April 24th, 2024

California Law Review Commission (CLRC)
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

Re: RESPONSE TO CLRC WORKING GROUP REPORT ON SINGLE-FIRM CONDUCT

We represent a diverse group of organizations including legal experts, policy advocates, community based organizations and union representatives from a broad spectrum of California industries which have been working collaboratively to provide information, resources and recommendations to both respond to reports developed by the CLRC and to effectively support updating California's Cartwright Act. This letter provides collective feedback and recommendations to strengthen the CLRC's Single-Firm Conduct report.

As set forth below, we advocate that the Commission recommend a single-firm conduct standard that incorporates a broader range of potential harms than set forth in the Working Group Report. We also recommend that the Commission articulate an alternative to the "rule of reason" framework that limits the ability of harms to be off-set by vague and unrelated potential benefits. Finally, we recommend that the Commission account for potential vagueness in the law by providing an expert administrative agency with rulemaking authority.

We look forward to and thank the Commission for its thoughtful consideration.

Sincerely,

- American Economic Liberties Project (AELP)
- California Nurses Association
- Democracy Policy Network (DPN)
- Economic Security California (ESCA)
- Ending Poverty in California (EPIC)
- Farm Action (FA)
- Greenlining Institute
- Institute for Local Self-Reliance (ILSR)

- Liberation in a Generation (LIG)
- Rise Economy
- Small Business Majority
- TechEquity Action
- United Food and Commercial Workers International Union (UFCW) Western States Council
- Warehouse Workers Resource Center (WWRC)
- Writers Guild of America West

I. INTRODUCTION

Federal antitrust law prohibits the creation or maintenance of a monopoly by any means other than competition on the merits.[1] Unlike California's Cartwright Act, which generally prohibits agreements between two or more parties in restraint of trade,[2] federal antitrust law also prohibits certain types of conduct that firms engage in unilaterally, or "single-firm conduct." The absence of a prohibition on monopolizing conduct is a blindspot in California's antitrust law, one which the Working Group Report on Single-Firm Conduct (the "Report") appropriately identifies as the Cartwright Act's "most glaring deficiency."[3]

The above and undersigned authors of this response agree with the Working Group Report that the inclusion of a single-firm conduct standard in the Cartwright Act would be a great improvement to California's antitrust law. We further agree with the Report's authors that merely parroting the language of Section 2 of the Sherman Act would create a "severe disadvantage" if California courts were led to believe that 130 years of federal jurisprudence - which has detrimentally narrowed the scope and enforceability of antitrust law - were imported into California law.

Aside from those broad areas of agreement, we nevertheless identify areas where the Report's recommendations should be improved. For example, the Report identifies the Rule of Reason as a source of confusion for courts ("there is no easy way for the courts to weigh the anticompetitive harms against the procompetitive benefits") but nevertheless risks codifying that very standard into California antitrust law. Meanwhile, the Report dismisses efforts in other jurisdictions - including New York's 21st Century Antitrust Act - that offer substantive alternatives.[4]

While the Report seeks to advance an alternative standard for one type of single-firm conduct - namely, prohibiting single-firm conduct that excludes competitors ("exclusionary conduct") - it does so to the neglect of other harmful modes of single-firm conduct. We recommend that the Commission address single-firm conduct more holistically to address harmful conduct rooted in an "abuse of dominance" or

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[1] Section 2 of the Sherman Act, 15 U.S.C.A. § 2; see also *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966) ("The offense of monopoly under s 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.")

[2] Cal. Bus. & Prof. Code Sec. 16700 *et seq*.

[3] Single-Firm Conduct Working Group, California Law Revision Commission Study of Antitrust Law, January 2024. Accessible online: http://www.clrc.ca.gov/pub/Misc-Report/ExRpt-B750-Grp1.pdf

[4] Since the adoption of CA Assembly Concurrent Resolution 95 (Cunningham; Wicks) in 2022, which initiated the California Law Revision Commission's Study B-750, numerous jurisdictions are pursuing variations on an "abuse of dominance" standard, including: Pennsylvania H.B. 2012 ("Open Markets Act") (2023-2024); Minnesota H.F. 1563 (2023-2024); Maine No. 1815 (2023); New York S6748 ("Twenty-First Century Antitrust Act") (2023-2024 ;pending re-introduction); New Jersey S3778 (2023-2024).

"unfairness" standard akin to Section 5 of the Federal Trade Commission Act. Focusing solely on exclusionary conduct may immunize some modes of conduct that harm workers, consumers, and businesses without necessarily excluding competitors. A broader standard might include conduct like price discrimination, price gouging, worker misclassification, resale price maintenance and other vertical restraints.

We acknowledge that the Report's list of harmful single-firm conduct is "illustrative, not exhaustive." Our recommendations are similarly not exhaustive. We also recommend that the Office of the Attorney General be granted rulemaking authority to enumerate unlawful conduct that would fall under a broader standard of "abuse of dominance" or "unfairness." That rulemaking authority should also be extended to California's Unfair Competition Law and Unfair Practices Act.

We present these recommendations in further detail below, and thank the California Law Revision Commission for its thoughtful consideration.

RECOMMENDATION #1: Adopt a Single-Firm Conduct standard that prohibits harm to trading partners even if that conduct may not exclude rivals.

The Working Group Report on Single-Firm Conduct makes several observations about how the antitrust laws address single-firm conduct, and in doing so provides a useful foundation for further discussion. The Sherman Act condemns the *act* of monopolization, but not the mere *possession* of a monopoly. Monopolies nevertheless can cause a variety of harms, including but not limited to high prices, restricted choice, and "dulled incentives to innovate."

The Working Group Report also recognizes that the antitrust laws were motivated by a broader understanding that concentrated economic power leads to concentrated political power. Increased competition can "generate many useful byproducts," "including a more equal distribution of income and wealth and expanded opportunities for small businesses and entrepreneurs." We agree.

In other ways, however, the Working Group Report adopts a more limited scope of potentially harmful single-firm conduct. For instance, the Report focuses on "single-firm anticompetitive conduct that is exclusionary," or conduct that weakens actual or potential competitors. While identifying "anticompetitive exclusionary conduct" is "far from straightforward" (a complexity we address below), it also ignores other modes of single-firm conduct that cause harm to trading partners without necessarily weakening actual or potential competitors.

For example, worker misclassification (the act of depriving workers of various legal benefits by treating them as independent contractors instead of employees) is a form of single-firm conduct that creates clear harms for workers, but may not have the ancillary effect of weakening or excluding competitors. That is particularly true when misclassification by one firm has the knock-on effect of causing competitors to engage in misclassification, even if there is no explicit agreement between the

firms to do so. FTC Commissioner Bedoya recently called misclassification "a pervasive and national scandal," depriving working people of "billions" every year.[5]

To provide another example, price discrimination (the roughly contemporaneous sale of the same good or service at prices which vary by more than the marginal cost of supplying those units) is a form of single-firm conduct more closely associated with an "exploitative abuse" theory of harm.[6] Exploitative abuse involves a firm with market power "exploiting" that market power, and is arguably not addressed as an antitrust offense, either at the state or federal level. California law does not explicitly prohibit price or access discrimination. While the state's Unfair Practices Act prohibits locality price discrimination (as noted in the Working Group Report), it does not directly ban price or access discrimination between different buyers of the same product or service.

In recent years, we've seen emerging bipartisan consensus aimed at expanding the scope of conduct prohibited by federal antitrust laws, including the consideration of federal legislation prohibiting self-preferencing,[7] price gouging,[8] and the deployment of anti-competitive pricing algorithms.[9] In November 2022, the Federal Trade Commission issued a revised Policy Statement regarding the scope of Section 5 of the FTC Act, which broadly prohibits "unfair methods of competition in or affecting commerce."[10] These documents are helpful touchstones for considering a broader range of "anticompetitive," "unfair," or "abuse of dominance" conduct than the exclusionary conduct set forth in the Working Group Report.

We also put forth the following modes of single-firm conduct that may cause harm to trading partners (namely consumers, workers, or independent businesses) without necessarily having an "exclusionary" effect on existing or potential competitors:

Firms acquiring or maintaining monopsony power by engaging in conduct that suppresses wages:

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[5] Remarks of Commissioner Alvaro Bedoya, "Overawed': Worker Misclassification as a Potential Unfair Method of Competition," February 2, 2024 https://www.ftc.gov/system/files/ftc_gov/pdf/Overawed-Speech-02-02-2024.pdf

[6] Price discrimination often occurs in buyer, rather than seller, markets, and buyer power can manifest at lower market shares than in seller markets. A company that buys 20 or 30 percent of the goods available in a certain industry has significant power to extract lower prices or other concessions from its suppliers, lest it take its business elsewhere. Indeed, the U.S. Seventh Circuit Court of Appeals found that a retailer with just a 20 percent share of the market had enough power to demand lower prices and other concessions from its suppliers. The thresholds included in New York's 21st Century Antitrust Act get closer to this reality; under that legislation, a seller with a 40 percent share of a given market, or a buyer with a 30 percent share, would be presumed to be dominant, a designation that would then allow prosecutors and judges to investigate whether that firm's actions are abusive.

[7] S.2992 - American Innovation and Choice Online Act, 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/senate-bill/2992/text

[8] S.4214 - Price Gouging Prevention Act, 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/senate-bill/4214/all-info

[9] S.3686 - Preventing Algorithmic Collusion Act, 118th Congress (2023-2024) https://www.congress.gov/bill/118th-congress/senate-bill/3686/text

[10] Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Federal Trade Commission, File No. P221202, November 10, 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf

- **Exploitative Contract Terms**, like forced arbitration or training repayment clauses that increase market power by reducing workers' capacity to bargain or seek legal redress. These clauses may not be able to be shown to harm rivals, but they can still increase a firm's market power.[11]

- **Misclassification**, wherein firms gain market power by improperly classifying workers as contractors to increase their control over worker's wages and conditions of employment.[12]

- **Supply Chain Wage Suppression**, in which firms use their dominant position in a buyer market to push down wages in an adjacent market.[13] This may not have a demonstrable effect on the dominant firm's rivals, but it will structurally lower wages in an upstream market and transfer that surplus to the dominant firm.

- **Union Busting**, maintaining dominance over labor markets by suppressing workers ability to collectively bargain.[14]

Firms acquiring or maintaining market power by exploiting consumers:

- **Price Gouging,** where dominant firms use their market power to raise prices in excess of costs to exacerbate inflation or other economic disruptions. When firms in concentrated markets are allowed to price gouge, it provides rivals an opportunity to tacitly collude and raise their prices along with the dominant firm. This increase in control over prices by the dominant firm can benefit rivals while exploiting consumers. We continue to see repeated instances of this behavior, creating and exacerbating inflation.[15]

- **Deploying exploitative pricing algorithms**, like Amazon's Project Nessie which "induced other online stores to raise their prices and allowed Amazon to extract additional profits from shoppers,"

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[11] J. J. Prescott et al., *First Evidence on the Use of Training Repayment Agreements in the US Labor Force*, ProMarket (Mar. 27, 2024), http://www.promarket.org/2024/03/27/first-evidence-on-the-use-of-training-repayment-agreements-in-the-us-labor-force/.

[12] Alvaro Bedoya, *"Overawed," Worker Misclassification as a Potential Unfair Method of Competition*, https://www.ftc.gov/system/files/ftc_gov/pdf/Overawed-Speech-02-02-2024.pdf.

[13] Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages*, 1978 to 2014, 83 AM. SOC. REV. 213, 216 (2018) ("dependence on large buyers decreases suppliers' wages and accounts for 10% of the decline in wage growth in nonfinancial firms since the 1970s"); Eamon Coburn, *Supply Chain Wage Theft as Unfair Method of Competition*, YALE LAW JOURNAL (FORTHCOMING) (2024), https://papers.ssrn.com/abstract=4716531 (last visited Apr 16, 2024).

[14] See Antitrust Complaint Against UPMC, Strategic Organizing Center, 43, http://thesoc.org/what-we-do/upmc-action/ ("UPMC's conduct not only violates federal labor law, but also may help maintain and extend UPMC's possible monopsony power"). Ioana Marinescu & Eric Posner, *A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony*, 14, Roosevelt Institute, https://rooseveltinstitute.org/publications/a-proposal-to-enhance-antitrust-protection-against-labor-market-monopsony/.

[15] Josh Bivens, *Corporate Profits Have Contributed Disproportionately to Inflation. How Should Policymakers Respond?*, Economic Policy Institute, https://www.epi.org/blog/corporate-profits-have-contributed-disproportionately-to-inflation-how-should-policymakers-respond/ ; Isabella Weber & Evan Wasner, *Sellers' Inflation, Profits and Conflict: Why Can Large Firms Hike Prices in an Emergency?*, Economics Department Working Paper Series (2023), https://scholarworks.umass.edu/econ_workingpaper/343.

per the FTC's recent complaint.[16] Deploying algorithms like this may not impair rivals, but it does grant the firm greater market power.

- **Preventing data portability or monopolizing data**, like Apple has been accused of by the Justice Department. So long as firm's choose not to "provide access or interconnection to any third-party," the Working Group proposal leaves firms free to monopolize and monetize consumer data as they see fit, denying consumers the ability to port their data to competing services.[17]

Firms acquiring or maintaining market power by exploiting non-rival businesses:

- **Imposing Vertical Restraints**, like anti-steering provisions that reduce trading partner's ability to recommend customers use cheaper or higher quality services.
- **Engaging in Price Discrimination**, wherein firms use their buyer power to force suppliers to sell to them on more beneficial terms than their rivals.
- **Imposing Extractive Fees**, like when a platform charges an independent business an excessive fee for access. Today, certain platforms can take as much as half of the value of transactions, or levy fees that are over a hundred times the cost of providing their services.

RECOMMENDATION #2: Harmful single-firm conduct should not be off-set by out-of-market "pro-competitive" benefits.

Antitrust laws have been interpreted over time to distinguish between conduct that is illegal *per se*, and conduct that may warrant consideration of benefits to competition. Whereas weighing harms and benefits can create uncertainty in the law, *per se* illegality provides clarity and sureness in the law. Even so, courts have increasingly drifted away from the *per se* standard, and conduct that was once thought to be without competitive benefits - like non-price vertical restraints[18] and resale price maintenance[19] - has become prone to the whims of judicial discretion.

In general, we support a strengthening of *per se* standards of illegality where there is negligible evidence of offsetting justifications or benefits.[20] For all other types of conduct - and for the reasons described in the Working Group Report and here - consideration of pro-competitive justifications should be constrained to avoid uncertainty in the law itself and unpredictable outcomes in its enforcement.

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[16] Dana Mattioli, *Amazon Used Secret 'Project Nessie' Algorithm to Raise Prices*, WSJ, https://www.wsj.com/business/retail/amazon-used-secret-project-nessie-algorithm-to-raise-prices-6c593706 (last visited Apr 14, 2024).

[17] Michael Liedke et al, *Justice Department Sues Apple, Alleging It Illegally Monopolized the Smartphone Market*, AP NEWS (2024), https://apnews.com/article/apple-antitrust-monopoly-app-store-justice-department-822d7e8f5cf53a2636795fcc33ee1fc3.

[18] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)

[19] *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)

[20] In its recommendation prohibiting "loyalty rebates," the Working Group Report distinguishes "volume discounts" as "generally procompetitive." We disagree with this characterization. Volume discounts have a tendency to favor larger firms with greater purchase power and may result in secondary-line price discrimination against smaller purchasers.

The process of determining antitrust liability by weighing the harmful (or "anti-competitive") and beneficial (or "pro-competitive") effects of conduct is often referred to as the Rule of Reason. It has come to dominate modern antitrust law, but what counts as "harmful" or "beneficial," and how courts weigh those effects against each other, has led to confusion in the courts and inconsistent outcomes. Providing a consistent methodology for weighing "anti-competitive" and "pro-competitive" effects is critical to restoring the rule of law.[21] At a fundamental level, the law should be sufficiently specific and its enforcement predictable and fair. Current Rule of Reason analysis falls short of that basic principle.

The Working Group Report appropriately recognizes that "there is no easy way for the courts to weigh the anticompetitive harms against the procompetitive benefits," but does not provide any recommendation for resolving this critical deficiency in the law. Rather, the Working Group Report imports that same confusion into its recommendations.[22]

Although the Cartwright Act does not currently address anticompetitive single firm conduct, the Rule of Reason applies to single firm conduct under federal law. The Rule of Reason has also been imported to claims alleging illegal restraints of trade under the Cartwright Act ("the analysis under the Cartwright Act mirrors the analysis under the Sherman Act."[23]) The Rule of Reason does not apply in cases of *per se* illegality, a standard of review for anti-competitive conduct that courts have deemed irrebuttable by any pro-competitive business justification. But California courts have recognized a recent trend toward applying the Rule of Reason even in those more extreme cases.[24]

Without clarity on what constitutes a "procompetitive effect," Rule of Reason analysis can serve as an escape hatch for firms engaging in anticompetitive conduct. In recent years, antitrust defendants have sought to avoid liability for otherwise anticompetitive conduct by arguing that restraints of trade allow them to "compete more effectively" in the market for motion-picture awards by restricting access to professional associations,[25] increase drug innovation by restricting entry of generic alternatives,[26] "increase utilization" of certain health plans by denying wrapping services to others,[27] and enhance consumer convenience and overall security by blocking rival smartphone app distributors.[28] In each instance, the respective courts found that the federal Rule of Reason applies equally to California's Cartwright Act before engaging in an imprecise balancing of anticompetitive and procompetitive effects.

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[21] Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 22 Loy. Consumer L. Rev. 15 (2009). Available at: http://lawecommons.luc.edu/lclr/vol22/iss1/5

[22] The Working Group Report recommends a prohibition on "anticompetitive exclusionary conduct" only to the extent that it "does not provide sufficient benefits to prevent the defendant's trading partners from being harmed by that increased market power." See Proposed Section 16720.1(b) at p. 16 of the Working Group Report.

[23] *Flaa v. Hollywood Foreign Press Ass'n*, 55 F.4th 680, 688 (9th Cir. 2022)

[24] *Sidibe v. Sutter Health*, No. 12-CV-04854-LB, 2022 WL 767087, at *2 (N.D. Cal. Mar. 11, 2022); citing *In re Cipro Cases I & II*, 61 Cal. 4th 116, 147-148 (2015) (finding that tying arrangements, which force purchasers to buy a separate product in order to receive another desired product, are subject to the per se rule and irrebuttable by any pro-competitive justification)

[25] *Id.*, at 691.

[26] *In re Cipro Cases I & II*, 61 Cal. 4th 116, 155 (2015)

[27] *Ben-E-Lect v. Anthem Blue Cross Life & Health Ins. Co.*, 51 Cal. App. 5th 867, 877 (2020)

[28] *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1042 (N.D. Cal. 2021), aff'd in part, rev'd in part and remanded, 67 F.4th 946 (9th Cir. 2023)

The New York 21st Century Antitrust Act, as originally introduced in 2021 and again in subsequent sessions, sought to resolve this confusion by barring evidence of pro-competitive effects from being introduced as a defense to cure competitive harm.[29] Although the New York Twenty-First Century Antitrust Act was among the direct catalysts for the California Law Revision Commission's current study of antitrust,[30] the Working Group dismisses it out of hand, suggesting that "the bill might thus be understood to prohibit desirable, procompetitive conduct."[31] We disagree with that criticism and the Working Group's characterization of the bill's opposition.

Where conduct is not subject to a *per se* standard of illegality, we recommend that consideration of "pro-competitive" effects be limited to the market in which the harm has occurred. Harm to competition in one market should not be offset by purported benefits in a separate market, and harm to a person or persons from the challenged conduct should not be offset by benefits to another person or persons.

RECOMMENDATION #3: Give California antitrust enforcers rulemaking authority.

Both the Working Group Report and this response set forth an "illustrative, not exhaustive" list of modes of single-firm conduct that would be addressed by a single-firm conduct standard.[32] Enumerating specific types of conduct in the law itself is beneficial to the extent it provides clear notice to market participants of the meaning of otherwise unclear terms in the statute. The more clarity can be provided in the statute itself, the lesser risk of leaving to courts broad discretion to interpret those terms in inconsistent ways.

Judges typically lack formal economics or antitrust training. Recent years have seen renewed efforts to encourage judicial appointments from a broader range of professional backgrounds, but even so, only a small number of nominees have labor or economic justice backgrounds.[33] Prior to her appointment to the Federal Trade Commission, Chair Lina Khan wrote, "antitrust adjudication has become highly reliant on technical evidence and complex economic analysis, but generalist judges often lack the expertise to independently assess the arguments before them. Courts have sought to compensate for this institutional deficiency by relying on amicus briefs and third-party experts for the economic reasoning justifying antitrust rules, partially mirroring how administrative agencies solicit and review comments on proposed rulemaking."[34]

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[29] NY S933C (2021-2022) ("Twenty-First Century Anti-Trust Act"), at §340(2)(b)(iii) ("Evidence of pro-competitive effects shall not be a defense to abuse of dominance and shall not offset or cure competitive harm.")

[30] The first resolution of California ACR-95 (2021-2022), the authorizing resolution for the California Law Revision Commission's present study of antitrust, directs the Commission to study, "Whether the law should be revised to outlaw monopolies by single companies [] as proposed in New York State's 'Twenty-First Century Anti-Trust Act.'"

[31] The Working Group Report notes that the New York 21st Century Antitrust Act garnered criticism from the New York City Bar Association and Antitrust Section of the American Bar Association, without mention of the broad organizational support for the bill from consumer, labor, and small business advocates.

[32] Working Group Report, at p. 15

[33] "Economic Justice, Judges, and the Law," Alliance for Justice, August 2022. Accessible online: https://afj.org/article/economic-justice-judges-and-the-law/

[34] This piece was written prior to Chair Khan's government service. See Lina M. Khan, *The End of Antitrust History Revisited*, 1679-1680, Harvard Law Review (2020), https://harvardlawreview.org/print/vol-133/the-end-of-antitrust-history-revisited/ (last visited Apr 14, 2024).

Khan's critique is an old one. The Supreme Court adopted the "Rule of Reason" in 1911, the same standard the Working Group recommends codifying. Congress saw this as a power grab by generalist judges who granted themselves the authority to classify restraints of trade as "reasonable." By 1914, Congress passed the Clayton and FTC Acts in response – granting the FTC rulemaking authority and classifying certain conduct as per se unlawful.

California lawmakers should similarly authorize the Office of the Attorney General (or another expert administrative body) to study business conduct, determine its competitive effects, and promulgate rules that provide clarity where it is lacking, in service of increased compliance with State antitrust and unfair competition laws. In doing so, the Attorney General should receive public comment, consider all harms and potential benefits of certain conduct addressed by the rulemaking, and clarify its enforcement priorities. Doing so will enhance compliance, deter non-compliance, and limit unpredictable and costly delegation of discretion to generalist judges.

Rulemaking can mitigate barriers to both public and private enforcement of California antitrust and unfair competition laws.[35] It can provide small businesses a pathway to address monopolizing or unfair conduct without them or their lawyers raising millions of dollars to engage in a protracted court battle; it can provide workers with a pathway to report conduct without taking a publicly oppositional stand against their employer; and it can allow consumers to redress harms that have a large collective impact but too small of an individual impact to rationally warrant legal action.

For these reasons, we encourage the Commission and California lawmakers to include rulemaking authority in any proposed revision to the California Cartwright Act, Unfair Competition Law, and Unfair Practices Act.

PROPOSED REVISIONS TO THE WORKING GROUP'S LEGISLATIVE PROPOSAL:

We are grateful to the Working Group for recommending that California law be updated to include an antitrust prohibition against single-firm conduct. We further recognize that California law is unique from other jurisdictions in that it already has laws prohibiting unfair competition and unfair practices exercised by single firms.

Using the Working Group's proposed legislation as a starting point, we encourage the Commission to adopt a broader prohibition on single-firm conduct than "anticompetitive exclusionary" conduct. For the reasons above, we also incorporate a modest limitation on the potential for anticompetitive or unfair conduct to be off-set by procompetitive benefits. Lastly, we encourage the authorization of competition rulemaking authority to increase the clarity and accessibility of the antitrust laws to all California workers, consumers, and businesses.

Finally, we discourage the Commission from viewing this proposal as the only option for addressing antitrust single-firm conduct. As numerous other jurisdictions continue to pursue various

[35] We understand that a separate Working Group has issued a report on Enforcement and Exemptions, and we reserve further discussion of barriers to enforcement for the Commission's consideration of that report.

legislation to adopt an "abuse of dominance" standard,[36] we encourage the Commission to avoid the Working Group's repudiation of those ongoing, evolving efforts.

Proposed Legislative Alterations:[37]

(a) It is unlawful for one or more persons to engage in anticompetitive exclusionary conduct, *unlawful monopolization or monopsonization, or unfair methods of competition* that affects any part of the trade or commerce within the State.

(b) Conduct, whether by one or multiple actors, is deemed to be anticompetitive exclusionary conduct, if the conduct tends to

> (1) diminish or create a meaningful risk of diminishing the competitive constraints imposed by the defendant's rivals and thereby increase or create a meaningful risk of increasing the defendant's market power, and
>
> (2) does not provide sufficient benefits *within the same market* to prevent the defendant's trading partners from being harmed by that increased market power.

(c) Conduct that monopolizes or monopsonizes or attempts to do so shall be unlawful regardless of its exclusionary effects on competitors.

(d) Conduct is deemed an unfair method of competition if the conduct is coercive, exploitative, collusive, abusive, deceptive, predatory, or involves the use of economic power of a similar nature. Unfair conduct must also tend to negatively affect competitive conditions.This may include, for example, conduct that tends to foreclose or impair the opportunities of trading partners or market participants, reduce competition between rivals, limit choice, or otherwise harm consumers or workers.

(e) Those harmed by monopolies or monopsonies may seek redress through private enforcement.

(f) The Office of the Attorney General ("Attorney General") shall also have authority to enforce this statute.

> *(1) The Attorney General shall promulgate rules to clarify what conduct shall be considered exclusionary, monopolizing, monopsonizing, or unfair commercial conduct. The Department shall consider the potential harms and benefits of the rules that it promulgates, but it need not prove that a rule's projected benefits exceed its projected harms or that relevant the conduct excludes competitors.*

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[36] *See, e.g.*, Pennsylvania H.B. 2012 ("Open Markets Act") (2023-2024); Minnesota H.F. 1563 (2023-2024); Maine No. 1815 (2023); New York S6748 ("Twenty-First Century Antitrust Act") (2023-2024 ;pending re-introduction); New Jersey S3778 (2023-2024)

[37] Section (c) is modeled after the *Grinnell Corp* standard that remains a leading articulation of illegal monopoly under Section 2 of the Sherman Act; Section (d) is modeled after the existing Federal Trade Commission's Section 5 policy statement; Section (f) is modeled after the existing Federal Trade Commission Act.

(2) The Attorney General shall establish a process through which workers, consumers, and businesses can seek remedies for conduct that is exclusionary, monopolizing, monopsonizing, or unfair at no cost.

(3) The Attorney General may require persons engaged in commerce within California to produce answers in writing to specific questions about a firm's structure and business practices without any law enforcement purpose. Such answers shall be complete and made under oath.

Definitions:

(g) "Trading partners" are parties with which the defendant deals, either as a customer or as a supplier. In (b), a trading partner is deemed to be harmed or benefited even if that trading partner passes some or all of that harm or benefit on to other parties.

(h) The defendant's conduct has *"*increased *or maintained* market power vis-à-vis a customer*"* if the defendant can profitably make a less attractive offer to that customer, such as by charging a higher price or providing a lower quality product, than the defendant could absent that conduct. *Price gouging during periods of inflation, pandemic, or emergency shall be considered as conduct that impermissibly increases market power. Firms accused of charging excessive prices may rebut claims with evidence that prices are justified by changes in cost or product quality.*

(i) The defendant's conduct has "increased market power vis-à-vis a supplier or worker" if the defendant can profitably make a less attractive offer to that supplier or worker, such as by paying less to the supplier or the worker or by offering less attractive working conditions, than the defendant could absent that conduct.

(j) "Anticompetitive exclusionary conduct" includes conduct that has or had a material risk of harming trading partners due to increased market power, even if those harms have not yet arisen and may not materialize.

(k) Establishing that the defendant has "engaged in exclusionary, *monopolizing, monopsonizing, or unfair conduct"* does not require defining a "relevant market" in which that conduct takes place. *Still, "sufficient benefits" in (b)2 cannot occur outside of the market that harm in (b)1 has occurred.*

(l) This statute does not require the plaintiff to establish any threshold of market power, as the focus of concern is on increases in market power *or unfair methods of competition*.

For more information please contact Teri Olle, Economic Security
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