Protecting Competition, Not Competitors: The Economic Stakes of Rewriting California Antitrust Law

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Executive summary

California antitrust law differs from federal law in one important respect. While the Cartwright Act prohibits agreements that restrain trade and California participates actively in merger enforcement, state law does not contain a direct analog to Section 2 of the Sherman Act governing unilateral conduct by a single firm. The California Law Revision Commission's (CLRC) review of single-firm conduct identified this distinction and considered whether California should establish a clearer mechanism for addressing exclusionary conduct that harms competition in California markets. AB 1776 (the COMPETE Act) is the result of that effort. It would extend the Cartwright Act to unilateral conduct while also directing California courts to develop an independent body of state antitrust law that is not bound by long-standing federal precedent.

The more significant effect of the COMPETE Act is not that it reaches unilateral conduct. Rather, it is that the bill would make it easier for plaintiffs, whether public enforcers or private litigants, to prevail in challenges to unilateral conduct than they could under the existing federal law. Federal antitrust doctrine recognizes that distinguishing exclusionary conduct from vigorous competition is inherently difficult. Price reductions, product improvements, discounts, exclusive arrangements and investments that benefit consumers frequently harm rivals at the same time. Because antitrust law protects competition rather than competitors, federal courts have developed administrable doctrines designed to reduce the risk that firms will be punished for competing successfully. The proposed policy changes would move California away from many of those safeguards without providing comparable replacement mechanisms.

The economic consequences of the policy shift extend beyond the cases ultimately decided in court. Antitrust rules influence business behavior before litigation is ever filed. Greater uncertainty regarding liability standards, combined with expanded opportunities for private litigation, can affect decisions about pricing, product design, investment, partnerships, innovation and expansion. Interviews conducted for this report with executives across multiple industries revealed broad support for antitrust enforcement, including state enforcement, where appropriate. Their principal concern was that the departure from established federal standards would increase uncertainty around ordinary business conduct. Respondents indicated that greater litigation risk and less predictable legal standards could discourage aggressive price competition, investment, innovation and collaborative activity, not because such conduct is necessarily unlawful, but because firms may become less willing to undertake actions that could later be challenged under unclear standards. In their view, the economic costs would arise less from ultimate liability than from the risk, expense and uncertainty of litigation itself. These concerns are consistent with broader evidence showing that fragmented and less predictable regulatory frameworks can increase compliance costs, impede scale and weaken incentives for investment and innovation. Europe's experience provides a cautionary illustration of these risks.

These concerns are particularly important in industries characterized by dynamic competition. California's economy has long been shaped by firms that achieved success through innovation, scale, experimentation and disruptive business models. Dynamic competition inevitably produces winners and losers. Many business practices that disadvantage competitors simultaneously create substantial benefits for consumers. A competition regime that makes it easier to challenge such conduct risks discouraging the very competitive process that drives innovation, productivity, investment and economic growth.

The central question for policymakers is therefore not whether anticompetitive unilateral conduct should be prohibited. It should be. The question is how California can deter genuinely exclusionary conduct while preserving the safeguards necessary to protect competition on the merits. Any reform should carefully balance the benefits of expanded enforcement authority against the costs of increased uncertainty, litigation risk and potential over-enforcement. In its current form, the COMPETE Act does not strike that balance. Instead, it creates a substantial risk that California will move from protecting competition to protecting competitors, with consequences that may ultimately harm consumers, innovation and the state's long-term economic competitiveness.

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1 The policy challenge: protecting competition vs. protecting competitors

A. The COMPETE Act's stated rationale and its practical effects

The impetus for the COMPETE Act stems from the California Law Revision Commission's review of single-firm conduct and concerns that California law does not expressly reach certain forms of anticompetitive unilateral conduct. In its January 2024 report (the CLRC Report), the CLRC Single-Firm Conduct Working Group (CLRC Panel) examined how California law addresses single-firm exclusionary conduct and concluded that California lacks a direct analog to the Sherman Act § 2. The report therefore explored potential reforms that would provide a clearer state-law mechanism for challenging anticompetitive unilateral conduct. Supporters of the COMPETE Act also argue that existing federal standards may not adequately address all forms of exclusionary conduct and that California should have greater ability to protect competition in California markets. In response to these concerns, California Assembly Bill 1776 (AB 1776), the Competition and Opportunity in Markets for a Prosperous, Equitable and Transparent Economy Act (the COMPETE Act), would extend the Cartwright Act to reach unilateral conduct.

Whether a meaningful enforcement gap exists warrants closer examination. Current California antitrust law reaches agreements in restraint of trade — behavior covered by the Sherman Act § 1 — and provides for the California attorney general to conduct pre-merger review (which parallels federal enforcement of the Hart-Scott-Rodino Act). But the Cartwright Act does not condemn the sort of single-firm conduct covered by the Sherman Act § 2.

There is certainly a potential benefit to state-level enforcement for single-firm conduct. Suppose a company monopolizes or attempts to monopolize a California market, such as a local hospital, grocery, labor or other geographically bound market in which Californians are the primary victims of the harm to competition. While such behavior would violate the Sherman Act, prosecuting it might not be a priority for the Department of Justice. In such cases, the California attorney general should have the power to challenge the conduct on behalf of Californians. However, California already has several pathways to challenge conduct under existing law. First, it can bring Sherman Act § 2 claims in federal court. Second, it can bring actions in California courts under the California Unfair Competition Law (UCL) and Unfair Practices Act (UPA).

The more consequential motivation for the COMPETE Act, as echoed by its proponents, is to make it easier for plaintiffs — both the California AG and private plaintiffs — to succeed in challenging unilateral conduct than under existing federal law. Indeed, the current draft of the COMPETE Act would do so. Even if those looser standards would apply just to California markets, the California legislature should consider why the federal standards for judging unilateral conduct have evolved as they have more than a century of experience of antitrust enforcement.

Antitrust cases are expensive to defend, and court judgments are imperfect. That is not a criticism of courts; it is simply a fact that legislatures should consider when passing legislation. The risk is real that plaintiffs will allege monopolization when it has not occurred, recognizing that they might get lucky in court or that the defendant will settle to avoid the expense of defending the suit and the risk of litigation uncertainty. Concerns about false positives and the difficulty of separating harmful conduct from competition on the merits have motivated the evolution of federal antitrust jurisprudence, and the CLRC report stresses the need to address them.

That concern is especially acute for unilateral conduct. Practices such as price cuts and product design changes often harm rivals precisely because they benefit consumers. The challenge is to distinguish exclusionary conduct from competition on the merits. The CLRC Panel recognized this difficulty. The current draft of the COMPETE Act does not resolve it. Instead, it moves away from the safeguards that make that distinction workable.

> The COMPETE Act will make it easier for plaintiffs to prevail in the following ways:
>
> - **Expansion to unilateral conduct:** Extends liability to single-firm conduct, addressing a potential gap but raising the same risks of mischaracterizing competition.
> - **Decoupling from federal safeguards:** Makes federal precedent nonbinding, removing established doctrinal screens that limit false positives and replacing them with less defined standards.
> - **Lowered effective thresholds for liability:** Reduces evidentiary and doctrinal barriers to claims, increasing reliance on open-ended balancing rather than administrable rules that filter weak cases early.

The changes described above create a substantial risk that procompetitive conduct will be mischaracterized as unlawful and that weak or speculative claims will proceed to costly litigation, for two reasons. First, by extending liability to unilateral conduct while decoupling from federal safeguards such as *Amex* (cross-market balancing), *Trinko* (limits on refusal to deal), *PeaceHealth/Cascade* (bundled discount safeguards) and *Brooke Group* (below-cost pricing and recoupment), the Act states that federal law, including Supreme Court precedent, does not bind California courts. Second, and even more fundamentally, by adopting the *In re Cipro*[1] framework's shifted evidentiary burden and open-ended liability standards, the Act directs California courts to maximize enforcement rather than requiring plaintiffs to clear the administrable, evidence-based screens federal doctrine relies on.

In practical terms, a predatory pricing case or a refusal-to-deal, bundling, or cross-market claims that would fail in the federal courts might succeed in California. Conduct that previously would have been screened out at early stages under federal doctrine could instead survive and proceed to costly litigation. The likely effect on Californians is that they will not benefit from price cuts that companies forego for fear of having to defend against a predatory pricing claim.

B. The CLRC Panel warned against punishing competition on the merits

At a minimum, separating California antitrust law toward unilateral conduct from federal standards creates uncertainty as to what standards California courts will use. More fundamentally, though, the risk remains that California antitrust enforcement will end up condemning the competitive behavior that antitrust laws should encourage. The CLRC Panel laid out the need to avoid condemning competitive behavior as a fundamental issue that California needs to address if it is to amend its antitrust laws to reach unilateral conduct in an economically sound way. Far from containing language to address this concern, the current draft of the COMPETE Act could invite antitrust challenges that are not grounded in evidence of harm to competition.

Competition generates losers as well as winners. As a result, one cannot infer harm to competition from the mere fact that a competitor suffers a loss of profit or even if it has to exit. As Judge Learned Hand famously argued in *Alcoa*, "The successful competitor, having been urged to compete, must not be turned upon when he wins."[2] What matters is whether the successful competitor gained market share by exclusionary, anticompetitive behavior, or simply because it was more efficient and provided better products or prices to consumers. The Supreme Court reiterated this principle in *Spectrum Sports, Inc. v. McQuillan*: "[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."[3] Consistent with this principle, the CLRC Panel concluded in its January 2024 report that the central issue is not monopoly power itself, but rather California's inability under the Cartwright Act to reach certain forms of a single firm's exclusionary conduct.

Despite wide acceptance of the principle that antitrust laws protect competition rather than individual competitors, applying the principle is not always simple. When a company is so successful that it, at least temporarily, dominates a market, it is not unusual for competitors that lose to cry foul and attribute the success to anticompetitive conduct. Federal enforcement has made it difficult for plaintiffs to prevail with respect to certain types of allegations. In particular, the Supreme Court has set a high bar for condemning price cuts as predatory, and courts have been reluctant to condemn product design decisions on the grounds that they lack the necessary subject-matter knowledge.[4]

These doctrinal limits exist precisely to keep antitrust law focused on protecting the competitive process rather than protecting particular competitors from it. Any effort to extend California antitrust law to unilateral conduct must grapple with this same challenge, or it risks doing the opposite of what it intends.

1 *In re Cipro Cases I & II*, 61 Cal. 4th 116 (2015)
2 *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 430 (2d Cir. 1945)
3 *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)
4 Federal antitrust law does not reflect the same concern for "false convictions" for all classes of antitrust offenses. Price fixing and market allocation are per se violations, and the courts do not give as much deference to exclusive dealing arrangements as they do to price cuts and product design.



2 Lessons from California competition law enforcement (and attempted enforcement)

The history of competition policy enforcement in California provides examples which justify giving the California AG the power to act against anticompetitive conduct. If there is in fact a gap in types of anticompetitive conduct that the California AG cannot challenge, one can justify passing legislation to fill in the gap. But the history of California antitrust and competition policy enforcement and attempted enforcement also provides cases that suggest that the concerns stated above in Section 1 are real.

A. Examples of California enforcement that have promoted competition

Sutter Health[5]

California challenged contracting practices that likely increased healthcare costs for California consumers and employers, ultimately securing substantial monetary and conduct remedies directed at California healthcare markets. A noteworthy feature of the case was that the relevant geographic market was California.

Valero's acquisition of petroleum terminals[6]

Despite the FTC's approval of the deal, California challenged Valero's acquisition of the last remaining independent terminals with capacity in the state. Although the FTC declined to challenge the transaction, California sued to block Valero's acquisition of the last independent petroleum terminals with available capacity in Northern California. While the court declined to issue a preliminary injunction, it concluded that California had raised serious competitive concerns, and Valero ultimately abandoned the transaction. As in Sutter Health, the relevant geographic market was entirely in California. Importantly, California's challenge did not rely on a novel state-law merger standard; rather, the state invoked the same federal Clayton Act § 7 framework that governs merger review nationwide, illustrating that California can address local market power concerns within federal antitrust standards.

Kroger-Albertsons[7]

California joined the FTC and a coalition of states to oppose the merger of the grocery giants. Concerns that the transaction would reduce competition among grocery retailers, particularly in Southern California, ultimately contributed to the merger's collapse. However, the case also highlights the need for caution before embracing expansive labor-market theories as a basis for antitrust intervention. The FTC alleged that the merger would weaken the bargaining position of unionized grocery workers, but the court declined to rely on that theory, emphasizing the limited evidence regarding the merger's likely effects on wages, benefits and working conditions.

The Sutter case involved agreements in restraint of trade, which Sherman Act § 1 could cover. The *Valero and Kroger-Albertsons* cases concerned merger and acquisition enforcement. But, as discussed in Section 1.A above, it is already possible for both the California AG and private parties to challenge unilateral conduct.

5 California Office of the Attorney General, Press Release (Aug. 27, 2021), "Attorney General Bonta Announces Final Approval of $575 Million Settlement with Sutter Health Resolving Allegations of Anti-Competitive Practices." (Accessed June 26, 2026)

6 California Office of the Attorney General, Press Release (Oct. 12, 2017), "After Attorney General Becerra Sues, Judge Prohibits Valero From Acquiring Northern California Petroleum Terminals." (Accessed June 26, 2026)

7 See Press Release, Cal. Dep't of Justice, Attorney General Bonta Secures Win Halting Kroger, Albertsons Merger: A Victory for Consumers Nationwide (Dec. 10, 2024)

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B. Examples of state-led overreach

In contrast to the examples discussed above, where California's enforcement efforts targeted conduct with tangible competitive risks, the following matters demonstrate how aggressive state intervention can be directed toward speculative theories of harm that may, if adopted, chill competition and innovation.

- **Google "search bias" litigation (2023):** California joined other states alleging that Google's search engine design favored its own vertical services (e.g., maps, travel and shopping results). While specialty (or "vertical") search engines such as Yelp might have preferred that Google respond to searches such as "restaurants near me" with a link to Yelp rather than with Google's own local search results, Google's local search results were competition to Yelp. Users who find Yelp results to be more useful than Google's can search in Yelp (or, increasingly, use the Yelp mobile app). The Justice Department was right to exclude a complaint about search bias in its successful suits against Google; and the court that heard the states' suit was right to dismiss the claim on summary judgment.[8] The decision by California AG to join Colorado and other states in this misguided suit should generate caution about the wisdom of untethering California competition law from federal standards. The court's conclusion was also consistent with the FTC's earlier decision to close its search-bias investigation, finding that Google's challenged design choices reflected product improvements and "competition on the merits," rather than exclusionary conduct.[9] If California lowers that threshold for concluding that unilateral conduct is anticompetitive, how will it confirm that product design improvements are not later characterized as exclusionary simply because they disadvantage rivals?
- **Challenges to consummated tech mergers:** California's participation in multistate efforts to unwind long completed platform acquisitions, most notably Facebook's purchases of Instagram (2012) and WhatsApp (2014), illustrates the limits of extending antitrust enforcement beyond established federal standards. Courts dismissed the states' challenge as untimely under laches, emphasizing the long delay in bringing claims against transactions consummated years earlier, and in parallel federal proceedings rejected similar theories for failure to demonstrate present monopoly power or ongoing competitive harm. These outcomes underscore the difficulty of pursuing backward looking, theory-driven enforcement where plaintiffs cannot meet federal evidentiary thresholds requiring proof of current market harm rather than historical conduct alone.[10]
- **T-Mobile/Sprint (2020):** California co-led a multistate effort to block a merger already approved by federal regulators. In *New York v. Deutsche Telekom* (2020), Judge Victor Marrero rejected the states' challenge, finding the evidence did not prove consumer harm in a dynamic wireless market. The opinion cautioned against basing intervention on a "presumption of anticompetitive effects" in such a rapidly evolving industry. Observers criticized this lawsuit as overreach, suggesting the states were arguably protecting a weaker competitor (Sprint) rather than consumers in a market where T-Mobile's aggressive competition had actually driven prices down.[11] In fact, the merger led to substantial efficiencies under which the merged entity has been able to provide a 5G network that rivals Verizon's and AT&T's.

If California had succeeded in these cases, it would have harmed rather than promoted competition. Fortunately, review by a federal court prevented the damage to competition from occurring in these cases. If the COMPETE Act passes, it is likely that the California AG will continue to bring cases that protect competitors rather than competition and, rather than losing in federal court, it will prevail in California courts.

8 *United States v. Google LLC*, No. 1:20-cv-3010 (APM), slip op. at 49-50 (D.D.C. Aug. 4, 2023) (rejecting at summary judgment the States' self-preferencing/search-bias theory based on Google's treatment of specialized vertical providers, finding insufficient evidence that the challenged conduct caused anticompetitive effects in the relevant markets). The court's later August 5, 2024 liability decision found Google liable under Section 2 based on its exclusionary default-distribution agreements, not on these rejected search-bias claims.

9 Federal Trade Commission, Statement of the Federal Trade Commission Regarding Google's Search Practices, FTC File No. 111-0163, at 2-3 (Jan. 3, 2013) (concluding that Google's design changes were intended to improve search quality and could properly be viewed as "competition on the merits").

10 See *New York v. Facebook, Inc.*, 549 F. Supp. 3d 6, 32-33 (D.D.C. 2021) (dismissing multistate challenge to Facebook's acquisitions of Instagram (2012) and WhatsApp (2014) under laches due to plaintiffs' delay), aff'd, No. 21 7078, 2023 WL 2131231 (D.C. Cir. Feb. 21, 2023) (per curiam); see also *FTC v. Facebook, Inc.*, 560 F. Supp. 3d 1, 25-26 (D.D.C. 2021) (dismissing complaint for failure to plausibly allege monopoly power) and *FTC v. Meta Platforms, Inc.*, No. 1:20 cv 03590 (D.D.C. Nov. 18, 2025) (finding FTC failed to establish current monopoly power and emphasizing that past acquisitions cannot sustain relief absent evidence of present anticompetitive harm).

11 *New York v. Deutsche Telekom*, No. 19-cv-5434 (S.D.N.Y. Feb. 2020) ("a presumption of anticompetitive effects would be misleading in this particularly dynamic and rapidly changing industry.")

C. Private litigation through alternative state statutes (UCL and UPA)

In the absence of a direct state-law prohibition on monopolization, private plaintiffs frequently turned to UCL and UPA to challenge allegedly anticompetitive conduct. Although these statutes offered alternative avenues for pursuing competition-related claims beyond traditional antitrust causes of action, courts often imposed meaningful limiting principles to confirm such claims were supported by concrete evidence of competitive harm.[12] The following cases illustrate how courts applied those constraints in practice:

- **Cel-Tech and UCL limits:** The California Supreme Court's decision in *Cel-Tech Communications, Inc.* v. *Los Angeles Cellular Telephone Co.* illustrates the importance of clear limiting principles in competition law. Concerned that an open-ended conception of "unfairness" could become untethered from competitive effects, the court rejected broad public-policy-based standards and required that unfair conduct be linked to harm to competition.[13] The decision reflects a broader lesson from antitrust and consumer-protection law: courts and legislatures have often narrowed vague standards after experience demonstrated the risk of unpredictable or overbroad enforcement.[14]
- **UPA predatory pricing claims (dismissed cases):** The U.S. Supreme Court's high threshold for establishing predatory pricing reflects a concern that the antitrust laws not be used to penalize the very price competition that those laws are supposed to promote. While the Cartwright Act does not reach unilateral conduct, the California UPA and UCL do; and plaintiffs can allege and indeed have alleged that predatory pricing can violate those statutes. Thus, the history of predatory pricing claims under those acts provides evidence of whether the concerns underlying the federal standard are justified or, alternatively, whether there are instances in which the tight federal standards have allowed defendants to get away with predatory pricing, i.e., low pricing to drive out competitors and thereby either create or preserve the opportunity to charge monopoly prices. In evaluating the implications of the cases below, the California legislature should consider whether the behavior at issue harmed California consumers or, alternatively, whether the cases were examples of competitors complaining about behavior that harmed them but benefited California consumers.
  - ***White & Yellow Cab v. Uber* (N.D. Cal. 2017):** Taxi companies alleged Uber's disruptive, lower-overhead model unfairly diverted riders and that Uber's pricing could be treated as below-cost or loss-leader competition. There can be little question that competition from Uber harmed the traditional taxi industry. There also can be little question that consumers have benefited. A federal district court applying California's UCL and UPA dismissed claims alleging unfair, price-based competition because the complaint did not plead sufficient facts showing below-cost pricing, competitive injury or how Uber's pricing practices violated the statutes.[15] In effect, federal guardrails prevented a competitor-driven lawsuit from interfering with procompetitive conduct that delivered lower prices and better service. The policy question is straightforward: does California want to make Uber's behavior at issue in the case illegal? If not, what in the act confirms that California courts will not condemn such behavior?
  - ***Medina v. Microsoft Corp.* (N.D. Cal. Aug. 25, 2014)[16] and *Eastman v. Quest Diagnostics* (N.D. Cal. 2015–2016):[17]** In both cases, courts dismissed predatory-pricing allegations because plaintiffs failed to plead sufficient facts regarding costs, pricing or competitive harm. The decisions demonstrate that California courts have traditionally imposed meaningful evidentiary requirements before allowing pricing-related competition claims to move forward.
  - ***Dixon Gas Club v. Safeway* (Cal. Ct. App. 2015):** Safeway used gas as a loss leader in order to attract shoppers to its stores. Dixon Gas Club, a competing gas retailer, sued Safeway alleging that its below-cost sales constituted predatory pricing. In contrast to the above cases, which were brought in a federal court, plaintiffs brought this case in California state court. The California Court of Appeals rejected the claim on the grounds that Safeway did not intend to "injure competitors or destroy competition," as required by the UPA[18]. As with the above cases, a question to ask is whether California needs to amend its antitrust laws to make Safeway's behavior illegal. Alternatively, is this case in which a competitor attempted to use the UPA to protect itself from competition. If the Legislature does not intend to make Safeway's behavior illegal, what in the current bill confirms that plaintiffs will not succeed in trying to do so?

These cases illustrate that even under California's broad UCL/UPA statutes, courts imposed rigorous evidence requirements such as specific pricing and cost data, proof of anticompetitive purpose and actual injury to competition, to filter out groundless claims. Such federal-style disciplines have served as critical safeguards against over-enforcement by confirming that only robust cases (with clear evidence of competitive harm) proceed. These cases also highlight what may be lost if California departs from these standards. Judicially developed evidentiary constraints have helped separate genuinely anticompetitive conduct from vigorous competition on the merits, reducing the likelihood that lawful business strategies are challenged simply because they disadvantage rivals. The COMPETE Act, however, departs from the structured standards that have guided courts in applying such guardrails, raising the risk that similar claims could proceed without the same level of evidentiary discipline. This concern is amplified where the effect of challenged conduct extends beyond California's boundaries, increasing the risk that plaintiffs will use California courts to circumvent the federal safeguards against condemning competitive behavior that benefits the entire country.

Against this backdrop, the case for deviating from federal standards warrants careful scrutiny. The following section therefore evaluates the federal framework directly and explains why, notwithstanding its limitations, it provides a more coherent and administrable basis for distinguishing procompetitive conduct from anticompetitive behavior.

12 One might argue that the skepticism that the California courts showed suggests that they might exercise similar constraint when enforcing the COMPETE Act. At a minimum, however, there will be a period of uncertainty as plaintiffs test what standards the California courts will impose. Moreover, the statutory instruction to maximize enforcement will likely make California courts less cautious about condemning competitive behavior.

13 *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel.* Co., 20 Cal. 4th 163, 185–87 (1999) (rejecting broad definitions of unfairness and holding that, in competitor actions, conduct should threaten an incipient antitrust violation or otherwise significantly threaten or harm competition).

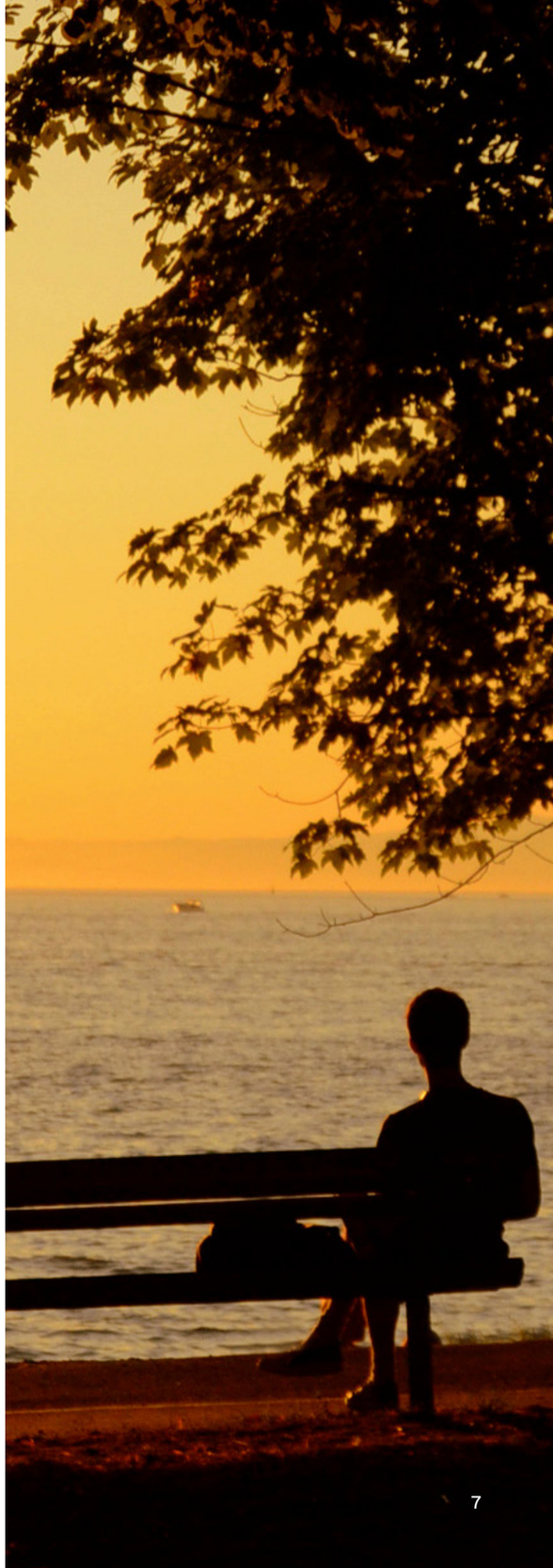
14 Federal Trade Commission Improvement Act of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695 (codified at 15 U.S.C. § 45(n)) (requiring substantial consumer injury and reflecting congressional efforts to cabin broad and indeterminate unfairness standards).

15 *A White & Yellow Cab Co. v. Uber Techs., Inc.*, No. 15 cv 05163 JSW, 2017 WL 4642346 (N.D. Cal. Oct. 17, 2017) (order granting in part motion to dismiss UCL and UPA claims).

16 *Medina v. Microsoft Corp.*, No. C 14 0143 RS, 2014 WL 4243592 (N.D. Cal. Aug. 25, 2014) (granting motion to dismiss state-law unfair competition and below cost pricing claims).

17 *Eastman v. Quest Diagnostics Inc.*, No. 15 cv 00415 WHO, 2016 WL 1640465 (N.D. Cal. Apr. 26, 2016) (granting motion to dismiss UPA and related pricing claims after multiple amendments).

18 *Dixon Gas Club, LLC v. Safeway Inc.*, No. A139283 (Cal. Ct. App. 2015)



3 Federal standards provide necessary safeguards

Whatever the merits of bringing unilateral conduct cases in California courts, the arguments for deviating from federal antitrust standards are not persuasive. Existing federal precedential standards, rooted in over a century of antitrust jurisprudence provide an economically grounded framework and strike a careful balance between policing truly anticompetitive conduct and avoiding undue interference with competition on the merits. By considering these standards as merely "instructive", the COMPETE Act discards much of the subtlety in federal antitrust law that encourages competition.

The following examples of federal doctrine on predatory pricing, two-sided platforms and monopsony illustrate why federal antitrust jurisprudence provides appropriate safeguards. Whether these specific precedents end up re-evaluated in California courts remains to be seen, but, bound by the COMPETE Act's focus on "'maximizing' effective deterrence," state courts may decide similar cases differently in the future.

A. The federal standard for predatory pricing is appropriate

Predatory pricing occurs when a firm sells below cost to discipline rivals and later recoup losses by raising prices. Predatory pricing has historically been difficult to distinguish from healthy price competition, "a core competitive activity" in a healthy market. [19]

Federal antitrust law reinforces this principle through carefully designed safeguards. The Supreme Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* is illustrative.[20] There, the Court required proof of two elements for a predatory pricing claim: (i) pricing below an appropriate measure of cost and (ii) a dangerous probability that the firm can recoup its losses through supra-competitive pricing. This requirement reflects a deliberate policy choice: absent recoupment, low prices unambiguously benefit consumers, and condemning such conduct would risk deterring the very price competition antitrust law seeks to encourage. As courts have recognized, rules that would require case-by-case evaluation of above-cost pricing would both create excessive uncertainty and "deter desirable price reductions."

The recoupment requirement under *Brooke Group* serves as an important reality check. Firms may price aggressively, incur losses and invest heavily in growth before eventually becoming profitable. Such conduct may reflect vigorous competition and innovation rather than an effort to acquire or exercise monopoly power. By requiring evidence that losses can later be recovered through supra-competitive pricing, the federal standard helps distinguish predation from competition on the merits.

The importance of this safeguard is illustrated by *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.* (1986).[21] In that case, the American radio manufacturer Zenith asserted that several Japanese manufacturers colluded to set predatory prices for radios within the US. It argued that the prices were predatory by virtue of being lower than the prices they charged in Japan. But the alleged conspiracy lasted for twenty years. The court reasoned that the predatory strategy that Zenith alleged made no economic sense, as it was implausible that defendants could recover the costs of twenty years of below-cost pricing by charging higher prices after Zenith (and other American competitors) exited. Had the plaintiffs prevailed, US consumers could have been denied the benefits of lower-priced electronics for nearly two decades in order to protect competitors that were struggling to compete effectively. The case highlights why antitrust law must distinguish between injury to rivals and injury to competition, and why courts require more than evidence of low prices alone before condemning conduct as predatory.

Federal predatory-pricing doctrine did not emerge fully formed. Earlier decisions sometimes risked treating vigorous price competition as evidence of competitive harm.[22] Over time, courts, enforcement agencies and economic research refined the doctrine to better distinguish exclusionary conduct from competition on the merits, ultimately producing the more structured framework reflected in *Brooke Group*.[23]

19 U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act 49 (2008) (withdrawn 2009)
20 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).
21 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).
22 *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967)
23 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)

Critics often cite *United States v. AMR Corp.* as evidence that that federal standards are too demanding.[24] In this case, the DOJ alleged that American Airlines cut fares and expanded capacity to drive out low-cost entrants, but the court found insufficient evidence of below-cost pricing and a dangerous probability of recoupment[25] under *Brooke Group*. Even if one believes that court applied those standards incorrectly,[26] the implication is not the standards themselves should be abandoned.

B. *Ohio v. American Express Co.* — contested result, correct framework

One of the central concerns with the COMPETE Act is that it introduces uncertainty regarding how courts should evaluate complex forms of competition by departing from established analytical frameworks. The treatment of multi-sided markets illustrates this concern particularly clearly. Although the outcome in *Ohio v. American Express* remains controversial, the decision's underlying principle is widely recognized as economically sound: competitive effects in multi-sided platform markets should be assessed across the platform as a whole rather than on any single side in isolation.[27] To the extent the COMPETE Act discourages or disallows consideration of cross-market effects, it risks producing an incomplete assessment of competition in platform markets.

The case involved contractual provisions that prevented merchants from steering customers toward lower-cost credit cards. Critics argued that these rules insulated American Express from price competition on the merchant side.[28] The Court nevertheless held that, because American Express operates a two-sided transaction platform connecting businesses and consumers, anticompetitive effects must be assessed across both sides of the platform[29]. Higher fees charged to merchants may fund rewards and services that increase value to cardholders, making it inappropriate to assess competitive effects on one side alone. Evaluating only merchant-side pricing would therefore risk missing the broader competitive dynamics.

Even if one agrees with the DOJ that American Express' no-steering rule was an agreement in restraint of trade, the Court was on solid economic ground in ruling that such an allegation could not be supported with reference to only one side of a two-sided market. As a result, it was also correct that demonstrating that the no-steering rule resulted in higher merchant discounts (i.e., merchants' fees to American Express) was insufficient to establish anticompetitive harm.[30]

24 See, e.g., Aaron S. Edlin & Joseph Farrell, The American Airlines Case: A Chance to Clarify Predation Policy (2002) (discussing the case as a test of modern predatory pricing doctrine).
25 *United States v. AMR Corp.*, 335 F.3d 1109, 1114–1120 (10th Cir. 2003) (applying Brooke Group standard and finding insufficient evidence of below-cost pricing and recoupment).
26 See, e.g., Edlin & Farrell, supra (arguing that the court applied an overly restrictive interpretation of predatory pricing standards).
27 *Ohio v. Am. Express Co.*, 585 U.S. 529, 547–49 (2018) (holding that, for a two-sided transaction platform, plaintiffs generally must show net anticompetitive effects in the market as a whole and that both sides of the platform must be considered when evaluating competitive effects).
28 *Ohio v. Am. Express Co.*, 585 U.S. 529, 539–41 (2018) (describing American Express's anti-steering provisions, which prevented merchants from discouraging use of Amex cards at the point of sale).
29 *Ohio v. Am. Express Co.*, 585 U.S. 529, 547 (2018) ("[I]n two-sided transaction markets, only one market should be defined" (quoting Filistrucchi et al., Market Definition in Two-Sided Markets: Theory and Practice, at 302)); id. ("evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power").
30 There is a principled argument that the no-steering rule resulted in anticompetitive harm even when one takes account of both sides of the market, but the Department of Justice apparently did not make such a case.

This standard remains an important safeguard. Multi-sided businesses commonly engage in cross-subsidization, charging one group of users to attract participation from another. Such arrangements can increase output, improve product quality and intensify competition between platforms. Requiring proof of net competitive harm does not immunize firms from liability; rather, it helps confirm that liability is tied to harm to the competitive process rather than isolated effects on one group of users. Courts risk treating ordinary features of platform competition as evidence of market power or exclusion. Without such a safeguard, ordinary features of platform competition, particularly pricing structures or contractual arrangements that support platform growth, could be mischaracterized as exclusionary. This concern is especially relevant in sectors that are central to California's economy, where platform-based business models are common.

C. Federal law already reaches monopsony harms

The claim that federal antitrust law protects only consumers is mistaken. As the Supreme Court declared in *Mandeville Island Farms v. American Crystal Sugar Co.* (1948), the Sherman Act is "comprehensive in its terms and coverage, protecting all who are made victims"[31] of forbidden restraints, including not just consumers but suppliers, workers and other participants. Therefore, anticompetitive practices that harm labor or input markets are already illegal under federal standards to the same extent as those harming consumers.

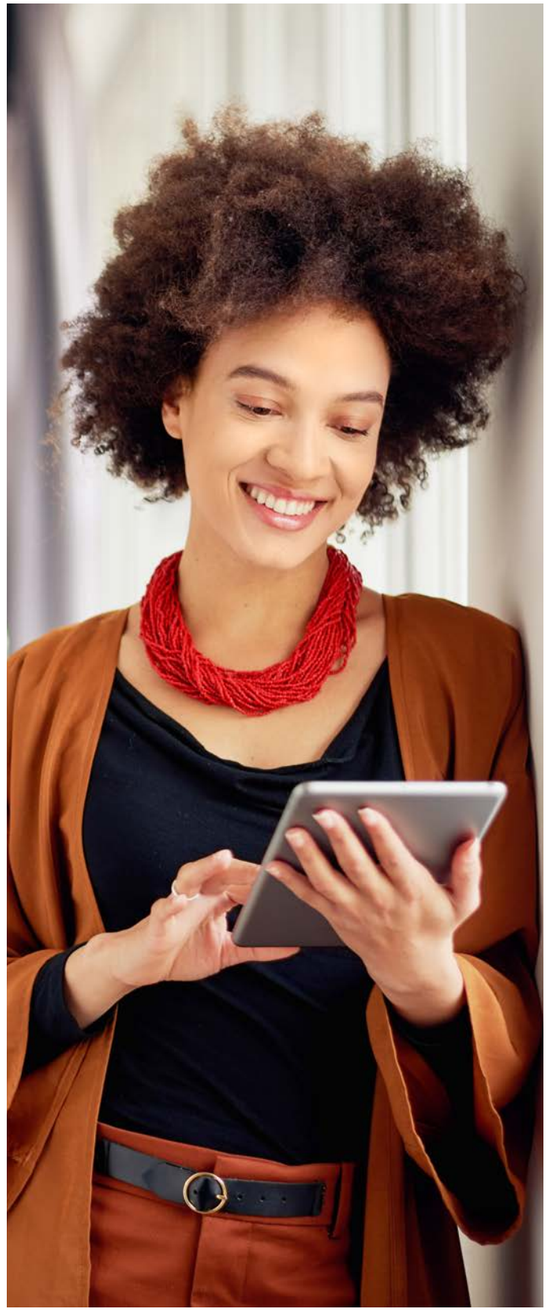
Indeed, federal enforcement and case law have long addressed "input side" collusion or monopolistic practices. In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007), the Supreme Court unanimously held that predatory bidding by a dominant buyer is analyzed under the same general framework as predatory pricing. The record indicated that Ross-Simmons had underinvested and expanded less aggressively than Weyerhaeuser,[32] highlighting the importance of distinguishing harm caused by superior competition from harm caused by anticompetitive conduct.

This symmetry shows that current law can address monopsonistic strategies that harm suppliers or workers, while distinguishing them from vigorous competition for inputs, which can benefit upstream sellers. In short, there is no gap in federal antitrust coverage for labor or supplier harms. Attempts to "go beyond" federal standards on these issues risk overreaching where existing law already provides a remedy.

31 *Mandeville Island Farms* v. *American Crystal Sugar*, 334 U.S. 219 (1948)
32 *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007)



4 Channels of economic harm and comparative evidence



The economic significance of the COMPETE Act would not be limited to cases in which California courts or enforcers ultimately impose liability. Antitrust standards shape business conduct ex ante: firms must decide, before any case is filed, whether pricing, bundling, contracting, product design, distribution, collaboration or investment decisions are likely to survive legal scrutiny. Through the interviews conducted with executives across media, entertainment, banking, retail, biotech and tech sectors, respondents broadly supported federal antitrust law, viewing its balanced and predictable standards as effective in protecting competition rather than competitors while safeguarding small and midsized firms from exclusionary conduct by dominant incumbents. Notably, most respondents did not object to California reaching unilateral conduct as a matter of principle. Instead, their concerns focused on the COMPETE Act's departure from established federal standards.

A. Legal uncertainty and dynamic competition

A recurring concern across interviews was that decoupling California law from federal precedent would create a prolonged period of uncertainty during which firms would be unable to predict how California courts would evaluate common business practices. One executive remarked that "it would take decades for even a semblance of certainty to emerge." Several respondents also noted that uncertainty may be compounded in heavily regulated sectors, such as financial services and utilities, where firms already operate under extensive state and federal oversight. For these firms, the concern is not just the COMPETE Act itself, but how a new California-specific antitrust regime would interact with existing regulatory requirements. Respondents noted that conduct already reviewed or mandated by regulators could nevertheless become subject to additional litigation and compliance scrutiny, increasing costs and complexity without changing underlying business obligations. When firms cannot reliably assess the legality of common commercial practices, they are more likely to delay, scale back, or abandon procompetitive initiatives. These concerns are consistent with empirical studies which have suggested that uncertainty in policy creates economic headwinds independent of the actual severity of the ultimate regulatory actions.[33]

33 Baker, S. R., Bloom, N. and Davis, S. J. (2016). Measuring Economic Policy Uncertainty. Quarterly Journal of Economics, 131(4), 1593-1636; see also Mumtaz et al. (2017), The State Level Impact of Uncertainty Shocks.

These concerns are particularly important when viewed through the lens of dynamic competition. Competition is not simply a snapshot of current market shares or prices. Firms compete by investing, innovating, developing new products and scaling successful business models. As economist Joseph Schumpeter observed, markets evolve through "creative destruction,"[34] where today's market leaders are frequently displaced by tomorrow's innovators. Former industry leaders such as AOL, CompuServe, Yahoo and Sears all lost their positions through competitive evolution rather than regulatory intervention. The challenge for competition policy is therefore not merely preventing firms from becoming large but preserving incentives for firms to innovate and compete aggressively in the first place.

B. Litigation risk and chilling effects

Executives are also wary of increased exposure to speculative or competitor-driven litigation. One respondent characterized the Act as potentially reaching "anything a competitor could or would want to sue us for." Respondents emphasized that the principal concern is not necessarily ultimate liability, but the cost, distraction and uncertainty associated with defending novel or expansive claims.

These concerns were particularly pronounced for small and medium-sized businesses. While much of the policy debate focuses on dominant firms, respondents noted that companies falling outside the Act's small-business exemption may lack the legal and compliance resources necessary to defend against aggressive litigation strategies. Several executives expressed concern that larger or better-resourced competitors could use litigation itself as a competitive weapon, imposing significant discovery, compliance and legal costs even when claims ultimately fail. Under the Act's burden-shifting framework, respondents worried that defendants may be required to justify ordinary competitive conduct at substantial expense.

Respondents expressed concern that the COMPETE Act could create uncertainty around a range of widely used business practices that they view as procompetitive and beneficial to consumers. Across industries, firms highlighted pricing discounts, bundled offerings, loyalty programs and collaborative R&D partnerships as conduct that could face greater scrutiny under the Act's broadly framed standards. One respondent raised similar concerns regarding labor and contractor arrangements, identifying uncertainty surrounding contractor networks, workforce procurement practices, training repayment provisions and other employment-related policies that operate in specialized labor markets. Executives warned that uncertainty over how courts would evaluate such practices could encourage more conservative business decisions, potentially reducing discounts, integrated offerings and innovation benefits available to consumers. Research-intensive industries were particularly concerned that exclusive partnerships between large and small firms, which often help bring new products to market, could become more difficult to pursue. While no respondent reported relocating activities outside California, some indicated that the Act had introduced concerns about the state's future attractiveness for investment and innovation. Several described decisions that are currently "easy yes" choices as becoming "complicated maybes." For firms with fewer resources, the answer could simply become "no." One respondent estimated compliance-related spending could increase by approximately 15%. The consequence may be less aggressive competition, fewer collaborative initiatives and greater reluctance to invest in innovative business models.

34 Joseph A. Schumpeter, Capitalism, Socialism and Democracy 81–86 (1942) (introducing the concept of "creative destruction" as the central mechanism of dynamic competition). See also ITIF, Rethinking Antitrust: The Case for Dynamic Competition Policy (2025) (distinguishing static price based analysis from innovation driven competition).

C. Investment, scale and European experience

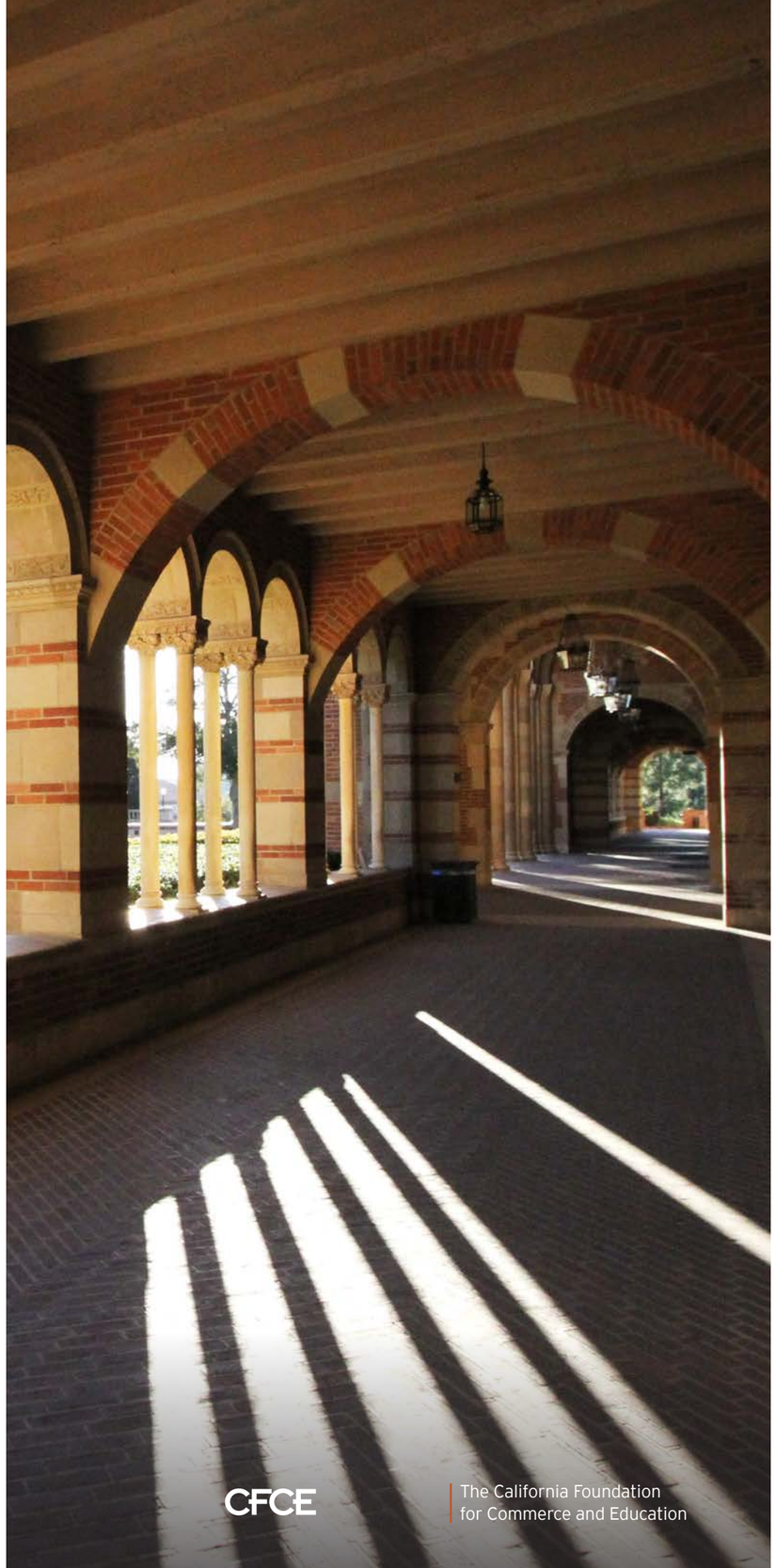
Interview respondents also emphasized potential implications for investment and economic growth. Stakeholders in the financial services industry cautioned that legal uncertainty could extend beyond firm conduct to investment decisions. International firms may be less willing to commit capital when California-specific antitrust exposure is difficult to predict, a concern that is broadly consistent with research linking antitrust policy uncertainty to reduced inward foreign direct investment.[35] Respondents further noted that if firms cannot balance reduced profitability in California with opportunities elsewhere, some may choose not to compete in California at all. Respondents in regulated industries similarly emphasized that uncertainty may affect not only investment decisions, but also the cost and complexity of executing investments. Expanded liability standards could subject procurement, contracting, workforce arrangements and other activities necessary to deliver infrastructure projects to greater scrutiny, increasing compliance costs and adding complexity to long-term investments.

These concerns are not purely theoretical. Europe's experience exemplifies the point. The 2024 Draghi Report identifies regulatory fragmentation, barriers to firm scale and increasing complexity as important contributors to Europe's productivity and competitiveness challenges. European policymakers have increasingly pointed to the costs imposed by differing rules across jurisdictions, including higher compliance burdens, reduced legal certainty and difficulties scaling innovative businesses across markets. The report further highlights Europe's innovation gap relative to the United States, particularly in technology-intensive industries.[36]

California is not Europe, and the comparison should not be overstated. Nevertheless, the concerns raised by respondents regarding uncertainty, compliance costs, reduced investment and barriers to scale closely mirror challenges now being debated by European policymakers. The European experience therefore serves not as a model, but as a cautionary illustration of how fragmented and less predictable regulatory frameworks may affect business formation, innovation, capital allocation and long-run competitiveness. The central lesson is not that unilateral conduct should escape scrutiny, but that competition policy should balance enforcement objectives against the economic costs of uncertainty and fragmentation.

35 Clougherty, J. A., & Zhang, N. (2023). Antitrust policy and inward FDI: The impact of policy risk and uncertainty on U.S. inward-FDI flows. International Business Review, 32(4), 102124

36 Mario Draghi, The Future of European Competitiveness: A Competitiveness Strategy for Europe, Part A, at 22–28, 67–71 (Eur. Comm'n 2024); European Parliamentary Research Service, Deepening the Single Market in Light of the Letta and Draghi Reports 1–3 (Oct. 2024) (discussing market fragmentation, barriers to scale, competitiveness challenges and innovation concerns within the European Union).



5 Looking ahead: California's emerging merger framework

The CLRC is separately considering whether California should implement its own merger statute, incorporating the 2023 DOJ/FTC Merger Guidelines as authority and further reducing reliance on existing federal precedent.[37] These proposals raise the same broad questions of whether California should prohibit what federal enforcement allows (even for mergers that have nationwide effects) and inject legal uncertainty by untethering California merger law from federal precedents.

The suggestion that California incorporate the most recent federal merger guidelines into California law is particularly problematic. Those guidelines deviate substantially from previous agency guidelines, which focused primarily on how the DOJ and FTC review the economic evidence that is central to sound antitrust enforcement. Instead, those guidelines are in effect a legal brief that advocates a return to an earlier and discredited approach to antitrust enforcement. Seventeen prominent antitrust economists including many former chief economists of the FTC and DOJ Antitrust Division that served in administrations of both parties have publicly criticized those guidelines.[38] Even if one believes, as many professionals do, that federal enforcement has permitted some markets to become overly concentrated, embracing the approach advocated in the most recent federal merger guidelines would be a substantial overreaction.

As is the case with unilateral conduct, one must ask whether existing law gives California the authority it needs to challenge anticompetitive mergers. California has successfully challenged mergers that were likely to be anticompetitive under existing law. A recent example is its participation in FTC's challenge to the proposed Kroger-Albertsons merger and its challenge to the proposed Valero transaction. Moreover, before concluding that California should be able to challenge mergers that federal authorities allowed, one should consider the T-Mobile-Sprint merger. That merger brought about substantial efficiencies that allowed the merged firm to provide a viable alternative to AT&T and Verizon. California joined other states in trying to block it. The discipline of the federal courts prevented those states from blocking a merger that increased mobile telephone competition.

37 California Law Revision Commission, Memorandum 2026-21, Revised Draft Merger Provisions and Additional Public Comment (May 15, 2026).

38 Letter to the Editor: Former FTC and DOJ Chief Economists Urge Separation of Economic and Legal Analysis in Merger Guidelines, https://www.promarket.org/2023/11/27/letter-to-the-editor-former-ftc-and-doj-chief-economists-urge-separation-of-economic-and-legal-analysis-in-merger-guidelines/. See also, Salinger, Michael A. (2024), The 2023 Merger Guidelines and the Role of Economics, Review of Industrial Organization, 65(1), 243-253. https://link.springer.com/article/10.1007/s11151-024-09957-x.

6 Balancing enforcement and competition

There should be no question that anticompetitive unilateral conduct should be illegal. But without safeguards against mischaracterizing competitive conduct as anticompetitive, laws intended to promote competition can do more harm than good. If California chooses to enact new antitrust legislation, it should make sure to incorporate adequate safeguards. One way to do so would be to link California law to federal precedents. If, for whatever reason, it chooses to distance itself from federal precedent, it needs to build in safeguards of its own. Far from doing so, the current draft of the COMPETE Act appears to instruct courts to tilt towards over-enforcement.

"Protect competition, not competitors" is not mere rhetoric. It reflects a core feature of sound competition policy: success by one firm necessarily implies harm to others. If the law allows those harmed competitors to recast that outcome as unlawful conduct without clear evidentiary and doctrinal constraints, antitrust risks becoming a mechanism for redistributing market outcomes rather than protecting the competitive process.




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