Date of Hearing: April 7, 2026

ASSEMBLY COMMITTEE ON JUDICIARY
Ash Kalra, Chair
AB 1776 (Aguiar-Curry) – As Amended March 23, 2026

As Proposed to be Amended

SUBJECT: CARTWRIGHT ACT: VIOLATIONS

KEY ISSUE: SHOULD CALIFORNIA ANTITRUST LAW BE REFORMED TO PROHIBIT SINGLE FIRM CONDUCT THAT IS MONOPOLISTIC OR RESTRAINING TRADE?

SYNOPSIS

As a result of growing corporate concentration across a host of industries, in 2022, the Legislature enacted ACR 95 (Wicks & Cunningham) Res. Chap. 147, Stats. 2022, which tasked the California Law Revision Commission with studying potential reforms to the Cartwright Act, the state's antitrust law. After three years of extensive work by the California Law Revision Commission, in January 2026, the Commission released its recommendations for amending the law to address anticompetitive behavior by a single firm. Although the federal Sherman Act does police monopolistic behavior by single firms, the Cartwright Act does not. The Commission recommended adopting provisions similar, but not identical, to Section 2 of the Sherman Act to address monopolistic behavior in California Law.

*This bill represents the legislative vehicle to enact the Commission's recommendations. The bill has three primary aspects. First, the bill makes findings and declarations that, among other provisions, reiterate case law holding that the Cartwright Act is "broader in range and deeper in reach than the Sherman Act." (*Cianci v. Superior Court *(1985) 40 Cal. 3d 903, 920.) Secondly, the bill prohibits one or more persons from acting in a manner that restrains trade or seeks to monopolize a market. Finally, the bill adopts ten provisions that are designed to help steer judicial interpretation of the statute that are rooted in federal case law but provides that the provisions are merely advisory and do not constitute threshold questions for judicial review.*

This bill is supported by a broad coalition of consumer groups, labor organizations, and small business advocates. The proponents of the bill argue that corporate consolidation is one of the predominant factors driving inflation and making life unaffordable for hard working Californians. This bill is vociferously opposed by the California Chamber of Commerce and dozens of industry trade groups from a wide cross section of California's economy. The opposition contends the bill is unnecessary, vague, overrides decades of case law, and is a boon to the plaintiff's bar. Proposed amendments are technical and address a cross-reference error.

SUMMARY: Adopts the California Law Revision Commission's recommended updates to the Cartwright Act to address single firm anticompetitive conduct. Specifically, **this bill**:

1) Provides that it is unlawful for one or more persons to act, cause, take, or direct measures, actions, or events that are either of the following:

a) In restraint of trade, which "restraint of trade" includes, but is not limited to, any actions, measures, or acts, as specified, whether directed, caused, or performed by one or more persons; or

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

2) Requires that anticompetitive effects and procompetitive justifications of the challenged conduct be evaluated within the same relevant market.

3) Provides that any of the following may constitute evidence of a violation of 1), but that liability does not require a finding, including, but not limited to, any of the following:

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

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

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

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

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

f) In a case where a defendant's business is a multisided platform, the defendant's conduct presents harm to competition on more than one side of the multisided platform, or the harm to competition on one side of the multisided platform outweighs any benefits to competition on any other side of the multisided platform;

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

h) The rival whose ability to compete has been reduced or harmed is as efficient, or nearly as efficient, as the defendant;

i) A single firm or person has or might achieve a market share or has market power at or above a threshold recognized under Section 2 of the federal Sherman Antitrust Act of 1890; or

j) A definition of "relevant market" where there is direct evidence of market power.

4) Requires courts to liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors "maximizing" effective deterrence of antitrust violations in accordance with *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758.

5) Finds and declares the following:

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

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

c) The California Supreme Court has determined that the Cartwright Act is "broader in range and deeper in reach" than the federal Sherman Anti-Trust Act (*Cianci v. Superior Court* (1985) 40 Cal.3d 903, 920);

d) The California Supreme Court has found the Cartwright Act is not modeled on the federal Sherman Anti-Trust Act and therefore interpretations of federal antitrust law are not conclusive (*Aryeh v. Canon Business Solutions, Inc*. (2013) 55 Cal.4th 1185, 1195);

e) California courts have recognized that the Cartwright Act departs from the Sherman Anti-Trust Act in many respects, including, but not limited to, inclusion of indirect purchaser recovery, use of a proximate cause test for Cartwright Act standing, recognition of broader harms and per se conduct, lower actionable market shares, structured rule of reason analysis, and differing burdens of proof;

f) Federal case law on the subject of antitrust law is not binding on California state courts, but courts may consider federal case law as persuasive authority to the extent they find it consistent with California law, as specified; and

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

EXISTING LAW:

1) Establishes, in federal law, the Sherman Antitrust Act of 1890. (15 U.S.C. Sections 1-7.)

2) Makes illegal, under the Sherman Act, every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the states or with foreign nations. (15 U.S.C. Section 1.)

3) Provides, under the Sherman Act, that every person who monopolizes, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, is deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. (15 U.S.C. Section 2.)

4) Authorizes a state attorney general to bring a civil action in the name of the state in any district court of the United States having jurisdiction over the defendant to secure monetary relief, as provided, for violations of the Sherman Act. (15 U.S.C. Section 15c.)

5) Establishes the Clayton Act. (15 U.S.C. Sections 12-27.)

6) Defines, under the Clayton Act, "antitrust laws" to include the Sherman Act, certain provisions of the Wilson Tariff Act, and the Clayton Act, as amended. (15 U.S.C. Section 12.)

7) Makes illegal, under the Clayton Act, certain exclusive dealing agreements, tying contracts, corporate mergers and acquisitions, and interlocking directorates, as specified. (15 U.S.C. Sections 13-14.)

8) Prohibits every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind, including specified noncompete clauses, subject to specified exemptions. (Business and Professions Code Section 16600 *et seq.*)

9) Establishes the Cartwright Act. (Business and Professions Code Section 16700 *et seq*.)

10) Defines a "trust" under the Cartwright Act as a combination of capital, skill, or acts by two or more persons for any of the following purposes:

    a) To create or carry out restrictions in trade or commerce.

    b) To limit or reduce the production, or increase the price of, merchandise or of any commodity.

    c) To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or any commodity.

    d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in the state.

    e) To make or enter into or execute or carry out any contracts, obligations, or agreements of any kind or description, by which they do all or any combination of the following:

        i. Bind themselves not to sell, dispose of, or transport any article or any commodity or any article of trade, use, merchandise, commerce, or consumption below a common standard figure, or fixed value.

        ii. Agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure.

        iii. Establish or settle the price of any article, commodity, or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

iv. Agree to pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price in any manner might be affected. (Business and Professions Code Section 16720.)

11) Makes every trust unlawful, against public policy, and void, except as exempted under the Cartwright Act. (Business and Professions Code Section 16726.)

12) Authorizes any person who is injured in their business or property by reason of anything forbidden or declared unlawful by the Cartwright Act, to sue in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him or her, interest on his or her actual damages, as specified, and preliminary or permanent injunctive relief when and under the same conditions and principles as injunctive relief is granted by courts generally under the laws of this state and the rules governing these proceedings, and be awarded a reasonable attorneys' fee together with the costs of the suit. (Business and Professions Code Section 16750.)

13) Establishes the Unfair Practices Act, which is intended to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented. (Business and Professions Code Section 17000 *et seq*.)

14) Prohibits, under the Unfair Practices Act, a range of behavior that reduces competition in pricing, including specified locality discrimination in pricing, sales under costs or loss leaders made with the intent of injuring competitors or destroying competition, and contracts for the performance of warranty service and repair below the cost of the service or repair. (Business and Professions Code Section 17040 *et seq*.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: Since 1990, economists note that over 75 percent of industries in the United States have experienced significant market concentration. (Luke Hinrichs, *Freedom from Domination: A Revival of Antitrust Law and the Will to Choose Democracy*, The Flaw (Sept. 6, 2022) available at: https://theflaw.org/articles/freedom-from-domination-a-revival-of-antitrust-law-and-the-will-to-choose-democracy/.) Seeking to protect consumers from increased market consolidation, in 2022, the Legislature tasked the California Law Revision Commission with studying if updates to the state's one hundred year antitrust law, the Cartwright Act, were necessary. (ACR 95 (Wick & Cunningham) Res Chap. 147, Stats. 2022.) Of note, because the Cartwright Act generally focuses on market collusion and the conduct of multiple firms, the Commission was asked to study how to combat anticompetitive behavior by a single firm or actor.

In January of this year, the Law Revision Commission released its proposal to reform the Cartwright Act to address single firm conduct. This bill would enact those recommendations. In support of this measure, the author states:

> AB 1776 promotes a fair, competitive economy by strengthening California's antitrust law to reflect modern market realities. Competition drives innovation, lowers prices, raises wages,

> and expands opportunity for consumers, workers, and small businesses. California's antitrust law, the Cartwright Act, was enacted in 1907 and does not clearly address anti-competitive conduct by a single dominant company. As markets have consolidated, this gap has allowed companies to stifle competition, limit consumer choice, and suppress wages without clear accountability under state law.
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> In 2022, the legislature unanimously passed ACR 95 (Cunningham and Wicks), a bipartisan resolution recognizing that the Cartwright Act "does not apply to monopoly conduct of single powerful companies" and directing the California Law Revision Commission (CLRC) to study updates. AB 1776 implements the CLRC's unanimous recommendations on single firm conduct. The Cartwright Act currently outlaws anti-competitive behavior by two or more companies and AB 1776 ensures this conduct by a single company is also illegal. The bill clarifies that California courts may consider federal antitrust precedent but are not bound by it, and that federal law does not preempt state law, consistent with longstanding principles.
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> By closing these gaps, AB 1776 aligns California with most other states and federal statutes that outlaw single-company anti-competitive conduct, reduces legal uncertainty, and strengthens the state's ability to protect competition. The bill does not prohibit business growth or monopolies—it targets anti-competitive conduct that harms consumers, workers, and small businesses and exacerbates California's affordability challenges.

Existing antitrust law, the Cartwright Act and the Sherman Act. California's main antitrust statute is the Cartwright Act, codified at Business and Professions Code Sections 16700 to 16770. Enacted in 1907, the Act closely parallels Section 1 of the Sherman Act (15 U.S.C. Section 1), which prohibits contracts, combinations, and conspiracies in restraint of trade. Like its federal counterpart, the Cartwright Act is designed to preserve and promote free competition in commercial markets. However, California courts have construed it as "broader in range and deeper in reach than the Sherman Act." (*Cianci v. Superior Court* (1985) 40 Cal. 3d 903, 920.)

Business and Professions Code Section 16720(e)(4) defines a "trust" to include combinations of agreements in which competitors "agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected." In other words, the Cartwright Act proscribes even indirect or subtle forms of coordinated behavior that may affect market prices or restrict trade.

To violate the Act, conduct must typically involve:

1. An agreement or concerted action between two or more people (so-called "single firm conduct" is not encompassed by the Act); and

2. Conduct that unreasonably restrains trade.

Under the Cartwright Act, an "agreement" or "concerted action" refers to a mutual understanding or coordinated conduct between two or more persons to restrain trade. It is the foundational element of any antitrust claim under both the Cartwright Act and the federal Sherman Act Section 1. (*Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 928 (Cartwright Act requires concerted action); *Texaco, Inc. v. Dagher* (2006) 547 U.S. 1, 5 (federal antitrust law also requires concerted action).)

An agreement under the Cartwright Act does not require a written contract or direct evidence of collusion. Somewhat unique to California is that courts recognize that circumstantial evidence may be used to infer concerted action, particularly because direct evidence of collusion is often unavailable in antitrust cases. (*In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 146.) The concerted action may be established through indirect mechanisms, such as the exchange of competitively sensitive information, market signaling, or the shared use of pricing algorithms that lead to parallel pricing behavior. Once concerted action is established (either through direct or circumstantial evidence), the court turns to the second prong: whether the conduct unreasonably restrains trade. Under California law, a restraint is considered unreasonable if it harms competition, rather than merely harming individual competitors. (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 269.) ("It is often repeated in antitrust cases that the law seeks to protect competition, not competitors; and stiff competition is encouraged, not condemned.") (internal quotations omitted).) Courts evaluate this through either the per se rule or the rule of reason. Certain types of restraints are deemed per se unlawful—such as horizontal price fixing, market allocation, and bid rigging—because they are presumed to always harm competition and lack any legitimate justification. Other restraints are analyzed under the rule of reason, which requires a case-specific inquiry into the conduct's actual or likely anticompetitive effects, the parties' market power, and any procompetitive justifications. (*Palsson*, *supra,* 16 Cal.3d at 934-35.)

Of note to this bill, the Cartwright Act, while mirroring Section 1 of the Sherman Act, does not contain an analogue to Section 2 of the Sherman Act which addresses the monopolistic behavior of a single firm. Section 2 of the Sherman Act states, "that every person who monopolizes, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, is deemed guilty of a felony, and, on conviction thereof, shall be punished by fine…" (15 U.S.C. Section 2.) Given the relatively short and general nature of the actual Section 2 of the Sherman Act, the Act's present understanding is largely the product of 100 years of federal case law and guidance documents promulgated by the Federal Trade Commission. For example, the requirement that a firm control at least fifty percent of a market to even trigger a potential violation of Section 2 of the Sherman Act comes from Federal Tade Commission guidance interpreting caselaw. (Federal Trade Commission, *Guide to Antitrust Laws, Single Firm Conduct,* available at: https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined.) Similarly, other threshold questions to prove monopolistic conduct under Section 2 of the Sherman Act originate in federal case law including requirements that conduct make little economic sense outside of thwarting competition (*Viamedia, Inc. Vs. Comcast Corp.* (7th Cir. 2020) 951 F.3d 429), that predatory conduct involves selling products below cost (*Brooke Group v. Brown & Williamson Tobacco* (1993) 509 U.S. 209), and that corporate efficiencies are to be considered when evaluating anticompetitive behavior. (*Ortho Diagnostic Systems v. Abbott Laboratories* (SDNY 1996) 920 F.Supp. 455.)

The closest analogue in state law to Section 2 of the Sherman Act is the state's Unfair Practices Act. (Business and Professions Code Section 17000 *et seq.*) That statute explicitly prohibits below cost pricing, locality discrimination, some rebate programs, and loss leaders. However, unlike the Sherman Act, the Unfair Practices Act does not examine overall competition within a marketplace. Accordingly, anticompetitive conduct by a single firm conduct that does not fall into one of the Act's enumerated prohibitions is not policed by state law.

The California Law Revision Commission's antitrust study process. Given that California has seen a significant increase in firm consolidation in recent years, particularly in the tech, oil and gas, and health care sectors, in 2022, the Legislature tasked the California Law Revision Commission with examining the Cartwright Act and proposing updates to the Act to reflect the modern economy. Following the enactment of the aforementioned ACR 95, the California Law Revision Commission undertook a three-year process of studying the topic, hearing from subject matter experts, accepting extensive public comment on various proposals, and crafting the recommendation that this bill seeks to codify.

As a part of the review of the Cartwright Act, the Commission assembled eight working groups of subject matter experts (including attorneys and economists), worked with the California Lawyers Association to seek input from their members regarding antitrust law, and held several panel presentations regarding the state of antitrust law. Through that process, the Commission was presented with three alternatives for handling single firm conduct. (Recommendation Antitrust Study: Single Firm Conduct (Jan. 2026) B-750 California Law Revision Report (2026) pg. 3.) The first approach presented to the Commission would have mirrored Section 2 of the Sherman Act. The Commission rejected this approach believing that some of the case law interpreting that section was too narrow and would have frustrated enforcement of the new section of the Cartwright Act. (*Id* at 13.) Conversely, the Commission also rejected an option that would have created an entirely novel approach to regulating single firm conduct. The Commission rejected this approach fearing that any new antitrust provisions without any meaningful interpretive case law would present a litigation nightmare. (*Ibid.*) The Commission also rejected adopting industry specific laws, notably tech industry specific laws, as well as standalone laws for "dominant companies." (*Id.* At 10.)

After rejecting the inadequate or riskier approaches discussed above, the Commission "settled on a hybrid approach that selectively draws on federal statutory and law to ground the new California standard while reflecting California's values and enforcement priorities." (*Id*. At 12.)

This bill adopts a "hybrid" approach to regulating single-firm conduct. This bill enacts the California Law Revision Commission's recommendations on regulating single-firm anticompetitive behavior. The bill adopts a series of findings regarding the need to police predatory anticompetitive behavior by single firms. The findings also reiterate California's decades old case law that holds that "the Cartwright Act is 'broader in range and deeper in reach' than the federal Sherman Anti-Trust Act" (*Cianci v. Superior Court*, supra, at p. 920) and that the Cartwright Act is not directly modeled after the Sherman Act. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1195.)

Secondly the bill enacts the actual prohibition on anticompetitive behavior that is, largely, modeled after Section 2 of the Sherman Act. This prohibition, in essence, states that it is unlawful for one or more persons to engage in the restraint of trade or to monopolize, or attempt to monopolize, an industry. The bill then explicitly prohibits a court excusing anticompetitive behavior in one market simply because that behavior may have boosted competition in another.

Finally, the bill aims to provide guidance to the courts. In light of the Commission's skepticism of some federal case law, the bill codifies a set of standards that may be considered by a court as evidence of potentially anticompetitive behavior, but, in order to prevent any of the factors from becoming a threshold condition to proving an antitrust case, explicitly states that a court need not

find any of the factors present in a given case to find anticompetitive behavior. These factors include:

- The unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct.
- The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons.
- The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or service required under federal antitrust law.
- The defendant's conduct makes no economic sense apart from its tendency to harm competition.
- The conduct's risk of harming competition or actual harm must be proven with quantitative evidence.
- In a case where a defendant's business is a multisided platform, the defendant's conduct presents harm to competition on more than one side of the multisided platform, or the harm to competition on one side of the multisided platform outweighs any benefits to competition on any other side of the multisided platform.
- In a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue.
- The rival whose ability to compete has been reduced or harmed is as efficient, or nearly as efficient, as the defendant.
- A single firm or person has or might achieve a market share or has market power at or above a threshold recognized under Section 2 of Title 15 of the United States Code.
- A definition of "relevant market" where there is direct evidence of market power.

Finally, the bill codifies existing state caselaw that requires California courts to liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors "maximizing" effective deterrence of antitrust violations. (*Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758.)

What constitutes "single firm conduct?" As discussed above, much of California's existing antitrust law focuses on anticompetitive behavior between two or more firms seeking to control a market. For example, if two rival grocery chains colluded to set prices at a level that would undermine competitors, that would be a violation of the existing law. However, if a single entity undertook such conduct, it would not be subject to a Cartwright Act violation. This bill then aims to police the conduct of one firm.

Several illustrative examples of anticompetitive single firm conduct can be found in the public comment letters written in support of the Commission's final recommendation. For example, several tech platforms that operate smart phone application stores are accused of prominently

displaying their own applications at the top of search results and deprioritizing search results for competitors' applications. One letter noted that an app store prioritized its file storage application over the rival Dropbox even when a person explicitly searched for "Dropbox." (Recommendation Antitrust Study: Single Firm Conduct (Jan. 2026) B-750 California Law Revision Report, *supra,* at p. 36.) Similarly, some firms have been accused of refusing to provide access to software platforms necessary to develop applications that work on a given operating system in order to stymie competition with the company's in-house systems. (*Ibid*.) Or, in the case of a company like Meta, some firms are simply accused of purchasing their rivals to stamp out any potential competition.

Other more traditional forms of anticompetitive behavior include a large company selling products at a price below the cost of production to ensure that smaller companies must leave the market, backing out of prior agreements to undercut a competitor's access to portion of a market, or trying to create exclusivity agreements to block competitors from gaining access to customers.

While some of this conduct does involve other parties and may be punishable under the existing law, much of this conduct is undertaken by a single party. The opposition to this measure contends that the Unfair Practices Act already regulates this conduct. This is indeed true. However, to counter this point, as stated in the Law Revision Commission's report recommending this measure, the Commission notes that because the Unfair Practices Act focus on specific conduct and not the impact to competition, the Act is both overbroad and yet too narrow to properly address single firm conduct. (*Id.* At 4.) Furthermore, the Unfair Practices Act provides for much lower penalties than the Cartwright Act and as such may not provide the necessary deterrence to large companies.

Regardless of the nature of an antitrust case, properly defining the relevant market in the initial pleadings is critical. One of the most critical aspects of any antitrust case is defining the "market" being impacted by the anticompetitive behavior. As the Federal Trade Commission notes, "Defining the market is the first and in many respects the most important question in antitrust." (Robert Rogowsky &William Shughart II, *Market Definition in Antitrust Analysis,* Federal Trade Commission (Oct. 1982) available at: https://www.ftc.gov/system/files/documents/reports/market-definition-antitrust-analysis-comment/wp077.pdf.) The market analysis is critical in all types of antitrust litigation, and in order for any case to have a modicum of hope for success, must be properly plead as a part of the initial filing of the case. (*Ibid.*) Accordingly, most antitrust cases require the plaintiff and their counsel to extensively consult with expert economists before a case is ever filed. The failure to consult with economic experts will almost certainly result in a market definition that will not survive a motion to dismiss the matter. Impressing the importance of properly defining a relevant market, the Federal Trade Commission notes, "In many antitrust cases the outcome falls neatly from the resolution of the market definition issue." (*Id* at p. 2.)

As it relates to single firm conduct, properly pleading and scoping the relevant market is especially important as a firm's percentage of the market share is likely to indicate just how much power a firm has to manipulate the market and stifle competition. For example, assuming one has properly plead the market for retail coffee sales, a neighborhood coffee shop is unlikely to ever have sufficient market power to truly undermine competition, whereas Starbucks or Dunkin Donuts may possess sufficient power to manipulate the market. This is why, as noted above, federal law typically requires a threshold showing that a firm occupies at least 50 percent of the market before a single firm antitrust case can proceed under Section 2 of the Sherman Act.

This bill, notably, does not include a market share threshold. The opposition to this measure, a myriad of business organizations led by the California Chamber of Commerce, note that the lack of a market threshold in this measure is a fatal flaw. Writing in opposition to this bill, the coalition notes, "AB 1776 is deeply flawed in that it has no market share thresholds in its application. For decades, courts and economists have been aligned in the basic economic view that an individual business with a small share of the market is far less able to harm competition than businesses with large market shares." To counter this point, the proponents of this bill note case law interpreting the Cartwright Act, which again currently only applies to multiple firms, held that even though two firms only controlled 20 percent of a relevant market, their exclusive dealing arrangement was sufficiently anticompetitive as to violate the Act. (*Fisherman's Wharf Bay Cruise v. Superior Court* (2003) 114 Cal.App.4th 309, 326.)

Returning to the coffee shop example, the proponents would argue that if the market is defined as the statewide market for coffee shops the small shop can attempt to engage in a range of anticompetitive behavior and will likely only undermine its own business. However, if the market is defined as coffee shops on the main street of a small town, the company's anticompetitive behavior may impact competition, even if the coffee shop still controls a relatively small portion of that smaller market. Accordingly, the proponents of the bill (and the Law Revision Commission) argue no market size threshold is necessary. Nonetheless, the opponents' argument that lacking a market threshold may result in litigation, especially in the early years of this bill taking effect, is not without merit. Unfortunately, the opposition has not provided a market size threshold they could accept, and the Committee sees no need to create one at this point in the legislative process. However, should the opposition present such a threshold, *the author may wish to consider a reasonable market threshold that would limit the single firm conduct provisions of this bill to firms that actually have the market size and power to truly undermine competition.*

Opponents fear that prohibiting conduct that is considered a "restraint of trade" will undermine existing business practices. The opposition to this bill argues that the hybrid approach utilized by the California Law Revision Commission, most notably adding the term "restraint of trade" to the prohibition of the bill confuses the state of the law, especially given that Section 2 of the Sherman Act omits such language. On this point the opposition argues, "While the "restraint of trade" term used in AB 1776 is a familiar one in antitrust law, no court or statute has ever defined how that terms applies to single-firm conduct, and the bill makes no effort to do so. Restraints of trade have always been evaluated in terms of two or more firms agreeing to take certain actions." While the opposition coalition is indeed correct that the bill does not define this term, decades of case law have. Although referencing a contract and arising in the context of Section 1 of the Sherman Act, in 1918 Justice Brandeis noted, "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. *The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition* [emphasis added]." (*Board of Trade of the City of Chicago v. United States* (1918) 246 U.S. 231, 238.)

Applying similar logic to this bill, every company in a capitalist society acts in a manner that may restrain competition, in that every company acts to undermine their competitors and boost their bottom line. Although not defined in this bill, it is highly likely a court examining any case that should arise under the proposed statute would look at a restraint's *actual* impact on competition. For example, in opposition to this bill California Life Sciences argues that because

the bill implicates actions that "establish or settle price" they will be committing antitrust violations by participating in discount drug programs or by offering price rebates to MediCal. However, because the actual impact on competition is negligible, in reality it is highly unlikely discounting drugs so that they can be purchased by persons who cannot otherwise afford their medication would be deemed anticompetitive. Similarly, while such conduct may technically be a restraint, it is nearly impossible to imagine that a court would hold a company liable for participating in a government program. This is especially true when comparing discounting drugs for low-income Californians to some of the conduct mentioned in the California Law Revision Commissions report, including intentionally burying search results of competitors products or limiting the interoperability of a company's products.

Opponents fear the lack of clarity in this measure will lead to unchecked litigation risks. A repeated theme of the opposition's arguments against this measure is that the bill is too vague and "rejects over 100 years of legal precedent." Much of this consternation is aimed at the proposed Section 16732 of the Business and Professions Code which aims to provide judges guidance in interpreting the bill. This section of the bill appears to originate from the Law Revision Commission's consternation that federal case law interpreting Section 2 of the Sherman Act will unreasonably narrow the applicability of this statute. Thus, in the guidance provisions, the bill states that "establishing liability shall not require a finding…of the following." The bill then lists the ten factors articulated above.

While bills providing guidance to the courts is not novel, the approach utilized in this bill is somewhat new. Instead of directly guiding the court to apply certain precedent, for example specifying that pricing a good at 15 percent or less than a competitor is presumptive evidence of a violation, the bill essentially lists factors from federal case law that the Commission is leery of the courts utilizing as threshold questions when evaluating an antitrust case. By telling the courts what factors they may, but need not, examine the bill does not provide the courts or the businesses implementing this bill much guidance of what conduct will be considered anticompetitive. While any guidance to the courts on a complex area of law is advisable, *the author may wish to consider amending proposed Section 16732 to provide a more affirmative set of factors that a court should consider when evaluating a case rather than a set of factors the court may but need not rely upon,* especially when considering that the Law Revision Commission looked askance at many of the cases that developed those factors in its public report.

The opposition also contends the bill in print is a "plaintiffs' lawyer's wish list." While complaining about trial lawyers is a well-worn lobbying technique, despite being linked to a private right of action, this bill poses far less of a risk of frivolous litigation than other areas of the law. For example, unlike a case arising under Proposition 65 or the Americans with Disabilities Act, where a plaintiffs' lawyer need only read a product's ingredient list or measure stripes in a parking lot to find a violation of the law and file suit, as the opposition coalition letter frequently notes, antitrust cases are far more complex. As noted above, without consulting with (and therefore paying in advance) an economist, most antitrust cases will die at the pleading stage. Additionally, the opposition provides no evidence that the state's existing laws regarding anticompetitive practices are rife with abuse. For example, the provisions of the Cartwright Act dealing with collusion have not produced a wave of frivolous litigation. The same can be said for the Unfair Competition Law and the Unfair Practices Act. Between the complexity of these cases, the sizable upfront costs of antitrust litigation, and the history of litigation under the existing Cartwright Act, the opposition's fears seem overstated.

Despite the doomsday scenario's presented by the opposition to this bill, the nature of antitrust law, the history of the existing law, and the realities of 100 years of case precedent suggest this bill will not undermine prescription drug benefits, airline loyalty programs, or any other consumer-friendly tools utilized by businesses to gain an advantage over competitors. The opposition also contends that this bill will end a number of consumer-friendly, pro-competition practices. As noted above, the life sciences industry contends this bill will prohibit discounting drugs. Other opponents have also argued this bill will eliminate consumer loyalty programs, regional pricing discounts, and potentially even releasing a film direct to a streaming service.

As noted above, when reviewing antitrust claims, courts tend to look at the actual impact on competition from the alleged conduct. Given that airline loyalty programs are one of the many ways that air carriers compete with one another to earn customers' business it is difficult to see how this bill would ban the practice. Indeed, the practice has not been successfully challenged under Section 2 of the Sherman Act and given that most airline loyalty programs partner with banks to issue credit cards (thus introducing a second firm into the mix) the programs appear to be legal under the existing Cartwright Act. This is largely the case because while technically a restraint, these programs promote competition. Using Justice Brandeis' logic, if a restraint actually promotes competition, it is not unlawful. A similar analysis would hold true for many of the worst case scenarios detailed by the opposition.

In totality, much of the business community's opposition to this bill appears rooted in the fact that this bill takes aim at potential anticompetitive misconduct of some of the largest businesses in the state. Given that one of the many drivers behind the original ACR that started the Law Revision Commissions work was the practices of social media companies who, for the most part, do not even charge for their products and yet make billions in revenue annually, it is understandable that industry does not want to see changes to the existing law. However, in an era of ever increasing consumer prices and corporate consolidation, enacting a new tool to promote market competition and lower prices is a reasonable policy for the Legislature to consider.

Proposed amendments correct a cross-reference omission. The bill in print is a product of the California Law Revision Commission's draft proposal with stylistic edits from the Office of Legislative Counsel. When Legislative Counsel drafted the measure, they revised the bill and broke one section of the bill into two, thus the bill contains four sections of code opposed to the three included in the Law Revision Commission's draft. The bill's codified findings reference the other sections of the bill, however, the new section drafted by Legislative Counsel was omitted from those cross references. The author proposes the following technical amendment to the proposed Section 16730 of the Business and Professions Code to remedy the error:

> **16730.** (a) The purpose of this section and Sections 16731***,*** ~~**and**~~ 16732***, and 16733*** is the promotion and protection of free and fair competition, which is fundamental to a healthy marketplace that protects all trade participants, including workers and consumers, and to an environment that is conducive to the preservation of our democratic, political, and social institutions.

ARGUMENTS IN SUPPORT*:* This bill is supported by a coalition of consumer advocates, labor organizations, and small business trade organizations. In support of the measure a coalition of some of the state's largest labor organizations write:

> California is the nation's wealthiest state and the fourth largest economy in the world, yet ranks 48th in the nation in terms of income inequality.1 70% of Californians believe that the

gap between the rich and poor is widening, and a similar share think the state government should do more to reduce the gap.

Corporate concentration indisputably contributes to these harmful trends. Across healthcare, technology, food and agriculture, entertainment, and consumer retail, market concentration has led to wage suppression, price inflation, and reduced opportunities for business growth. Since the 1990s, consolidation has affected roughly 75% of all U.S. industries, leaving in its wake fewer small businesses, weaker unions, job insecurity, and exploding income inequality.

Without a state law against illegal monopolization, Californians may only use antitrust law to challenge illegal monopolies in federal court pursuant to weakened federal antitrust law. The erosion of federal antitrust laws was not accidental. Beginning in the late 1960s, an intellectual movement known as the "Chicago School" de-emphasized market competition in favor of short-sighted economic gains. Over the next several decades, big business co-opted and promoted Chicago School thinking as a tool to advance its interests. Big businesses triumphed, and antitrust enforcement plummeted.

Following an expansive three-year review of California's antitrust law, the Cartwright Act, the California Law Revision Commission (CLRC) – California's most prestigious nonjudicial legal body – made two key findings: *First*, the Cartwright Act does not prohibit illegal monopolization or unilateral, "single firm" anticompetitive conduct. *Second*, directly mirroring federal antitrust law would be both inconsistent with current California law and effectively import federal jurisprudence that has diluted the federal law's original scope and strength, limiting the effectiveness of state antitrust enforcement.4 The COMPETE Act, which is a verbatim codification of the CLRC's final unanimous recommendation, fixes this by allowing illegal monopolization claims to be brought in state court pursuant to California antitrust cases rooted in a century of law.

By every measure, the COMPETE Act reflects a consensus-based, non-partisan approach to reinvigorating competition.

ARGUMENTS IN OPPOSITION*:* As noted, a coalition of business trade groups, led by the Chamber of Commerce, opposes this measure. In addition to the above mentioned comments, they write:

These uncertainty concerns are compounded by the bill's instruction to courts that well established and longstanding federal standards for evaluating business practices, designed to distinguish between lawful and unlawful competition are not required under California law. For example, AB 1776 rejects the economic and legal principles that assist courts in distinguishing between unlawful, below-cost pricing and lawful price cutting, calling into question business's ability to offer low prices aimed at gaining customers, which is one of the most frequently used competitive strategies, particularly among small businesses and new entrants. The bill also nullifies the commonsense rule created by the U.S. Supreme Court that a company generally has no duty to assist its rivals and a monopolist only has to do so in unique situations, potentially creating a California standard under which *competitors are compelled to assist one another*, rather than compete with one another.
Similarly, in a transparent effort to elevate business interests over consumers, the bill states that plaintiffs suing under AB 1776 need not show that "[t]he rivals whose ability to compete has been reduced are as efficient, or nearly as efficient, as the defendant," thereby

safeguarding the business of less efficient competitors. AB 1776 likewise disavows the notion that, in two-sided markets, courts should evaluate the competitive effects on both sides of the market, thereby ignoring the economic reality that consumers, on one side of a dual-sided market, often benefit from conduct that may harm competitors, on the other side of the market, and flipping on its head the "consumer welfare standard" that has guided courts and antitrust policy for decades. In another troubling and significant dismissal of federal law, AB 1776 states that "one or more" persons may be held liable for monopolization, whereas federal courts and economists have always recognized that monopolization – as the name implies – is the complete domination of a market by a *single* competitor.

AB 1776's disavowal of these guiding, federal standards will not only increase litigation and costs but leaves California courts with little guidance on how to deal with these complex issues. The bill's rejection of federal law is even more troubling given the California Supreme Court's repeated explanation that federal antitrust case law is "helpful" in interpreting the Cartwright Act. *State of California ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1164.

REGISTERED SUPPORT / OPPOSITION:

Support

American Economic Liberties Project
American Federation of State, County and Municipal Employees, AFL-CIO
California Association for Microenterprise Opportunity
California District Attorneys Association
California Federation of Labor Unions, AFL-CIO
California Low-Income Consumer Coalition
California Nurses Association
California Professional Firefighters
California Teamsters Public Affairs Council
Center for Responsible Lending
Communication Workers of America, District 9
Consumer Attorneys of California
Consumer Federation of California
Consumer Watchdog
Courage California
Economic Security California Action
Economic Security Project Action
End Poverty in California
Institute for Local Self-Reliance
International Alliance of Theatrical Stage Employees
Internet Accountability Project
Kapor Center Advocacy
Oakland Privacy
Responsible Online Commerce Coalition
SEIU California
Service Employees International Union, California State Council
Small Business Majority

Smart - Transportation Division
Teamsters California
Tech Oversight California
Techeqiuty Action
The Office of Kat Taylor
UDW/AFSCME Local 3930
United Domestic Workers/AFSCME Local 3930
United Food and Commercial Workers Union, Western States Council
Writers Guild of America West

Opposition

African American Farmers of California
Airlines for America
American Investment Council
Associated General Contractors of California
Associated General Contractors San Diego
Association for Competitive Technology
Athens Services
Bay Area Council
Biocom
Biocom California
Biotechnology Innovation Organization
Brea Chamber of Commerce
Building Owners and Managers Association of California
California Apartment Association
California Assisted Living Association
California Association of Realtors
California Attractions and Parks Association
California Bankers Association
California Broadband & Video Association
California Broadcasters Association
California Building Industry Association
California Business Properties Association
California Chamber of Commerce
California Construction and Industrial Materials Association
California Farm Bureau
California Food Producers
California Forestry Association
California Fresh Fruit Association
California Fuels and Convenience Alliance
California Grocers Association
California Hospital Association
California Life Sciences Association
California Manufacturers and Technology Association
California Manufacturing Technology Association
California Restaurant Association
California Retailers Association
California Strawberry Commission

California Taxpayers Association
California Trucking Association
California Waste Haulers Council (unless amended)
California's Credit Unions
Carlsbad Chamber of Commerce
Chamber of Progress
Chino Valley Chamber of Commerce
Citrus Heights Chamber of Commerce
Civil Justice Association of California
Colusa County Chamber of Commerce
Computer & Communications Industry Association
Connected Commerce Council
Corona Chamber of Commerce
CTIA
Da Vita Healthcare Partners INC.
Elevate California
Engine
Fontana Chamber of Commerce
Greater Bakersfield Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
Greater Ontario Business Council
Greater Riverside Chambers of Commerce
Hollywood Chamber of Commerce
Housing Contractors of California
International Franchise Association
LA Cañada Flintridge Chamber of Commerce and Community Association
Laguna Niguel Chamber of Commerce
Lodi Chamber of Commerce
Long Beach Area Chamber of Commerce
Los Angeles Area Chamber of Commerce
Los Angeles County Business Federation
Motion Picture Association
Murrieta Wildomar Chamber of Commerce
National Association of Mutual Insurance Companies
Netchoice
Nisei Farmers League
North San Diego Business Chamber of Commerce
Oceanside Chamber of Commerce
Orange County Business Council
Personal Insurance Federation of California
San Deigo Regional Chamber of Commerce
San Juan Capistrano Chamber of Commerce
Santa Ana Chamber of Commerce
Santa Clarita Valley Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Silicon Valley Leadership Group
Software and Information Industry Association
Technet

Technology Industry Association of California
The Greater Coachella Valley Chamber of Commerce
Torrance Chamber of Commerce
Tri County Chamber Alliance
Tulare Chamber of Commerce
Upland Chamber of Commerce
West Ventura County Business Alliance
Western Plant Health Association
Western Wood Preservers Institute
Yorba Linda Chamber of Commerce

Other

California Law Revision Commission

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