this distinction in lower federal courts,<sup>102</sup> there is no Supreme Court caselaw determining how to differentiate when, for the purposes of state-action immunity, municipal corporations function as market participants versus when they act as government entities. Jarod Bona and Luke Wake have proposed applying a test similar to the one the courts use in dormant Commerce Clause cases.<sup>103</sup> The distinction made by the Supreme Court in *Thacker* and discussed above may also be applicable.

Government-owned LPCs are creatures of states or municipalities. As such, they would certainly argue they are immune from antitrust scrutiny, even when they refuse to deal with private broadband

---

<sup>99</sup> *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).

<sup>100</sup> See, e.g., *City of Columbia v. Omni Outdoor Advertising Inc.*, 499 U.S. 365, 379 (1991) ("We reiterate that, with the possible market participant exception, any action that qualifies as state action is 'ipso facto... exempt from the operation of the antitrust laws..."); *FTC v. Phoebe Putney Health Systems Inc.*, 568 U.S. 216, 226 n.4 ("An amicus curiae contends that we should recognize and apply a 'market participant' exception to state-action immunity because Georgia's hospital authorities engage in proprietary activities... Because this argument was not raised by the parties or passed on by the lower courts, we do not consider it.").

<sup>101</sup> *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 403 (1978).

<sup>102</sup> See, e.g., *Edinboro Coll. Park Apartments v. Edinboro Univ. Found.*, 850 F.3d 567 (3d Cir. 2017); *VIBO Corp. v. Conway*, 669 F.3d 675 (6th Cir. 2012); *Freedom Holdings Inc. v. Cuomo*, 624 F.3d 38 (2d Cir. 2010); *Hedgecock v. Blackwell Land Co.*, 52 F.3d 333 (9th Cir. 1995).

<sup>103</sup> See Jarod M. Bona & Luke A. Wake, *The Market-Participant Exception to State-Action Immunity from Antitrust Liability*, 23 J. ANTITRUST & UNFAIR COMP. L. SECTION OF THE STATE BAR OF CA., VOL. 1 (Spring 2014), available at <https://www.theantitrustattorney.com/files/2014/05/Market-Participant-Exception-Article.pdf>.

providers with whom they compete while withholding a critical input (*i.e.*, the ability to attach to their poles). But there are two problems with this argument.

First, it seems unlikely that the LPCs could argue that they are acting pursuant to a clearly articulated policy of displacing competition when they refuse to deal with broadband providers. As Sen. Lee pointed out in his letter, there are state laws that would impose a duty to deal on reasonable and nondiscriminatory terms, but for any exemptions to that authority due to the TVA.<sup>104</sup> For instance, North Carolina and Kentucky require all pole owners not subject to FCC Section 224 authority to offer nondiscriminatory pole access.<sup>105</sup>

On the other hand, they could appeal to the TVA's contract authority,<sup>106</sup> in addition to the TVA's stated policy that its purpose is "to provide for the ... industrial development" of the Tennessee Valley.<sup>107</sup> But even if this grants the TVA authority to regulate rates for pole attachments, it doesn't mean the TVA has enunciated an articulable policy of displacing competition in refusing to deal with broadband providers. It also would appear contrary to the purpose of promoting industrial development to forestall broadband deployment in the Tennessee Valley simply because LPCs that also offer municipal-broadband systems don't want that competition. In other words, their refusal to deal is not protected by an appeal to any articulable policy to displace competition, either by a state or the TVA.

Second, under the caselaw that does exist, government-owned LPCs are market participants that should not receive antitrust immunity. For instance, in one case, a private arena owner challenged under antitrust law an exclusive contract between a municipal-arena owner and LiveNation.<sup>108</sup> The court held that state-action immunity was "less justified," because the municipality's "entertainment contracts" reflected "commercial market activity," not "regulatory activity."<sup>109</sup> Here, the LPCs' actions as both power companies and municipal-broadband providers reflect commercial-market activity more than regulatory activity. They shouldn't be able to claim immunity from antitrust for this refusal to deal, any more than a private broadband provider could.

#### **D. Recommendation: Subject the TVA and Government-Owned LPCs to Antitrust Law**

In sum, the FTC or DOJ should strongly consider litigation (or supporting litigation with *amicus* briefs) arguing the TVA (and similarly situated federal corporations) is not exempt from antitrust

---

<sup>104</sup> See Lee Letter, *supra* note 84, at 2.

<sup>105</sup> *Id.* at n.4; N.C. Gen. Stat. § 62-350(a) (requiring all pole owners to offer non-discriminatory pole access); 807 Ky. Admin. Regs. 5:015 § 2(1) (same).

<sup>106</sup> 16 U.S.C. § 831i ("Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act").

<sup>107</sup> 16 U.S.C. § 831.

<sup>108</sup> See *Delta Turner Ltd. v. Grand Rapids-Kent County Convention/Arena Authority*, 600 F.Supp.2d 920 (W.D. Mich. 2009).

<sup>109</sup> *Id.* at 929.

scrutiny when it acts pursuant to a commercial function, including when it sets anticompetitive rates for pole attachments that would slow broadband buildout. This clearly affects the market for access to LPC-owned utility poles.

Moreover, the LPCs' anticompetitive refusal to deal appears to be separate from the rates set by the TVA pursuant to its ratemaking authority or contractual powers. The LPCs themselves should be subject to antitrust law. The FTC or DOJ should try to get clarity that LPCs are not immune from antitrust scrutiny through strategic litigation, arguing for a market-participant exception to state-action immunity. This could also apply to municipally owned enterprises outside of the TVA context.

## **VI. Prevailing Wages**

Prevailing-wage laws and project labor agreements (PLAs) represent significant regulatory interventions in construction labor markets that substantially distort competition, inflate costs, and create artificial barriers to market entry. These regulations—including the federal Davis-Bacon Act (1931),<sup>110</sup> state “Little Davis-Bacon” acts,<sup>111</sup> and government-mandated PLAs—fundamentally alter market dynamics by imposing wage floors and labor terms that would not emerge under competitive conditions.

The Davis-Bacon Act requires contractors on federally funded construction projects exceeding \$2,000 to pay locally “prevailing” wages and benefits, while state variants impose similar requirements at different thresholds. PLAs are pre-hire collective-bargaining agreements that establish employment terms on construction projects, often mandating union-scale wages, benefits, and work rules. These regulatory mechanisms prevent price competition in labor markets, restrict market entry, and concentrate benefits among a subset of market participants at the expense of consumers, taxpayers, and excluded businesses.

### **A. Prevailing Wage's Anticompetitive Roots**

The Davis-Bacon Act's historical origins reveal its fundamentally anticompetitive design. Enacted during the Great Depression, the law was explicitly created to protect unionized white construction workers from competition from non-unionized Black and immigrant laborers. Rep. Robert Bacon (R-N.Y.) introduced the legislation after a contractor from Alabama employed Black workers on a federal hospital project in his district. Congressional debate records document clear racial and protectionist motivations, with representatives expressing concerns about “cheap colored labor” and “southern contractors employing low-paid colored mechanics.”<sup>112</sup>

---

<sup>110</sup> 40 U.S.C. 3141-3148.

<sup>111</sup> *Dollar Threshold Amount for Contract Coverage*, U.S. DEP. LABOR (Jan. 1, 2023), <https://www.dol.gov/agencies/whd/state/prevailing-wages>.

<sup>112</sup> David Bernstein, *The Davis-Bacon Act: Vestige of Jim Crow*, 13 NAT'L. BLACK L.J. 276, 285, 286 (1994).

The policy's origin as a mechanism to shield incumbent firms and workers from competition continues to shape the law's modern effects. While explicitly discriminatory language has disappeared, the regulatory framework still operates to protect established market participants (predominantly unionized contractors) from competition from firms employing different business models and wage structures.<sup>113</sup> As the U.S. Court of Federal Claims recently recognized in *MVL USA Inc. v. United States*, requirements like PLA mandates violate competition principles by excluding qualified bidders based on their unwillingness to adopt a particular labor model, regardless of their capacity to perform the work effectively.<sup>114</sup>

## **B. Wage-Determination Mechanisms: Methodological Flaws and Market Distortions**

The wage-determination process under prevailing-wage laws is fundamentally flawed and systematically produces results that distort market signals. The U.S. Government Accountability Office (GAO) has, over decades, raised concerns about the U.S. Labor Department's (DOL) wage-survey methodology, data quality, lack of verification of submitted wage data, and the infrequency of wage updates in some areas. For example, a 1994 GAO review noted that the quality of data the DOL used remained a concern, due to varying contractor response rates and the lack of data verification.<sup>115</sup> A 1979 GAO report, which recommended the repeal of the Davis-Bacon Act, stated that DOL procedures "provided no assurance that the rates actually prevail for workers on similar private construction projects in the locality."<sup>116</sup> In 2011, the GAO concluded: "Labor cannot determine whether its wage determinations accurately reflect prevailing wages because it does not currently calculate response rates or analyze survey nonrespondents."<sup>117</sup>

This wage-determination methodology transforms the "prevailing wage" from a passive observation of market conditions into an active intervention that establishes an artificial price floor for labor—often above the wage rate in a competitive market. For example, the Beacon Hill Institute found Davis-Bacon wages to be 20.2% above local market averages.<sup>118</sup> Rather than reflecting local labor-

---

<sup>113</sup> *Prevailing Wages: Frequently Asked Questions*, CENT. AM. PROG. (Dec. 22, 2020),

<https://www.americanprogress.org/article/prevailing-wages-frequently-asked-questions> ("Strong prevailing wage laws prevent low-road contractors from undermining higher standards that workers attain through collective bargaining. Indeed, prevailing wage laws tend to be particularly important for protecting market rates in areas with strong unions.").

<sup>114</sup> *MVL USA Inc. v. United States*, No. 24-1057 (Fed. Cl. 2025).

<sup>115</sup> GAO/HEHS-94-95R, *Davis-Bacon Act*, U.S. GEN. ACCOUNT. OFF. (1994), available at <https://www.gao.gov/assets/hehs-94-95r.pdf>.

<sup>116</sup> Oversight Hearing on the Davis-Bacon Act, Hearings Before the Subcomm. on Labor Standards of the House Committee of Labor and Education, 96<sup>th</sup> Cong. 1 (1979) (testimony of Elmer B. Staats, Comptroller General of the United States), available at <https://downloads.regulations.gov/WH-2022-0001-0028/content.pdf>.

<sup>117</sup> GAO-11-152, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, U.S. GOV. ACCOUNT. OFF. (2011), available at <https://www.gao.gov/assets/gao-11-152.pdf>.

<sup>118</sup> William F. Burke & David G. Tuerck, *The Federal Davis-Bacon Act: Mismeasuring the Prevailing Wage*, BEAC. HILLS INST. (May 16, 2022), available at <https://web.archive.org/web/20221220162927/https://www.beaconhill.org/BHStudies/2022/FINAL-BHI-DBA-2022-05-16.pdf>.

market conditions, the result is a government-imposed wage structure that privileges certain business models (typically, union-affiliated), while disadvantaging others that might otherwise compete effectively through different labor-cost structures.

### **C. Prevailing Wage's Anticompetitive Effects**

Prevailing-wage laws and PLA mandates significantly restrict competition in public-construction markets by creating substantial barriers to entry for many contractors. By mandating artificially high wages, these laws immediately disadvantage contractors whose business models depend on market-determined labor rates. Small, non-union contractors typically operate with lower overhead and different cost structures that allow them to compete effectively in open markets. Mandated wage floors eliminate this competitive advantage.

In addition, compliance with prevailing-wage laws imposes substantial administrative costs that disproportionately affect small businesses. Contractors must submit weekly certified payrolls, meticulously track employee hours across numerous job classifications, and maintain extensive records. These requirements create fixed compliance costs that larger firms can more easily absorb but that present significant barriers for smaller competitors.

PLA mandates typically require adherence to union work rules, staffing ratios, and hiring practices that may conflict with non-union contractors' established operational models. The RAND Corp.'s study of Los Angeles' Proposition HHH housing projects found that developers deliberately altered project sizes to fall below PLA-applicability thresholds, demonstrating the significant burden these requirements impose.<sup>119</sup>

The cumulative effect of these barriers is a reduction in the number and diversity of bidders on public-construction projects. While some studies claim prevailing-wage laws do not reduce bid competition, this conclusion contradicts both economic logic and survey evidence. Surveys by the Associated Builders and Contractors show that a large percentage of contractors are deterred from bidding on prevailing-wage projects; one survey found that 75% of respondents said such laws would make them less likely to bid on public projects in their communities.<sup>120</sup>

This reduced competition is particularly pronounced among non-union, small, and minority-owned businesses, which constitute the majority of construction firms nationally. The MVL USA case provides judicial confirmation of this anticompetitive effect, with the court finding that PLA

---

<sup>119</sup> Jason M. Ward, *The Effects of Project Labor Agreements on the Production of Affordable Housing*, RAND CORP. (2025), available at [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RRA1300/RRA1362-1/RAND\\_RRA1362-1.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RRA1300/RRA1362-1/RAND_RRA1362-1.pdf).

<sup>120</sup> ABC *Prevailing Wage/Davis-Bacon Act Survey*, ASSOC. BUILD. CONTRACT. (Mar. 3, 2021), <https://www.abc.org/Portals/1/News%20Releases/ABC%20National%202021%20Survey%20on%20Prevailing%20Wage%20Davis%20Bacon%20Policies%20FINAL.pdf?ver=2021-03-03-102740-943>.

requirements unlawfully restricted competition by excluding responsible contractors based not on their capabilities, but on their unwillingness to adopt a particular labor model.<sup>121</sup>

#### **D. Recommendations**

Eliminating prevailing-wage laws and PLA mandates would allow construction labor markets to function according to the same competitive principles that drive efficiency and innovation throughout the economy. In a deregulated environment, labor compensation would be determined by the interactions of supply and demand, reflecting workers' productivity, skills, and local economic conditions. This would allow for more efficient allocation of labor resources and more accurate price signals. In addition, a broader range of contractors—including non-union, small, and minority-owned businesses—would be able to compete effectively for public projects based on their efficiency, quality, and value proposition, rather than their ability to navigate complex regulatory regimes. Moreover, with lower overall project costs, more public construction would be feasible within existing budgets, creating additional employment opportunities.

Critics argue that eliminating these regulations would lead to reduced construction quality and safety. But these concerns can be addressed through more direct and efficient mechanisms. Quality can be ensured through stringent performance specifications, robust inspection protocols, and appropriate performance-bonding requirements. Worker safety is better protected through targeted safety regulations (such as Occupational Safety and Health Administration standards) rather than indirectly through wage mandates.

### **VII. Energy Transmission**

FERC Order No. 1000, implemented in 2011, aimed to foster competition in electric-transmission development by removing federal rights of first refusal (ROFRs) for incumbent utilities, and by establishing new frameworks for transmission planning and cost allocation. Despite these well-intentioned goals, almost a decade and a half of evidence demonstrates that Order No. 1000 has failed to deliver its promised benefits. It has instead created significant market distortions that harm consumers, businesses, and the broader economy.

The DOJ and FTC should advocate for eliminating or substantially modifying FERC Order No. 1000 to better align regulatory frameworks with the economic realities and operational characteristics of electricity-transmission markets.

#### **A. The Contradiction at Order No. 1000's Core**

Order No. 1000 embodies a fundamental contradiction; it attempts to achieve competitive outcomes through centralized planning and prescriptive regulation. This approach conflicts with basic economic principles about information aggregation and incentive structures in markets.

---

<sup>121</sup> MVL USA, *supra* note 110 (“market research consistently show[s] project labor agreements would ‘reduce adequate competition at a fair and reasonable price’ for the solicitations”).

The order attempts to engineer competition by mandating regional-planning processes, requiring the consideration of public-policy requirements, establishing interregional coordination, removing federal ROFRs, and imposing complex cost-allocation methodologies. These mechanisms have, however, proven inadequate, as demonstrated by the minimal impact of competitive bidding.<sup>122</sup>

## **B. The Central-Planning Problem: Information Deficiencies and Misaligned Incentives**

Order No. 1000's centralized-planning approach suffers from what the economist Friedrich A. Hayek terms the “knowledge problem.”<sup>123</sup> Regional-planning authorities simply cannot aggregate the dispersed, local knowledge necessary to make optimal transmission investment decisions. Transmission needs are influenced by constantly changing generation patterns, demand fluctuations, technological developments, and site-specific constraints that centralized planners cannot effectively process.

Evidence confirms this theoretical concern. In the Midcontinent Independent System Operator (MISO), only nine out of 2,174 approved projects over a five-year period were specifically designated to meet regional system needs.<sup>124</sup> Instead of substantive regional planning, the process has often devolved into a “paper compliance exercise.”<sup>125</sup>

Additionally, planners operating under Order No. 1000 are not subject to the profit-and-loss signals that discipline decisionmaking in markets. This creates a disconnect between planning decisions and economic efficiency. The result has been inefficient investment patterns: overbuilding of certain types of transmission (often local projects) and underbuilding of others (typically, larger regional or interregional lines essential for market integration).<sup>126</sup>

---

<sup>122</sup> Josiah Neeley, *Right of First Refusal Laws for Electric Transmission Are Anti-Competitive in Interstate Commerce*, R STR. INST. (Jun. 24, 2021), <https://www.rstreet.org/research/right-of-first-refusal-laws-for-electric-transmission-are-anti-competitive-in-interstate-commerce> (“Since the order went into effect, only 3 percent of new transmission investment in the United States has been subject to competition.”); see also Johannes Pfeifenberger, Judy Chang, & Akarsh Sheilendranath, *Transmission Solutions: Potential Cost Savings Offered by Competitive Planning Processes*, BRATTLE GROUP (Nov. 13, 2018), available at [https://www.brattle.com/wp-content/uploads/2021/05/14880\\_brattle\\_competitive\\_transmission\\_naruc\\_11-13-18.pdf](https://www.brattle.com/wp-content/uploads/2021/05/14880_brattle_competitive_transmission_naruc_11-13-18.pdf) (“the scope of competition has been limited to only 2% of total U.S. transmission investments over the last 5 years”).

<sup>123</sup> F. A. Hayek, *The Use of Knowledge in Society*, 35 AMER. ECON. R. 519 (1945).

<sup>124</sup> *Plan for the Grid We Need, Not the Grid We Have*, SUSTAIN. FERC PROJ. (Oct. 13, 2021), <https://sustainableferc.org/plan-for-the-grid-we-need-not-the-grid-we-have>.

<sup>125</sup> *Id.*

<sup>126</sup> Devin Hartman, *FERC Hath Spoken*, R STR. INST. (May 14, 2024), <https://www.rstreet.org/commentary/ferc-hath-spoken-transmission> (“The overbuilt local projects undermined development of regional projects with superior economies of scale. The economic projects under Order 1000 had an impressive benefit-cost track record; the problem was that inferior projects often crowded them out.”).

### C. Federal ROFR Removal: Undermined by State Barriers and Exemptions

While Order No. 1000 eliminated federal ROFR provisions, it allowed states to enact their own ROFR laws, and numerous states have chosen to do so. These state-level provisions—ostensibly aimed at promoting efficiency and reliability in transmission development by recognizing existing operational expertise and established infrastructure—have served as a workaround to Order No. 1000’s limitations. Additionally, Order No. 1000 included exemptions for projects that address “immediate reliability needs” and for certain system upgrades—measures intended to streamline the response to urgent system requirements.<sup>127</sup> But the resulting combination of federal rules, state ROFR statutes, and these exemptions has created a complex regulatory landscape, potentially increasing transaction costs and uncertainty for all market participants, including new entrants. At the same time, to the extent that Order No. 1000 was aimed at increasing “competition,” this background complexity has frustrated even the meager benefits it hoped to achieve.

### D. ‘Competition’ Under Order No. 1000: Perverse Incentives and Failed Outcomes

The “competition” fostered by Order No. 1000 is not competition in a traditional market sense. Rather, it is competition for a regulated monopoly franchise: the right to build and operate a rate-regulated asset whose costs are ultimately borne by captive ratepayers. This structure creates perverse incentives that undermine genuine efficiency.

Empirical evidence demonstrates these failures. Multiple analyses show that “competitive” solicitations have frequently been associated with substantial project delays—in some cases, adding as many as 1,000 days to development timelines—and significant cost escalations.<sup>128</sup> One study found that two-thirds of competitively bid projects exceeded their initial cost estimates, with final costs averaging at least 59% more than the winning bid amounts.<sup>129</sup>

---

<sup>127</sup> Fred Ashton, *FERC Dims the Lights on Competition*, AM. ACTION FORUM (Aug. 30, 2022), <https://www.americanactionforum.org/insight/ferc-dims-the-lights-on-competition> (“Order 1000 did not appreciably increase competition as intended, as the order’s many loopholes were exploited to insulate incumbent firms from competition and undercut its intent.”).

<sup>128</sup> See *Competitive Transmission: Experience To-Date Shows Order No. 1000 Solicitations Fail to Show Benefits*, CONCENTRIC ENERGY ADVIS. (Aug. 2022), at 1, available at <https://ceadvisors.com/wp-content/uploads/2024/10/Competitive-Transmission-Experience-To-Date-Shows-Order-No.-1000-Solicitations-Fail-to-Show-Benefits.pdf> (“Competitive solicitations added as many as 1000 days to the development of transmission projects, and many experienced cost escalations, further questioning the value of competitive solicitations.”).

<sup>129</sup> Supplemental Comments of Developers Advocating Transmission Advancements, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Docket No. RM21-17-000; *Transmission Planning and Cost Management*, Docket No. AD22-8-000; *Joint Federal-State Task Force on Electric Transmission*, Docket No. AD21-15-000 (Dec. 15, 2023), available at <https://dailyenergyinsider.com/wp-content/uploads/2024/01/FERC-white-paper-12.15.23.pdf> (“Updated cost information also shows that competitively developed projects exceed the cost expectations in winning bids by 59-66% on average.”)

While some projects have come in on or under budget, others have come in considerably over budget.<sup>130</sup> For example, the Artificial Island project was 61% under budget and Suncrest was 29% under budget, but the Ten West Link project was 30% over budget, Estrella was 22% over budget, Harry Allen-Eldorado was 42% over budget, and Miguel was 45% over budget.<sup>131</sup> Overall, there was an average cost increase of 6% under a “competitive” bidding model<sup>132</sup> (and may be as high as 12%, depending on how certain baseline amounts are factored in).<sup>133</sup>

Cost caps, which are often proposed in competitive bids, have not fully protected customers from the risk of cost increases, calling into question their enforceability and efficacy.<sup>134</sup> Economic theory suggests that competition fosters innovation and efficiency, but the competitive-procurement process under Order No. 1000 does not create “textbook competition” and does not fundamentally alter the transmission market; it simply replaces one monopoly with another.<sup>135</sup> The type of dynamic gains from innovation often associated with competition are unlikely to emerge as a result of Order No. 1000’s competitive-solicitation policy.<sup>136</sup>

This outcome is predictable. Developers have incentives to submit unrealistically low bids to win projects, knowing that cost caps may prove illusory and subject to renegotiation. This environment leads to a “winner’s curse,” under which the most aggressive—rather than the most capable—bidder prevails. This is hardly the market discipline that FERC intended to foster.

Furthermore, the requirement to run solicitations under Order No. 1000’s “competition” requirements has been shown to induce delays in transmission development by adding significant time and red tape.<sup>137</sup> This results from protracted solicitation processes, project re-scoping challenges, and administrative burdens.<sup>138</sup> The process also encourages frivolous and costly litigation.<sup>139</sup>

---

<sup>130</sup> *Id.*

<sup>131</sup> Supplemental Comments of Developers Advocating Transmission Advancements, Federal Energy Regulatory Commission Docket No. RM21-17-000 at 6, [https://elibrary.ferc.gov/eLibrary/filelist?accession\\_number=20231215-5048&optimized=false](https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20231215-5048&optimized=false).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 7.

<sup>134</sup> Concentric Energy Advisors, *supra* note 124, at 11 (discussing how cost caps in the Ten West Link transmission project failed to adequately protect customers from cost overruns).

<sup>135</sup> *Id.* at 4 ; Affidavit of Dr. Carl R. Peterson, Federal Energy Regulatory Commission Docket No. RM21-17-000 at 12-13(2022), available at [https://web.archive.org/web/20240523195203/https://ceadvisors.com/wp-content/uploads/2022/10/Peterson-Affidavit\\_Final.pdf](https://web.archive.org/web/20240523195203/https://ceadvisors.com/wp-content/uploads/2022/10/Peterson-Affidavit_Final.pdf).

<sup>136</sup> *Id.* at 14-15

<sup>137</sup> See *Recent Experience with Competitive Transmission Projects and Solicitations*, DEV. ADVOCATING TRANSM. ADV. (DATA) COALIT. (2025), available at [https://www.modernizethegrid.com/wp-content/uploads/2025/02/DATA-Whitepaper-2024\\_2-5-25\\_vF\\_edit.pdf](https://www.modernizethegrid.com/wp-content/uploads/2025/02/DATA-Whitepaper-2024_2-5-25_vF_edit.pdf)

<sup>138</sup> Peterson, *supra* note 131, at 15.

<sup>139</sup> See, e.g., *Recent Experience with Competitive Transmission Projects and Solicitations*, *supra* note 133 at 18-20.

While “competition *for* the market”—as opposed to competition *within* the market—can function effectively under certain conditions, it proves problematic in electricity transmission. Because transmission projects remain subject to regulatory oversight and regulated rate structures, the competitive process devolves into a contest primarily based on unenforceable promises of cost containment and delivery timelines. Unlike true competitive markets, where firms bear the full consequences of cost overruns or delays, transmission developers under Order No. 1000 often shift these risks onto captive ratepayers, weakening incentives for genuine efficiency.

Moreover, the requirements imposed by Order No. 1000 can thwart necessary collaboration among transmission planners and owners. Previously, collaboration among utilities was the norm for developing transmission networks.<sup>140</sup> Now, competitive processes impede information, such as local knowledge about routes and costs. Because this information is competitively valuable, the process creates a disincentive to share such information with regional planners and stakeholders.<sup>141</sup> Indeed, the introduction of pseudo-competition into transmission development raises the specter of antitrust law, which can explicitly discourage many collaborative frameworks among competitors:

Antitrust policies can strictly bar certain communications and collaboration. Communications between competitors in competitive markets are illegal in order to prevent collusion or other activities that can raise prices. In the transmission space, which is generally a regulated industry, the application of standard antitrust rules on collaboration are vague at best, but conservative entities may wish to avoid any antitrust legal risk by erring on the side of reducing communication. For example, it is standard practice today for electric industry trade associations to have antitrust policies that include... communication-restricting guidelines.<sup>142</sup>

Thus, in effect, the electric-transmission industry receives none of the benefits of free-market competition under Order No. 1000, but is hamstrung by the same legal requirements imposed to combat allegedly unfair competition.

Further compounding these competition concerns is that current regulatory structures may inadvertently inhibit beneficial vertical integration, particularly between transmission and generation segments. In certain contexts, vertical integration can yield substantial operational efficiencies—such as better-coordinated planning and reduced transaction costs—that enhance consumer welfare. Regulatory barriers or overly stringent separation requirements can deny ratepayers these potential efficiencies, thereby exacerbating, rather than alleviating, competition-related inefficiencies.

---

<sup>140</sup> Rob Gramlich, Richard Doying, & Zach Zimmerman, *Fostering Collaboration Would Help Build Needed Transmission*, at 42, GRID STRATEG. (Feb. 2024), available at [https://gridstrategiesllc.com/wp-content/uploads/2024/02/GS\\_WIRES-Collaborative-Planning.pdf](https://gridstrategiesllc.com/wp-content/uploads/2024/02/GS_WIRES-Collaborative-Planning.pdf).

<sup>141</sup> *Id.* at 41-42.

<sup>142</sup> *Id.* at 42.

## E. Distorting Investment Through Flawed Cost Allocation

Order No. 1000 mandates that costs for new transmission facilities be allocated in a manner “roughly commensurate” with estimated benefits. This principle, however, is undermined by its inherent vagueness and FERC’s delegation of defining “benefits” to individual planning regions.<sup>143</sup>

This delegation has resulted in inconsistent definitions across regions, creating uncertainty for developers and opportunities for strategic behavior.<sup>144</sup> Vague cost-allocation rules inevitably distort investment signals. If beneficiaries are not accurately identified, economically inefficient projects might gain support, as costs are diffused across many ratepayers. Conversely, beneficial projects may be opposed if entities fear being allocated costs that exceed their actual gains.

The principle of cost causation—that costs should be borne by those who cause them to be incurred, or who directly benefit—is nominally embraced by Order No. 1000, but undermined in practice. When “benefits” are broadly attributed without clear linkage to specific users, costs tend to be socialized, severing the crucial connection between use and payment. This dulls market participants’ incentives to make efficient decisions regarding their use of the transmission system.

## F. Recommendations

The cumulative effect of Order No. 1000’s flawed planning mandates, compromised competitive processes, and distortive cost-allocation mechanisms is tangible harm across the economy. In particular, consumers face higher electricity costs. The Brattle Group calculated in 2018 that genuine competitive processes could lead to cost savings of up to 40%, with customers saving \$8 billion over five years.<sup>145</sup> These projected savings have largely failed to materialize. With transmission spending growing from \$15 billion in 2005 to nearly \$40 billion annually, the foregone benefits are substantial.<sup>146</sup>

We recommend repealing or substantially modifying Order No. 1000. The does not mean abandoning the goal of efficient transmission development. Rather, it represents a shift toward regulatory approaches that better align with market principles that focus on outcomes, not processes. Instead of prescribing detailed planning mechanisms, regulation should define desired outcomes

---

<sup>143</sup> Richard L. Roberts, *Analysis of FERC Order No. 1000*, STEPTOE LLP (Aug. 3, 2011), <https://www.steptoel.com/en/news-publications/analysis-of-ferc-order-no-1000.html> (“FERC provides very little guidance on how it expects benefits to be defined and calculated and the methods that would satisfy the six standards.”)

<sup>144</sup> Scott Madden, *FERC Order No. 1000: Five Years On*, SCOTT MADDEN MANAG. CONSULT. (Jun. 2016), at 5, available at <https://www.scottmadden.com/content/uploads/2018/08/FERC-Order-No.-1000-Five-Years-On.pdf> (“Not surprisingly, this has led to divergent definitions of benefits across regions, with CAISO socializing the cost of all competitive transmission, while PJM has specific methods to quantify and allocate benefits of different types of projects. Each region has established thresholds for cost allocation (and competition) based on its view of how costs and benefits accrue to various stakeholders.”).

<sup>145</sup> Johannes P. Pfeifenberger, Judy Chang, Akarsh Sheilendranath, J. Michael Hagerty, Simon Levin, & Wren Jiang, *Cost Savings Offered by Competition in Electric Transmission: Experience to Date and the Potential for Additional Customer Value*, BRATTLE GROUP (Apr. 2019), available at <https://etccoalition.wpengine.com/wp-content/uploads/Brattle-Report-Cost-Savings-Offered-by-Competition-in-Electric-Transmission.pdf>.

<sup>146</sup> Neeley, *supra* note 118.

(reliability, economic efficiency, non-discriminatory access) and allow market participants flexibility to achieve them.

## VIII. Anticompetitive *Cy-Pres* Practices

The *cy-pres* (“next best”) doctrine permits funds from cash settlements in class actions to be directed to third parties—typically, charitable organizations with missions ostensibly related to the lawsuit's claims—rather than to class members themselves. While traditionally used for residual funds that remained after compensation attempts, *cy pres* has increasingly been employed as a primary distribution mechanism when class members are deemed hard to identify, or when per-member compensation would be minimal.

In 2009, the DOJ Civil Rights Division adopted a policy of directing leftover settlement funds—those not distributed to direct victims—toward third-party charities.<sup>147</sup> This marked a significant shift, as prior to this, such *cy-pres* distributions were rare in federal government settlements. The policy was intended to ensure that unclaimed funds from civil-rights settlements were used to benefit communities or causes related to the underlying case, rather than reverting to the U.S. Treasury or remaining undistributed. Since then, the government’s policy has flip flopped with each change in administration, with the first Trump administration rescinding the guidance,<sup>148</sup> the Biden administration reinstating it,<sup>149</sup> and the second Trump administration again rescinding it.<sup>150</sup>

Judge Richard Posner has observed that, when there is “no indirect benefit to the class from the defendant's giving the money to someone else,” the *cy-pres* remedy in the litigation context becomes “purely punitive.”<sup>151</sup> In addition to the punitive aspect of the *cy-pres* remedy, the practice is anticompetitive in that it bestows a windfall to some organizations, conferring an anticompetitive advantage *vis-à-vis* competing organizations.

*Cy-pres* awards function as non-market subsidies that bypass normal competitive processes. Recipient organizations gain funds without incurring the marketing, outreach, or compliance costs typical in nonprofit fundraising. This creates artificial price advantages in the “market” for charitable dollars. That is because *cy-pres* funds flow to organizations based on litigation outcomes, rather than donor preferences or demonstrated effectiveness.

---

<sup>147</sup> Alison Somin & Frank Garrison, *DOJ's Proposed Third-Party Settlement Payment Rule Is Ripe for Abuse*, THE HILL (Aug. 8, 2022), <https://thehill.com/opinion/judiciary/3588678-doj-proposed-third-party-settlement-payment-rule-is-ripe-for-abuse>.

<sup>148</sup> Memorandum from Jeff Sessions, U.S. Atty' Gen. *re: Prohibition on Settlement Payments to Third Parties*, U.S. DEP. JUSTICE (Jun. 7, 2017), <https://www.justice.gov/archives/opa/press-release/file/971826/dl>.

<sup>149</sup> Memorandum from Merrick Garland, U.S. Att'y Gen. *re: Guidelines and Limitations for Settlement Agreements Involving Payments to Non-governmental Third Parties*, U.S. DEP. JUSTICE (May 5, 2022), available at [https://www.justice.gov/d9/pages/attachments/2022/05/05/02\\_ag\\_guidelines\\_and\\_limitations\\_memorandum\\_0.pdf](https://www.justice.gov/d9/pages/attachments/2022/05/05/02_ag_guidelines_and_limitations_memorandum_0.pdf).

<sup>150</sup> Memorandum from Pam Bondi, U.S. Att'y Gen. *re: Reinstating the Prohibition on Improper Third-Party Settlements*, U.S. DEP. JUSTICE (Feb. 5, 2025), <https://www.justice.gov/ag/media/1388536/dl?inline>.

<sup>151</sup> *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

The Google Location History settlement is widely considered one of the most outrageous examples of *cy-pres* abuse, as explained by the Hamilton Lincoln Law Institute:

The underlying lawsuit alleges Google violated the privacy rights of its users by misinforming them that it was not tracking users locations when they turned off Google’s “Location History” feature in their account settings. The parties reached a \$62 million settlement but claim that actually distributing those funds to class members—i.e., the Google users actually harmed according to the lawsuit—was infeasible. Instead, they propose giving the class nothing for the release of their claims to sue Google and distributing the cash proceeds effectively as grants to third-party advocacy groups through *cy pres*. Many of the proposed recipient groups have pre-existing relationships with either class counsel or Google.<sup>152</sup>

### A. *Cy-Pres* Practice’s Anticompetitive Effects

*Cy-pres* payments to third parties displace donations that might otherwise go to organizations competing for similar causes. A nonprofit receiving *cy-pres* funds gains capacity to undercut competitors on service delivery or advocacy without demonstrating superior value. Newer or smaller nonprofits face heightened entry barriers when established institutions receive litigation-driven funding streams unrelated to merit. The GWU Law Center example shows how *cy pres* can entrench incumbent organizations.

One class action settlement in an antitrust case, for example, included an award of \$5.1 million of unclaimed antitrust settlement funds to the George Washington University School of Law (“GWU Law”) to create a “Center for Competition Law.” Not coincidentally, the lead plaintiffs’ lawyer was a GWU Law alumnus. The National Law Journal called this result one of the most criticized *cy pres* awards in recent years. The diversion of funds to an organization in which class counsel has such a personal interest arguably runs counter to class counsel’s duty to “fairly and adequately protect the interests of the class.”<sup>153</sup>

When funds are directed by courts or attorneys, rather than by the class members themselves, the resulting allocation fails to reflect actual consumer preferences. Moreover, by providing a windfall to third-party nonprofits, the allocation fails to reflect donor (and potential donor) preferences, distorting the fundraising market. In both cases, *cy-pres* practices present a form of centralized resource allocation that replaces market-based decisions with judicial fiat. Organizations receiving *cy-pres* windfalls can expand operations, hire additional staff, or launch new initiatives without demonstrating market demand. This artificial growth comes at the expense of potentially more

---

<sup>152</sup> *In re Google Location History Litigation*, HAMILT. LINC. LAW INST. (Mar. 4, 2024), <https://hlli.org/in-re-google-location-history-litigation>.

<sup>153</sup> John H. Beisner, Jessica Davidson Miller, & Jordan M. Schwartz, *Cy Pres: A Not So Charitable Contribution to Class Action Practice*, U.S. CHAMBER INST. FOR LEG. REFORM (2010), available at [https://instituteforlegalreform.com/wp-content/uploads/2020/10/cypres\\_0.pdf](https://instituteforlegalreform.com/wp-content/uploads/2020/10/cypres_0.pdf).

efficient or responsive organizations that lack access to the *cy-pres* funding stream, thereby stifling competition among nonprofits.

The availability of *cy-pres* funds encourages nonprofits to divert resources toward cultivating relationships with class counsel, judges, and potential defendants, rather than toward improving their core services or demonstrating impact to donors. This creates significant deadweight loss and economic friction.

## **B. Compelled ‘Charitable’ Speech**

*Cy-pres* distributions effectively force class members to “donate” to organizations they may not support. This raises serious concerns when recipient organizations engage in advocacy or pursue political agendas.

For example, in *Hawes v. Macy's Inc.*, the court rejected a settlement partly because the proposed *cy-pres* recipient, Public Interest Research Group (PIRG), was unsuitable. Indeed, its work was completely unrelated to the bed-sheet-labeling issues in the lawsuit.<sup>154</sup> PIRG focuses primarily on environmental issues, product safety, and political advocacy, rather than consumer mislabeling concerns—making it impossible to justify as the “next best use” for settlement funds. Even PIRG's promise to use the funds for relevant consumer education failed to address the fundamental problem that money given to the organization would effectively support its broader unrelated activities, such as global warming, energy, health, and “democracy & government.”<sup>155</sup> In addition, the court noted that “PIRG uses portions of its funds to donate to other organizations—organizations whose missions are even a further cry from any issues this suit presents,” including the People’s Action Institute, which advocates for socialized medicine; Environment America, which seeks to ban plastic; and Onward Together, a PAC that supports progressive candidates in their runs for offices across the country.<sup>156</sup>

This compelled funding of third-party speech represents both a consumer-welfare loss and a distortion of the charitable marketplace. It artificially increases resources for certain advocacy positions without donor choice.

## **C. Recommendation: End *Cy-Pres* Payments to Third Parties**

We recommend the DOJ and FTC work together to limit anticompetitive *cy-pres* distributions and end the administration-to-administration flip flopping regarding the practice. This should include issuing joint enforcement guidelines clarifying that *cy-pres* remedies are disfavored and will not be pursued by the agencies due to their competitive-distortion effects, and establishing strict conditions where *cy pres* might be acceptable (*e.g.*, only after exhaustive direct-distribution efforts).

---

<sup>154</sup> *Hawes v. Macy's Inc.*, No. 1:17-CV-754, 2023 WL 8811499, 2023 U.S. Dist. LEXIS 226617 42 (S.D. Ohio Dec. 20, 2023).

<sup>155</sup> *Id.* at 43.

<sup>156</sup> *Id.*

In addition, the agencies should consider rulemaking within their statutory authority to restrict *cy-pres* in cases involving federal antitrust or consumer-protection laws. These guidelines and rulemaking should be supported by workshops that bring together economists, legal scholars, and nonprofit-sector experts to document competitive harms from *cy-pres* and empirical research on how *cy-pres* distributions affect nonprofit competition.

We recommend the agencies file strategic *amicus* briefs in key class-action cases arguing that *cy-pres* distributions distort competition in nonprofit markets. They should challenge settlements with *cy-pres* provisions during Tunney Act reviews, highlighting their anticompetitive effects.

By deploying these coordinated approaches, the DOJ and FTC can effectively curtail *cy-pres* practices that undermine competitive markets and redirect settlement funds to their rightful recipients—the consumers and businesses directly harmed by anticompetitive conduct.

## **IX. Recommendations for DOJ and FTC Rules, Guidelines, and Enforcement Actions**

We recommend that the DOJ and FTC undertake reforms needed to restore antitrust enforcement to economically sound principles and to remedy regulatory overreach that has undermined both competition and consumer welfare. The Biden administration’s departure from the consumer-welfare standard, exemplified by failed merger challenges like *FTC v. Meta/Within* and expansive theories of “innovation foreclosure,” has created legal uncertainty, while chilling legitimate business conduct. Simultaneously, regulatory initiatives like the blanket ban on noncompete agreements and dramatically expanded Hart-Scott-Rodino filing requirements have imposed substantial compliance costs that disproportionately burden smaller firms. This has, paradoxically, created barriers to the very competition these policies purport to protect.

Beyond traditional antitrust concerns, the FTC’s enforcement approach in data security and children’s privacy has produced similarly anticompetitive effects through regulatory uncertainty and asymmetric compliance burdens. The agency’s “common law” of data security, developed through coercive settlement practices, rather than adversarial adjudication, provides insufficient guidance, while favoring incumbents who can better absorb investigation costs. Similarly, the expansion of the Children’s Online Privacy Protection Act’s (COPPA) definition of personal information to include persistent identifiers has demonstrably reduced children’s online content by 18%, while concentrating market power among larger content creators who can survive without targeted advertising revenue. These enforcement patterns reveal how well-intentioned regulatory initiatives can themselves become anticompetitive regulations when they abandon economic rigor in favor of structural presumptions and speculative theories of harm.

### **A. Refocus on the Consumer Welfare Standard**

Almost from its inception, U.S. antitrust enforcement has centered largely on the consumer welfare standard (CWS), focusing on price and output effects as the principal indicators of competitive

harm. While the CWS is often attributed to the influence of the Chicago School, it was applied in court decisions long before it extended its influence in the 1970s.<sup>157</sup>

Recently, however, the FTC and DOJ have signaled a sharp departure from this paradigm. Particularly under President Joe Biden’s appointees—such as former FTC Chair Lina Khan and former Assistant U.S. Attorney General Jonathan Kanter—antitrust policy was shifted to encompass such broader concerns as innovation, fair competition for workers and small businesses, and the structural risks of concentrated market power, even when prices and output were not affected directly.<sup>158</sup>

This reorientation has manifested in several enforcement actions and policy revisions. Notably, the FTC and DOJ withdrew the 2020 Vertical Merger Guidelines, citing an overreliance on efficiencies and a narrow focus on price. Merger challenges such as *FTC v. Meta/Within* and *DOJ v. UnitedHealth/Change Healthcare* have advanced theories of harm centered on potential competition and “innovation foreclosure,” respectively, without sound evidence of harm to competition or consumers. The courts, however, have rejected these government theories as too speculative.<sup>159</sup> These and other enforcement efforts were codified in the 2023 Merger Guidelines, which further de-emphasized efficiencies and emphasized risks to labor markets, nascent competition, and “platform entrenchment.”<sup>160</sup>

---

<sup>157</sup> See Herbert Hovenkamp, *Did "Consumer Welfare" Change Antitrust?*, SSRN (Feb. 1, 2025), at 3, <https://ssrn.com/abstract=5117989>. (“The other version, which is the one commonly accepted today, looks more explicitly at the welfare of consumers, who are almost always benefitted by lower prices, higher output, or unrestrained innovation. That is the same standard that antitrust courts have applied in hundreds of federal court decisions, and long before it was associated with any conception of economic ‘welfare.’ Further, as this paper shows, it did not change even a little when the language of consumer welfare entered antitrust analysis in the 1970s.”); see also Lazar Radic & Nicolas Petit, *The Superiority of the Consumer Welfare Standard*, SSRN (Dec. 15, 2024), at 15, <https://ssrn.com/abstract=5065469> (“At the dawn of the 20th century, in the progressive era, US courts had already started to read the Sherman Act as a Congressional demand to safeguard the supreme good of economic competition. In interpreting this act, the justices asked themselves questions about consumer welfare. As early as 1904, the Supreme Court’s opinion in *Northern Securities* stated that the Sherman Act addresses an ‘economic question,’ that is, how to optimize ‘public convenience’ and ‘general welfare.’ Subsequently, concerns about consumers and prices typical of the CWS were quick to emerge, at least nominally, in the Supreme Court’s case law. Decisions like *Central Lumber v South Dakota* in 1912, *Chicago Board of Trade* in 1918, or *US Steel* in 1920<sup>33</sup> talked of ‘consumers interest,’ ‘power over price,’ and ‘raising prices to consumers.’”).

<sup>158</sup> See, e.g., Jonathan Kanter, *Remarks at New York City Bar Association’s Milton Handler Lecture, U.S. Dep. Justice* (May 18, 2022), <https://www.justice.gov/archives/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association> (“Three aspects of the consumer welfare standard have been the most problematic. First, there are some versions that assert the antitrust laws were never intended to protect our democracy from corporate power, or to promote choice and opportunity for individuals and small businesses. In this view, the antitrust laws are meant to promote wealth and output, but do nothing for the liberty of our nation.”).

<sup>159</sup> In *FTC v. Meta/Within*, the Court pointed out that “To the extent the FTC implies that—based solely on the objective evidence of Meta’s resources and its excitement for VR fitness—it would have inevitably found and implemented some unspecified means to enter the market, the Court finds such a theory to be **impermissibly speculative**.” (Emphasis ours). *FTC v. Meta Platforms Inc.*, No. 5:22-cv-04325-EJD, 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023). See also *UnitedHealth Grp. Inc. v. United States*, No. 1:22-cv-00481, 2022 WL 4365867 (D.D.C. Sept. 19, 2022).

<sup>160</sup> See Part IX.D, *infra*.

As antitrust scholar Herbert Hovenkamp has observed, however, the FTC and DOJ will have a better chance to prevail in litigation in cases where its theories of harm are articulated in economic terms consistent with the CWS: higher prices, reduced market output, or concrete threats to innovation.<sup>161</sup> As explained by Lazar Radic and Nicolas Petit:

The CWS narrows the risk of discretionary antitrust standards like the protection of competition or the competitive process. First, the CWS reduces the type 1 error of false conviction in regard to industries or practices where straight reductions in competition (like collusion, monopolization, or mergers) do not translate into social welfare losses.

(...)

Second, the CWS reduces the type 2 error of false acquittal when straight limitations of competition are too costly to observe.<sup>162</sup>

Moreover, this shift in enforcement philosophy has raised concerns that an overemphasis on structural harms or the fate of individual firms could erode the longstanding distinction between protecting *competition* and protecting *competitors*.<sup>163</sup> As reaffirmed in numerous court decisions, antitrust law is designed to preserve the competitive process, not to insulate firms from vigorous rivalry or the consequences of market dynamics.<sup>164</sup> If agencies adopt a posture that penalizes firm conduct solely because it disadvantages less-efficient or less-innovative rivals, they risk undermining this foundational principle and chilling legitimate competition. Paradoxically, antitrust law would be hindering rather than fostering competition.

## **B. Rescind the FTC's Noncompete-Agreements Rule**

Approved in May 2024, the FTC final rule banning noncompete agreements (NCAs)<sup>165</sup> purportedly protects workers, but could hinder incentives to hire and train workers. To be sure, there are cases in which noncompete agreements raise legitimate policy concerns. But there are also contexts in which they can serve a useful procompetitive function. An absolute ban across all industries and occupations is overly broad, particularly one that applies to senior executives.

---

<sup>161</sup> Herbert Hovenkamp, *Antitrust Policy After Biden*, PROMARKET (Sep. 16, 2024), <https://www.promarket.org/2024/09/16/antitrust-policy-after-biden>.

<sup>162</sup> Radic & Petit, *supra* note 153, **Error! Bookmark not defined.**, at 25.

<sup>163</sup> See Fred Ashton, *Why the Consumer Welfare Standard Is the Backbone of Antitrust Policy*, AM. ACTION FORUM (Oct. 6, 2022), <https://www.americanactionforum.org/insight/why-the-consumer-welfare-standard-is-the-backbone-of-antitrust-policy> (“Proponents argue that antitrust enforcement agencies should look beyond the effects business practices have on consumers and instead use antitrust policy to promote other social goals, including mitigating depressed employee wages, minimizing inequality, limiting harms to competitors, and preventing the rise of big firms that have amassed political power. In other words, this movement calls for a “fairness” standard—but fairness is subjective. Fairness cannot be measured using economic tools and data. Replacing the consumer welfare standard with one of fairness threatens to worsen economic outcomes for consumers and risks slowing innovation and economic growth.”).

<sup>164</sup> See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (“It is axiomatic that the antitrust laws were passed for ‘the protection of competition, not competitors.’”).

<sup>165</sup> See *Non-Compete Clause Rule*, 89 FED REG. 38342 (May. 7, 2024), available at <https://www.govinfo.gov/content/pkg/FR-2024-05-07/pdf/2024-09171.pdf>.

The rule is also economically unsound. The empirical evidence the FTC cites in its notice of proposed rulemaking (NPRM) is incomplete, inconclusive and, in many instances, methodologically flawed. As explained in our comment submission to the NPRM, the literature on NCA enforceability yields mixed results: while some studies suggest NCAs may depress wages or reduce mobility in certain contexts, others show positive effects, especially for higher-skilled workers.<sup>166</sup>

In particular, studies find that NCAs can increase employee wages when disclosed prior to hiring, and that enforceability is associated with increased firm-sponsored training. This suggests that NCAs help mitigate hold-up problems and encourage investment in human capital.<sup>167</sup> Think, for instance, of a consultancy firm. Old partners would have little incentive to share knowledge, methodologies, and other firm goodwill with younger partners and associates if the latter could leave and open a new shop the next day. A noncompete clause bans competition in the short term, but fosters information sharing that allows for greater output and competition in the mid- and long-term. A categorical ban fails to account for these procompetitive benefits and wrongly assumes that alternative mechanisms like nondisclosure agreements (NDAs) or fixed-term contracts can substitute for NCAs with equal efficacy.<sup>168</sup>

Moreover, the FTC's experience with NCAs does not justify a regulatory ban. The agency has brought only a handful of enforcement actions involving NCAs, all resolved through settlements without admissions of liability or findings of law.<sup>169</sup> These cases provide no clear judicial precedent establishing NCAs as violations of Section 5 of the FTC Act.<sup>170</sup> Historically, NCAs have been governed by state contract law under a rule-of-reason approach that considers their reasonableness in scope, duration, and necessity to protect legitimate business interests. The commission's blanket ban—without regard to industry, wage level, or market power—would upend this longstanding legal tradition and intrudes upon an area of regulation traditionally left to the states.<sup>171</sup>

Finally, the economic and administrative burdens of enforcing the rule are substantial. According to the FTC's own estimates, the rule would apply to nearly 30 million U.S. workers.<sup>172</sup> Yet the agency has neither the resources nor the institutional expertise to administer this regulatory regime effectively. As our comments point out, the initial NPRM lacked even a cursory analysis of the resources that would be required for effective implementation and enforcement of the rule.<sup>173</sup> A

---

<sup>166</sup> *Comments of International Center for Law & Economics, In Re: Non-Compete Clause Rulemaking, Matter No. P201200, INT'L. CTR. LAW ECON.* (Apr. 19, 2023), at 11-18, available at <https://laweconcenter.org/wp-content/uploads/2023/04/ICLE-Noncompete-NPRM-Comments-final.pdf>.

<sup>167</sup> Evan Starr, *Consider This: Wages, Training, and the Enforceability of Covenants Not to Compete*, 72 *INDUS. & LABOR REL. REV.* 783 (2019).

<sup>168</sup> ICLE Comments, *supra* note 162, at 52-58.

<sup>169</sup> *Id.* at 60.

<sup>170</sup> *Id.* at 61-62.

<sup>171</sup> *Id.* at 74-75.

<sup>172</sup> *Id.* at 68-70.

<sup>173</sup> *Id.* at 68.

wiser course would be to continue using existing antitrust tools to challenge NCAs in cases where they demonstrably harm competition, while supporting further research and state-level experimentation, rather than imposing a premature national ban.

### C. Review and Revise HSR Rules and Form

On Oct. 10, 2024, the FTC finalized significant updates to the Hart-Scott-Rodino (HSR) Form and Instructions. On Nov. 12, 2024, the new HSR rules were published in the Federal Register.<sup>174</sup> While the final rule is a vast improvement over what was proposed in 2023, they still impose excessive costs on merging parties, and warrant an extensive review. The FTC may have had the best intention to improve and modernize the merger-review process, but the revised rules have introduced substantial burdens that may hinder efficient dealmaking without commensurate benefits to antitrust enforcement.

One of the primary concerns is the significant increase in time and resources required to prepare HSR filings. The FTC estimates that the average time to complete an HSR filing has risen by 68 hours, bringing the total to approximately 105 hours per-filing. For complex transactions involving overlapping products or supply relationships, the burden can reach up to 121 hours.<sup>175</sup> This escalation in preparation time translates to greater legal and administrative costs for companies, potentially deterring beneficial mergers and acquisitions—most of which do not pose any risks to competition.

Moreover, the updated rules mandate the disclosure of extensive information, including detailed narratives on transaction rationale, supply-chain relationships, and customer data.<sup>176</sup> Such requirements may not only be onerous but also risk exposing sensitive business information. While such information may be useful to assess a transaction's impact on competition, it is not typically useful during the initial phase of the merger procedure, and can be requested in those cases where it is more likely to be pertinent.

Importantly, the resource implications for the FTC and DOJ themselves must also be considered. With limited personnel and time, the agencies cannot realistically conduct in-depth reviews of every transaction flagged under the updated requirements. By compelling enforcers to sift through increasingly lengthy and complex filings, the revised rules risk diluting focus and delaying review of transactions that truly raise red flags. Streamlining the process—particularly by eliminating or limiting mandatory narratives for transactions with no horizontal overlaps—would allow agencies to

---

<sup>174</sup> As Published Final Rule on Premerger Notification; Reporting and Waiting Period Requirements, FED. TRADE COMM'N (Nov. 12, 2024), <https://www.federalregister.gov/documents/2024/11/12/2024-25024/premerger-notification-reporting-and-waiting-period-requirements>.

<sup>175</sup> Finally the Final HSR Rules: Key Takeaways from the New HSR Pre-Merger Notification Form, WHITE & CASE (Jan. 10, 2025), <https://www.whitecase.com/insight-alert/finally-final-hsr-rules-key-takeaways-new-hsr-pre-merger-notification-form>.

<sup>176</sup> *Id.*

better allocate their scarce investigative resources toward deals with a higher likelihood of competitive harm.

In light of these issues, it is imperative to reconsider the 2020 HSR rule updates. Reforms should aim to balance the need for thorough antitrust review with the practical realities of business transactions. Streamlining disclosure requirements and reducing unnecessary procedural hurdles can help ensure that the HSR process effectively protects competition without imposing undue burdens on merging parties.

#### **D. Review and Revise Horizontal Merger Guidelines**

FTC Chair Andrew Ferguson announced<sup>177</sup> earlier this year that the DOJ and FTC’s joint 2023 Merger Guidelines will serve as the framework for the agency’s merger-review analysis. While we acknowledge that there could be reasonable arguments against rescinding the guidelines—such as promoting regulatory stability or conserving agency resources—we respectfully recommend initiating a serious evaluation of their impact on enforcement outcomes and market dynamics.

The 2023 Merger Guidelines represented a radical departure from established antitrust consensus, abandoning decades of consumer-welfare principles, while echoing the anti-economic, anti-competitive agenda of the neo-Brandeisian movement. True continuity for the FTC would mean upholding sound economic principles and protecting consumers, not embracing a document designed to dismantle them. Chair Ferguson has rightly noted that the Biden-era FTC initiated a “four-year regulatory assault on American businesses” and “hindered economic growth and increased costs to the American consumer.”<sup>178</sup>

ICLE has previously outlined policy and legal concerns with the 2023 Merger Guidelines in regulatory comments to the agencies. The 2023 Merger Guidelines overemphasize structural presumptions and do not adequately consider the potential benefits of mergers. Moreover, they fail to provide clear guidance on how to distinguish between harmful and beneficial mergers, making it difficult for businesses and practitioners to navigate the regulatory landscape.<sup>179</sup>

The 2010 Guidelines, for instance, expressly identified mergers that are “unlikely to have adverse competitive effects and ordinarily require no further analysis”; namely, those involving increases in

---

<sup>177</sup>FTC Chairman Andrew N. Ferguson Announces that the FTC and DOJ’s Joint 2023 Merger Guidelines Are in Effect, FED. TRADE COMM’N (Feb. 18, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/02/ftc-chairman-andrew-n-ferguson-announces-ftc-doj-joint-2023-merger-guidelines-are-effect>.

<sup>178</sup> Dissenting Statement of Commissioner Andrew N. Ferguson Regarding the Unfair or Deceptive Fees Rulemaking Matter Number R207011, FED. TRADE COMM’N (Dec. 17, 2024), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/ferguson-junk-fees-dissent.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-junk-fees-dissent.pdf). In his dissent, Ferguson cites a congressional staff report that found the Biden-Harris Administration had imposed an estimated \$1.7 trillion in cumulative regulatory costs on the economy. See Majority Staff of H. Comm. on Oversight and Accountability, 118th Cong., *Death by a Thousand Regulations: The Biden-Harris Administration’s Campaign to Bury America in Red Tape* (Sept. 25, 2024).

<sup>179</sup> See Comments of International Center for Law & Economics on the FTC & DOJ Draft Merger Guidelines, Docket No. FTC-2023-0043-0001, INT’L. CTR. LAW ECON. (Sep. 18, 2023), <https://www.regulations.gov/comment/FTC-2023-0043-1555>.

the Herfindahl-Hirschman Index (HHI) of less than 100 and those resulting in an HHI less than 1,500. This provides a much more helpful “safe harbor” to business and practitioners. The 2023 Merger Guidelines do not identify any such mergers, whether under the 2010 thresholds or otherwise.<sup>180</sup>

The current merger guidelines are generally averse to growth through strategic acquisitions. They include presumptions that significantly increase the possibility of blocking pro-competitive mergers, ignoring the literature that finds that, in general, mergers (particularly vertical mergers) are pro-competitive.<sup>181</sup> The 2023 Merger Guidelines also appear to rest on the presumption that any increase in market concentration is inherently harmful to consumers.

But economic theory and empirical research in industrial organization and trade economics recognize that market concentration can often be the result of vigorous competition, not its absence. Indeed, the literature examining trends in competition consistently finds that greater competitive pressure can lead to higher levels of concentration, as more-efficient firms gain market share. As Chad Syverson aptly summarizes:

Many empirical studies in varied settings have found that greater *substitutability*/competition—resulting from, say, reductions in trade, transport, or search costs—shifts activity away from smaller, higher-cost producers and toward larger, lower-cost producers... [We] demonstrate that search cost reductions reallocate market share toward lower-cost and larger sellers, increasing market concentration even as margins fall. It is not an exaggeration to say that there are scores, perhaps hundreds, of such studies.<sup>182</sup>

This, of course, does not imply that every increase in concentration is pro-competitive. Instead, it simply means that a previous trend toward concentration need not be anticompetitive in any way, as the guidelines assume.

There is a distinction between “binding” and “persuasive” authority in the context of agency guidelines. While not legally binding, the merger guidelines can still influence court decisions and therefore have the potential to harm markets beyond the agencies’ action. We respectfully urge the FTC and DOJ to reconsider the use of this misguided foundation for merger review and would recommend that the agencies instead reinstate the 2010 Horizontal-Merger Guidelines as the most expeditious means to ensure continuity of antitrust principles that have guided courts and enforcement agencies for decades.

---

<sup>180</sup> *Id.* at 6.

<sup>181</sup> *Id.* at 41-44.

<sup>182</sup> Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions* 33 J. ECON. PERSP. 23, 27 (2019).

## E. Develop a Real Section 5 Common Law of Data Security

Under Section 5 of the FTC Act, the FTC has developed what some have called a “common law” of data security through complaints and consent decrees.<sup>183</sup> Unfortunately, this common law bears little resemblance to the legal principles developed over centuries by judges analyzing real disputes between private parties.<sup>184</sup> It instead reflects a process whereby the government has been able to leverage its immense power as prosecutor and judge to strong arm companies into 20-year consent decrees with no admission of guilt.

The problem with such an approach is that it does little to give fair notice to market participants about what “reasonable” data security entails.<sup>185</sup> Such regulatory uncertainty has strong anticompetitive effects, as smaller businesses and startups are likely much less able to invest in regulatory-compliance lawyers than are larger businesses and incumbents. The process of investigations and prosecution can bankrupt even those businesses who eventually win when they get in front of an Article III court, such as what happened with LabMD.

### I. *The LabMD Case: A cautionary tale*

LabMD was a small diagnostics laboratory in the business of providing cancer-screening services to patients. As part of this business—and as required by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its implementing regulations—LabMD retained patient data, including personally identifiable information (PII).<sup>186</sup>

In 2008, Tiversa, a “cyberintelligence” company that employed custom algorithms to exploit peer-to-peer (P2P) network vulnerabilities, downloaded from the computer of a LabMD employee a file, dubbed the “1718 file,” that contained PII of approximately 9,300 LabMD patients.<sup>187</sup> Shortly thereafter, Tiversa engaged in what LabMD has characterized (in our opinion, fairly) as a shakedown to induce LabMD to pay Tiversa for “remediation” services.<sup>188</sup> LabMD refused and fixed the P2P vulnerability itself.<sup>189</sup>

---

<sup>183</sup> See, e.g., Daniel Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM L. REV. 583 (2014).

<sup>184</sup> See, e.g., Geoffrey A. Manne & Ben Sperry, *FTC Process and the Misguided Notion of an FTC “Common Law” of Data Security*, INT’L. CTR. LAW ECON (2014), <https://laweconcenter.org/resources/ftc-process-misguided-notion-ftc-common-law-data-security>.

<sup>185</sup> See Kristian Stout & Geoffrey A. Manne, *When “Reasonable” Isn’t: The FTC’s Standard-less Data Security Standard*, 15 J.L. ECON. POL’Y 67 (2019).

<sup>186</sup> Brief of Petitioner at 2, *LabMD Inc. v. FTC*, 894 F.3d 1221 (11th Cir. 2018) (No. 16-16270).

<sup>187</sup> *Id.* at 3.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 2-3.

Following some fairly questionable interactions between the FTC and Tiversa,<sup>190</sup> LabMD came under investigation by the agency for more than three years. In its enforcement complaint, the FTC ultimately alleged two separate security incidents: the downloading of the 1718 file by Tiversa, and the mysterious exposure of a cache of “day sheets” allegedly originating from LabMD that were discovered in Sacramento, California.<sup>191</sup> The FTC alleged that each incident was caused by LabMD’s “failure to employ ‘reasonable and appropriate’ measures to prevent unauthorized access to personal data,” and “caused, or is likely to cause, substantial harm to consumers . . . constitut[ing] an unfair practice under Section 5(a) of the Federal Trade Commission Act . . . .”<sup>192</sup>

The FTC brought the complaint before one of its administrative law judges (ALJ), who ruled against the commission in his initial determination—holding, among other things, that the term “likely” means “having a high probability of occurring or being true,” and that the FTC failed to demonstrate that LabMD’s conduct had a high probability of injuring consumers.<sup>193</sup>

The ALJ put down a critical marker in the case—one that provided some definition to the FTC’s data-security standard by demarcating those instances in which the commission may exercise its authority to prevent harms that are actually likely to occur from those that are purely speculative. Unsurprisingly, the FTC voted to overturn the ALJ’s decision in LabMD—finding, among other things:

- That “a practice may be [likely to cause substantial injury] if the magnitude of the potential injury is large, even if the likelihood of the injury occurring is low;”
- That the FTC established that LabMD’s conduct in fact “caused or was likely to cause” injury as required by Section 5(n) of the FTC Act;
- That substantiality “does not require precise quantification. What is important is obtaining an overall understanding of the level of risk and harm to which consumers are exposed;” and
- That “the analysis the Commission has consistently employed in its data security actions, which is encapsulated in the concept of ‘reasonable’ data security” encompasses the “cost-benefit analysis” required by the act’s unfairness test.<sup>194</sup>

---

<sup>190</sup> See STAFF OF H. COMM. ON OVERSIGHT AND GOV’T REFORM, 113TH CONG., *Tiversa, Inc.: White Knight or Hi-Tech Protection Racket?* 5-7 (Jan. 2, 2015).

<sup>191</sup> Initial Decision at 2, *In re LabMD Inc.*, 160 F.T.C. No. 9357, 2015 WL 7575033 (Nov. 13, 2015) [hereinafter ALJ LabMD Initial Decision].

<sup>192</sup> Brief of Complainant at 5, *LabMD Inc.*, 160 F.T.C. No. 9357, 2015 WL 7575033 (Nov. 13, 2015).

<sup>193</sup> ALJ LabMD Initial Decision, *supra* note 187, at 42 (The day sheets were ultimately excluded from evidence because the FTC couldn’t prove whether the documents had ever been digital records, nor could it prove how the day sheets made their way out of LabMD and to Sacramento.).

<sup>194</sup> *LabMD Inc.*, Docket No. C-9357 at 4 (F.T.C. July 29, 2016), *overruled by LabMD Inc. v. FTC*, 894 F.3d 1221 (11th Cir. 2018).

In actuality, however, the commission’s manufactured “reasonableness” standard—which, as its name suggests, purports to evaluate data-security practices under a negligence-like framework—amounts in effect to a rule of strict liability for any company that collects personally identifiable data.

When LabMD appealed the case to the 11th U.S. Circuit Court of Appeals, the court ruled against the FTC.<sup>195</sup> The court found it particularly important that there was no true standard for determining “reasonable” data security in its “common law” of complaints and consent decrees. The court stated:

The Commission must find the standards of unfairness it enforces in “clear and well established” policies that are expressed in the Constitution, statutes, or the common law. The Commission’s decision in this case does not explicitly cite the source of the standard of unfairness it used in holding that LabMD’s failure to implement and maintain a reasonably designed data-security program constituted an unfair act or practice. It is apparent to us, though, that the source is the common law of negligence.<sup>196</sup>

The FTC did, on Jan. 6, 2020, announce that it would have “New and improved FTC data security orders.”<sup>197</sup> While the new orders do list more specific requirements to help explain what the FTC believes is a “comprehensive data security program,” there is still no legal analysis in either the orders or the complaints that would give companies fair notice of what the law requires. Furthermore, nothing about the underlying FTC process has changed, which means there is still enormous pressure for companies to settle rather than litigate the contours of what “reasonable” data-security practices look like. Thus, orders and complaints continue to do little to nothing to remedy the problems that plague the commission’s data-security enforcement program.

## 2. *The need for Article III court enforcement*

The FTC should reform how it enforces its authority under Section 5 by committing to using Article III courts for enforcement actions, rather than its own Part 3 process with internal ALJs, which they can appeal and then rule against.

The FTC’s process is quite different than the institution of the common law. The incentives of the administrative-complaint process put relatively more pressure on companies to settle data-security actions brought by the FTC, relative to private litigants. This is because the FTC can use its investigatory powers as a public enforcer to bypass the normal discovery process to which private litigants are subject, and over which independent judges have authority.

---

<sup>195</sup> See *LabMD Inc.*, 894 F.3d at 1237.

<sup>196</sup> *Id.* at 1231.

<sup>197</sup> Andrew Smith, *New and Improved FTC Data Security Orders: Better Guidance for Companies, Better Protection for Consumers*, FTC BUSINESS BLOG (Jan. 6, 2020), <https://www.ftc.gov/business-guidance/blog/2020/01/new-and-improved-ftc-data-security-orders-better-guidance-companies-better-protection-consumers>. The rest of this subsection is adapted from Ben Sperry, *The FTC Still Has a Long Way to Go on its “Common Law” of Data Security*, TRUTH MARK. (Feb. 27, 2020), <https://truthonthemarket.com/2020/02/27/the-ftc-still-has-a-long-way-to-go-on-its-common-law-of-data-security>.

In a private court action, plaintiffs can't engage in discovery unless their complaint survives a motion to dismiss from the defendant. Discovery costs remain a major driver of settlements, so this important judicial review is necessary to make sure there is actually a harm present before putting those costs on defendants.

Furthermore, the FTC can also bring cases in a Part III adjudicatory process, which starts in front of an ALJ but is then appealable to the FTC itself. Former Commissioner Joshua Wright noted in 2013 that “in the past nearly twenty years... after the administrative decision was appealed to the Commission, the Commission ruled in favor of FTC staff. In other words, in 100 percent of cases where the ALJ ruled in favor of the FTC, the Commission affirmed; and in 100 percent of the cases in which the ALJ ruled against the FTC, the Commission reversed.”<sup>198</sup> In other words, the FTC nearly always rules in favor of itself on appeal if the ALJ finds there is no case, as it did in LabMD. The combination of investigation costs before any complaint at all, and the high likelihood of losing through several stages of litigation, makes the intelligent business decision to simply agree to a consent decree.

The results of this asymmetrical process show the FTC has not really been building a common law. Not only does nearly every company targeted for investigation settle, but the FTC's data-security orders tend to be nearly identical from case-to-case, reflecting the standards of the FTC's Safeguards Rule. Since the orders were giving nearly identical—and, as LabMD found, vague—remedies in each case, it cannot be said that a common law developed over time.

Without caselaw on the facts necessary to establish substantial injury, “unreasonable” data-security practices, and causation, there will continue to be more questions than answers about what the law requires. And without changes to the process, the FTC will continue to be able to strong arm companies into consent decrees. This will continue to harm smaller businesses like LabMD, who simply can't afford the same level of investment in regulatory compliance as bigger companies to guess at the FTC's desired standard, nor survive being the target of an FTC Section 5 investigation under such vagueness.

## **F. Review of COPPA Rules**

The FTC recently released its final COPPA Rule.<sup>199</sup> The rule has continued down a path that was started in 2013, whereby persistent identifiers are by themselves considered “personal information” subject to “verifiable parental consent.” The result is that less children's content has been created, along with a growing concentration on the supply side of content creation for children. This is an anticompetitive rule that has, on net, harmed children's welfare.

---

<sup>198</sup> Joshua Wright, *Recalibrating Section 5: A Response to the CPI Symposium*, CPI ANTITRUST CHRON. (Nov. 2013), at 4, available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/recalibratingsection-5-response-cpi-symposium/1311section5.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/recalibratingsection-5-response-cpi-symposium/1311section5.pdf).

<sup>199</sup> See Children's Online Privacy Protection Rule, 90 Fed. Reg. 16918 (Apr. 22, 2025).

The Children's Online Privacy Protection Act (COPPA) sought to strike a balance in protecting children, without harming the utility of the internet for children. As Sen. Richard Bryan (D-Nev.) put it when he laid out the purpose of COPPA:

The goals of this legislation are: (1) to enhance parental involvement in a child's online activities in order to protect the privacy of children in the online environment; (2) to enhance parental involvement to help protect the safety of children in online fora such as chatrooms, home pages, and pen-pal services in which children may make public postings of identifying information; (3) to maintain the security of personally identifiable information of children collected online; and (4) to protect children's privacy by limiting the collection of personal information from children without parental consent. The legislation accomplishes these goals in a manner that preserves the interactivity of children's experience on the Internet and preserves children's access to information in this rich and valuable medium.<sup>200</sup>

In other words, COPPA was designed to protect children from online threats by promoting parental involvement in ways that also preserve a rich and vibrant marketplace for children's content online. Consequently, the pre-2013 COPPA Rule did not define personal information to include persistent identifiers standing alone. These persistent identifiers are critical for the targeted advertising that funds the interactive online platforms and the creation of children's content that the legislation was designed to preserve.

#### *I. Economic Framework: Transaction costs and market effects*

In the context of the COPPA Rule, website operators and online services create incredible value for their users, but they also can, at times, impose negative externalities relevant to children who use their services. In the absence of transaction costs, it would not matter whether operators must obtain verifiable parental consent before collecting, using, or disclosing personal information, or whether the initial burden is placed on parents and children to avoid the harms associated with such collection, use, or disclosure.

But given that there are transaction costs involved in obtaining (and giving) verifiable parental consent, it matters how the law defines personal information (which serves as a proxy for a property right, in economist Ronald Coase's famous framing). If personal information is defined too broadly and the transaction costs for providers to gain verifiable parental consent are too high, the result may be that the social benefits of children's internet use will be lost, as platform operators restrict access beyond the optimum level.

Despite the FTC's best efforts under the COPPA Rule, the transaction costs associated with obtaining verifiable parental consent continue to be sufficiently high as to prevent most operators from seeking that consent for persistent identifiers. As a result, the supply curve for children's online content shifts left, as the marginal cost of monetizing it increases. The cost is driven upward by the

---

<sup>200</sup> 144 Cong. Rec. 11657 (1998) (Statement of Sen. Richard Bryan), available at <https://www.congress.gov/crec/1998/10/07/CREC-1998-10-07.pdf#page=303>.

higher compliance costs of obtaining verifiable parental consent before serving targeted advertising. This supply shift means that less online content will be created for children.

## 2. *Empirical Evidence: The YouTube case study*

These results are not speculative at this point. Scholars who have studied the issue have found the YouTube settlement, made pursuant to the 2013 amendments, has resulted in less child-directed online content due to creators' inability to monetize that content through targeted advertising. In their working paper "COPPAcalypse? The YouTube Settlement's Impact on Kids Content,"<sup>201</sup> Garrett Johnson, Tesary Lin, James C. Cooper, & Liang Zhong summarized the issue as follows:

The Children's Online Privacy Protection Act (COPPA) prohibits operators of online services directed at children under 13 from collecting personal information without obtaining verifiable parental consent. In 2013, the FTC amended the COPPA rules so that the definition of personal information includes "persistent identifier that can be used to recognize a user over time and across different Web sites or online services," such as a "customer number held in a cookie... or unique device identifier." Because obtaining verifiable parental consent for free online services is difficult and rarely cost justified, COPPA acts as a de facto ban on the collection of personal information—and hence personalized advertising—by providers of free child-directed content.

On September 4, 2019, YouTube entered a consent agreement with the FTC to settle charges that it had violated COPPA. The FTC's allegations focused on YouTube's practice of serving personalized advertising on child-directed content without obtaining verifiable parental consent... As part of the settlement, YouTube also agreed to identify child-directed content and to stop collecting personal information from MFK content viewers. Beginning January 1, 2020 (hereinafter, the post-settlement period), YouTube required channel owners producing MFK content to designate either their entire channel or specific videos on their channel as MFK. YouTube augmented these self-designations with an automated classifier to identify content directed at children. The automated classifier looks for content that includes, for instance, child actors, child characters, games, toys, songs, and stories that children like. Between the announcement and implementation of the settlement (hereinafter, the announcement period), YouTube provided content creators details on its compliance plan. The FTC also provided legal guidance, explaining that MFK content creators could face civil penalties of up to \$42,530 per video if they fail to self-designate and YouTube's classifier fails to correctly identify their content as MFK.<sup>202</sup>

The results for children's online content were catastrophic, resulting in 18% less content produced by child-directed content creators, as more content creators focused on non-child-directed content that could still be monetized. There was also less investment in the quality of child-directed content,

---

<sup>201</sup> Garrett A. Johnson, Tesary Lin, James C. Cooper, & Liang Zhong, *COPPAcalypse? The YouTube Settlement's Impact on Kids Content*, SSRN (Mar. 14, 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4430334](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4430334).

<sup>202</sup> *Id.* at 7-8.

with the proportion of original content falling by 11% and user content ratings falling by 10%. Views of child-directed channels fell by 20%.<sup>203</sup>

Importantly, for this proceeding, the competitive effects of this change should also be noted:

Consistent with our content creation results, we see larger relative reductions in both views and subscriptions among channels with fewer baseline subscribers. The asymmetric impact is more pronounced on the demand side, such that we see no significant change in views for top-quartile channels. This result is consistent with the effect of deactivating platform personalization: the platform can no longer pair users with long-tail content that matches their interests.<sup>204</sup>

In other words, the YouTube enforcement, pursuant to the change in the definition of personal information, has been extremely harmful to the supply of children-directed content online, but it also has led to greater concentration among suppliers of content creation. It is difficult to break into this market without the ability to fully monetize content, but it becomes nearly impossible when the algorithm is no longer able to match a creator to potential viewers.

The FTC should reconsider the COPPA Rule, specifically the provisions that include standalone persistent identifiers in the definition of “personal information.”

## **X. Conclusion**

We have outlined numerous federal and state laws, regulations, and agency practices that, despite often-laudable intentions, function as significant barriers to competition, ultimately harming consumers, workers, and businesses. From certificates of convenience and necessity that entrench monopolies to occupational-licensing rules that stifle entry and innovation, government-imposed restrictions frequently serve to protect incumbent interests rather than the public.

Our analysis extends to legalized cartels operating under antitrust exemptions, the problematic application of state-action immunity, distortionary prevailing-wage laws, the failed competitive experiment of FERC Order No. 1000, and anticompetitive *cy-pres* practices. Our recommendations aim to dismantle or reform these unnecessary barriers and reorient regulatory and enforcement priorities toward sound economic principles and the consumer welfare standard. This includes specific calls to eliminate or scale back CCNs and occupational licensing, and to reevaluate and curtail antitrust exemptions.

Furthermore, we urge the DOJ and FTC to refine their own rules and enforcement actions by rescinding the overly broad noncompete-agreement rule; reviewing and revising HSR rules and merger guidelines to reduce undue burdens and align with pro-competitive goals; and developing a more transparent and predictable approach to data security and children’s privacy enforcement.

---

<sup>203</sup> See *id.* 2-3.

<sup>204</sup> *Id.* at 3.

By addressing the areas identified in our comments, the DOJ and FTC can build upon their historic roles in competition advocacy and foster an environment in which innovation, efficiency, and consumer choice can flourish. The overarching goal should be to ensure that markets are driven by genuine competition, not by anticompetitive regulations that privilege the few at the expense of the many. Such reforms are crucial to enhance consumer welfare and promote robust economic growth.

The DOJ and FTC have important roles to play in ensuring government entities don't harm competition. Through their advocacy efforts, the agencies should focus on making sure the law itself doesn't become "legal plunder."<sup>205</sup>

---

<sup>205</sup> See FRÉDÉRIC BASTIAT, *THE LAW* (1850).