

SHOULD CALIFORNIA ADOPT REVISIONS PROPOSED BY CONGRESS AND THE NEW YORK STATE LEGISLATURE TO ADDRESS SINGLE-FIRM CONDUCT?

By Susannah Torpey, Brandon Annette and Quinlan Cummings¹

California's primary antitrust statute, the Cartwright Act, prohibits any contract combination or conspiracy in restraint of trade or commerce, mirroring language codified in federal law.² However, the Cartwright Act is silent on single-firm monopolies, a direct departure from its federal law counterpart, the Sherman Act. Section 2 of the Sherman Act ("Section 2") addresses such monopolies by making it unlawful to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations."³ The Cartwright Act, by contrast, only outlaws "trusts," defined by the statute as concerted action by "two or more persons" to restrain trade.⁴ Thus, the Cartwright Act does not reach unilateral conduct that restrains competition.⁵ As such, anticompetitive conduct that has been successfully prosecuted under Section 2, such as predatory pricing,⁶ patent misuse,⁷ anticompetitive product redesign,⁸ and refusals to deal,⁹ is not proscribed by the Cartwright Act.¹⁰

California is not alone in limiting antitrust proscription to concerted conduct. For example, New York's little Sherman Act, the Donnelly Act, currently does not reach unilateral conduct. However, the recent New York State Senate Bill S933A looks to Section 2 and European abuse-of-dominance standards for guidance on prohibiting predatory and exclusionary conduct by dominant single firms. Further, while federal law on its face bans exclusionary conduct by monopolists under Section 2, critics have argued that Section 2 of the Sherman Act itself has been under-enforced and is ineffective at holding monopolists accountable for anticompetitive conduct over the past two decades.¹¹ In part to combat this issue, Senator Amy Klobuchar (D-MN) introduced the federal Competition and Antitrust Law Enforcement Reform Act of 2021 ("CALERA"), which endorses a European framework while focusing on increasing merger standards as a means of preventing the formation of monopolies indirectly.

Having taken note of these developments, the California Law Revision Commission (“CLRC”) is studying whether California law should be revised to prohibit exclusionary conduct to acquire or maintain a monopoly. The CLRC has requested commentary and opinions on the topic from members of the antitrust community. Accordingly, Sections I and II of this article detail New York’s Senate Bill S933A, CALERA, European antitrust standards, and other developments in monopoly regulation to help the CLRC make informed decisions regarding potential revisions to California antitrust law addressing single-firm conduct. Section III addresses arguments the CLRC should consider in deciding how and whether to implement a prohibition on single-firm conduct in California.

I. NEW YORK’S TWENTY-FIRST CENTURY ANTITRUST ACT

The Donnelly Act, New York State’s antitrust statute, does not prohibit unilateral anticompetitive conduct by monopolists; instead, like the Cartwright Act, it prohibits concerted anticompetitive behavior. In early 2021, the New York legislature proposed The Twenty-First Century Antitrust Act (“S933A”) to address this issue.¹² S933A would establish (1) a claim for monopolization and (2) a “European-inspired” claim for abuse of a dominant position.

A. MONOPOLIZATION UNDER S933A: THE TWENTY-FIRST CENTURY ANTITRUST ACT

Section 2(a) of S933A would create “an express monopolization violation using substantially the same language as Section 2 of the Sherman Act.”¹³ Section 2(a) of S933A is almost identical to Section 2 of the Sherman Act, providing “[i]t shall be unlawful for any person or persons to monopolize, or attempt to monopolize . . . , or combine or conspire with any person or persons to monopolize . . . any business, trade, or commerce . . . in this state.”¹⁴

Section 2(a) of S933A was introduced to “fill a gap in the current law, which has been interpreted to prohibit only multiparty anticompetitive conduct.”¹⁵ However, there is controversy regarding whether

New York should follow federal law and prohibit anticompetitive single-firm conduct.¹⁶ Critics of the bill contend that enforcement against single-firm conduct will be weak “[b]ecause the provision mimics federal law, . . . [and] courts construing the state counterpart will rely on existing federal case law authority,” which has been ineffective in regulating single-firm conduct in this millennium.¹⁷

B. “ABUSE OF DOMINANCE” STANDARD

Whereas Section 2(a) of S933A intentionally mirrors federal law, Section 2(b) does not. In fact, Section 2(b) explores new territory for U.S. antitrust law altogether, by making it unlawful for “any person or persons with a dominant position in the conduct of business, trade, or commerce, in any labor market, or in the furnishing of any service in this state to abuse that dominant position.”¹⁸ The Sherman Act has no similar provision on abuse of dominance; nor does any state law, for that matter.¹⁹ This abuse of dominance standard is “European-inspired”²⁰ and is based on Article 102 of the Treaty of the Functioning European Union (“Article 102”), which states that “[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited.”²¹ Article 102 includes a broad prohibition against “exploitation” of market power, while Section 2 only reaches anticompetitive conduct that demonstrably harms the competitive process.²² Thus, it is “easier to challenge . . . certain unilateral conduct such as predatory pricing, tying, and monopoly leveraging” under the abuse-of-dominance standard in European courts than under the Sherman Act in American courts.²³

Section 2(b), like its European Union counterpart, does not explicitly define “dominant position” or what constitutes “abuse.”²⁴ However, Section 2(b) makes clear that a relevant market need not be defined to prove abuse of dominance. It states that “[i]f direct evidence is sufficient to demonstrate that a person has a dominant position or has abused such a dominant position, no court shall require definition of a relevant market in order to . . . find that a claim has been stated.”²⁵ As examples of “direct evidence” of a dominant position, Section 2(b) includes “[t]he

unilateral power to set prices, terms, conditions, or standards; [e]vidence that a person is not constrained by meaningful competitive pressures; and [] the use of non-compete clauses, no-poach agreements or the unilateral power to set wages.”²⁶ This list draws clear inspiration from the Treaty of the Functioning European Union, which includes a similar non-exhaustive list of behaviors that might indicate “abuse of dominance.”²⁷

Article 102 also provides that “if a company has a market share of less than 40%, it is unlikely to be dominant.”²⁸ Section 2(b) similarly allows for a presumption of non-dominance for a person or firm with a low market share of 40% for sellers and 30% for buyers.²⁹ This is in contrast to a showing of at least 50% market share to prove monopolistic conduct that has frequently been cited in cases involving the Sherman Act.³⁰

Additionally, Section 2(b) gives significantly broader power to the New York Attorney General than does the current Donnelly Act. Under the proposed provision, the Attorney General would have rule-making power under the New York Administrative Procedure Act to issue rules to “carry out” Section 2(b).³¹ The Attorney General must also be notified at least 60 days in advance of any merger that would result in the buyer owning more than \$8 million in assets or voting securities of the target;³² this is the first merger requirement of this nature under state antitrust law in the United States.³³

Critics of Section 2(b) believe that its abuse-of-dominance standard may be too broad and undefined, and could deter procompetitive business conduct.³⁴ Critics also contend that the low threshold of market shares needed to demonstrate a dominant position under Section 2(b), 30%–40%, may harm small and new-to-market innovators by criminalizing their growing businesses.³⁵ They further argue that the relatively open definition of dominance could invite frivolous litigation against non-monopolistic conduct, which even if the courts dismissed, could bankrupt growing businesses.³⁶

On the other side of the debate, supporters of Section 2(b) believe it is much-needed change to take on the emergence of “big tech”³⁷ and balance-out weak federal laws that have limited litigation against large technology companies over the past three decades.³⁸ Jay Himes, former Chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York, testified before the New York State Senate that Section 2(b) is the most “important” portion of S933A because of how “out of touch Section 2 [of the Sherman Act] theory . . . is with the exercise of exclusionary and exploitive single-firm conduct in fact taking place in real world commerce today.”³⁹ Himes noted that the abuse-of-dominance standard is able to address single-firm conduct—including the conduct of big tech—that is “largely beyond the coverage of U.S. antitrust law [including] monopoly leveraging, predatory pricing, margin squeezes, foreclosure of competitors through product pricing strategies, and even excessive pricing.”⁴⁰

II. COMPETITION AND ANTITRUST LAW ENFORCEMENT REFORM ACT

CALERA, introduced by Senator Amy Klobuchar in 2021, proposes sweeping reforms to federal antitrust law, aimed in part to combat and prevent the formation of monopolies through merger enforcement.⁴¹ These federal reforms may be necessary to revitalize Section 2 as an effective enforcement tool, which has been a clear focus of the United States Department of Justice (“DOJ”) in recent years.⁴²

Among the changes proposed by CALERA are lowering the threshold for finding mergers unlawful, shifting the burden of proof onto merging parties to prove that a transaction would not materially harm competition, and, like S933A, removing the requirement that a plaintiff define a relevant market to establish an antitrust case.⁴³ The portions of the bill most impactful on single-firm conduct are (a) the removal of certain requirements to allege monopolization and (b) the European-inspired “appreciable risk” standard for approval of mergers.⁴⁴

A. REMOVAL OF COURT-CREATED HURDLES TO PLEADING MONOPOLIZATION

CALERA proposes to remove several court-created hurdles to alleging specific types of monopolization claims. Significantly, CALERA removes the requirement that a plaintiff alleging an exclusionary refusal to deal show that the “defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct”—a requirement defendants have relied on to dismiss cases predicated on exclusionary refusals to deal.⁴⁵ The bill would similarly remove the requirement in predatory pricing cases to show (1) differential treatment in cases of exclusionary conduct, (2) that a defendant with significant market power is likely to recoup losses from below-cost pricing, (3) evidence of below-cost pricing, and (4) that the conduct in question makes no economic sense other than to harm competition.⁴⁶ Removing these court-created hurdles would fundamentally alter requirements for bringing several monopolization claims under federal law, and would remove significant barriers that currently exist for those prosecuting single-firm anticompetitive conduct.

Critics of CALERA have raised concerns that removing such requirements will allow a broad range of frivolous lawsuits that will chill procompetitive conduct and innovation in the market.⁴⁷ Critics further argue that CALERA will directly undermine and conflict with federal judicial precedent under the Sherman Act.⁴⁸

Proponents of this bill urge instead that it is a necessary reform in the face of overly liberal Supreme Court precedent that has permitted anticompetitive conduct and consolidation of market power.⁴⁹ Senator Klobuchar remarked that the bill “send[s] courts a message about Congress’s view of . . . the legislative history of landmark antitrust laws.”⁵⁰ The removal of these hurdles would lower the burden to bring claims against monopolists for small business plaintiffs.

B. “APPRECIABLE RISK” STANDARD FOR MERGERS

Much like S933A, CALERA looks to European law for guidance on proposed antitrust reforms. In particular, CALERA would amend Section 7 of the Clayton Act to prevent any merger that “may . . . create an appreciable risk of materially lessening competition or tend to create a monopoly.”⁵¹ Article 102 is the clear precedent here, as it has a similar standard of assessing allegedly anticompetitive conduct by reference to whether the conduct is “capable of restricting competition.”⁵² As such, CALERA and Article 102 punish the mere *possibility* of harm to competition rather than actual harm, thus introducing a relatively low bar to lawsuits against alleged monopolists.⁵³ The CALERA reform is explicitly intended to establish a “structural presumption” that mergers that have an “appreciable risk” of harming competition are “a single firm controlling an outsized market share . . . presumptively prohibited under Section 7 of the Clayton Act.”⁵⁴

Critics argue that the European standard is too punitive for mergers and would stifle innovation. Consumer welfare can be supported when large technology companies buy small startups and their products because those small companies are simply too limited to grow their products. Thus, critics contend that the broad “appreciable risk” standard could capture even procompetitive benefits in its grasp.⁵⁵ Supporters, however, claim that the U.S. antitrust law “has lagged [behind] efforts [of] other developed countries, particularly when it comes to enforcement against the dominant digital platforms and other large corporations,” and that the goal of the new merger standard is to stop single-firm monopolies in their inception.⁵⁶

III. CALIFORNIA LAW REVISION CONSIDERATIONS

The CLRC was authorized by the California Legislature to study whether the Cartwright Act should be revised to prohibit exclusionary single-firm conduct, like Section 2 of the Sherman Act

and as proposed in S933A and CALERA.⁵⁷ At the outset, it is important to note that the intent of these changes is to lessen the burden on plaintiffs and government enforcers, and increase enforcement against monopolies.⁵⁸ The challenge will be to find an appropriately balanced law that is neither over-protective, such that it deters procompetitive conduct, nor too weak, such that it enables anticompetitive conduct. This Section will review in greater detail how S933A and CALERA could impact businesses and consumers, which may help inform the California Legislature.

A. THE EXPRESS-VIOLATION STANDARD OF THE TWENTY-FIRST CENTURY ANTITRUST ACT

As discussed in Section I(a), S933A proposed in New York would introduce an express violation against exclusionary single-firm monopoly conduct that mirrors the language of Section 2 of the Sherman Act.⁵⁹ Thus, this portion of the proposed New York law would match federal law. The reaction to this proposed change has been largely positive, and the New York City Bar has formally approved the addition “to the extent that it tracks Section 2 of the Sherman Act.”⁶⁰ Several small-business associations in the state also support the addition of the express violation language, noting that “[a]nticompetitive conduct is often perpetrated by a single corporation But under the current law, the state can only punish conspiracies between multiple companies.”⁶¹

However, because the proposed language in S933A so closely tracks the language of Section 2 of the Sherman Act, it means that the proposed law may be critiqued for having the same perceived shortcomings as Section 2 of the Sherman Act.⁶² In particular, Section 2 has been criticized for being too weak, “unequipped to capture the architecture of market power in the modern economy,” and allowing the rise of “big tech” and other de facto monopolies.⁶³ Additionally, a series of Supreme Court decisions on Section 2, including *Trinko* and *Brooke Group*, have been criticized for weakening the standard for Section 2 and enabling anticompetitive conduct. Thus, given the large presence of

technology companies in California, the CLRC should carefully consider whether it benefits competition in California to adopt revisions to the Cartwright Act that simply mirror Sherman Act Section 2 and go no further.

B. THE ABUSE-OF-DOMINANCE STANDARD OF THE TWENTY-FIRST CENTURY ANTITRUST ACT

To address concerns regarding the weaknesses of Section 2 of the Sherman Act, and the similarly worded express violation standard in S933A, the drafters of S933A have introduced the abuse-of-dominance standard.⁶⁴ If approved, S933A will prohibit more extensive single-firm conduct than the Sherman Act does. This includes conduct that the Supreme Court has treated permissively under the Sherman Act, such as predatory pricing that does not meet the high bar established by the Supreme Court.⁶⁵ Further, S933A prohibits “refusing to deal with another person with the effect of unnecessarily excluding or handicapping actual or potential competitors” under its abuse-of-dominance standard.⁶⁶ This has been interpreted by the New York City Bar as an “extreme” version of the essential-facilities doctrine, which prohibits a monopolist’s abuse of its position under limited circumstances if it owns an essential facility with no reasonable alternative and refuses to offer access to the facility.⁶⁷ Thus, the abuse-of-dominance provision “may impose a far more stringent standard of conduct for a non-monopolist than the standard federal antitrust law imposes for even an actual monopolist.”⁶⁸

Given the novelty of this provision in the United States, it has unsurprisingly attracted a great deal of debate. Proponents of the abuse-of-dominance standard argue that it is needed to reach harmful conduct that the Sherman Act typically does not, such as predatory pricing and margin squeezes.⁶⁹ Some coalitions of small businesses have argued that current antitrust laws have allowed large monopolistic corporations to dominate product markets and harm labor markets.⁷⁰ For example, some proponents of the provision argue that “corporations exercising monopsony [] power over

markets, including labor markets, can [suppress wages] at much lower levels of concentration than current antitrust precedent takes into consideration.”⁷¹ S933A, in contrast, clearly defines a threshold market share that constitutes abusive, dominant power in the market.⁷² Proponents contend that the abuse-of-dominance standard will only impact businesses with a substantial position in the market (30% or higher) while offering much-needed protection to small competitors.⁷³ Small Business Rising, a coalition of 30 small businesses in New York, submitted a letter in support of Section 2(b), indicating that it enables the New York Attorney General and small businesses to bring lawsuits against larger businesses without needing “expensive economists and lawyers Instead, a dominant firm’s wrongful conduct . . . will be enough to . . . expose them to punishment for their illegal monopolization.”⁷⁴

On the other hand, critics argue that the abuse-of-dominance standard is so broad it may prohibit procompetitive behavior or stifle innovation by small businesses. According to these critics, many standard, procompetitive business practices exercised by large firms, like price discounting, would be treated as *per se* violations under the proposed rules, undermining federal law.⁷⁵ Critics have argued that under the proposed language of the abuse-of-dominance standard, procompetitive single-firm conduct, such as offering market incentives like discounted prices, could be criminalized if the firm holds over 30% of the market.⁷⁶ Some critics further argue that innovation may also be punished under the abuse-of-dominance standard if “[a]ny business that creates a new product could be targeted because they are the ‘first’ and ‘only’ ones to do so.”⁷⁷ Lawsuits could be lodged against small, innovative businesses within strong local markets.⁷⁸

It is worth noting that the New York City Bar (“City Bar”), which endorsed the express-violation standard of S933A, recommended that the abuse-of-dominance provisions be “stricken in their entirety.” The City Bar voiced concerns that the abuse-of-dominance position differs too substantially from existing federal law and precedent and will

be confusing to enforce.⁷⁹ In particular, the City Bar took issue with the proposed language that “evidence of pro-competitive effects shall not be a defense to abuse of dominance.”⁸⁰ This conflicts with federal antitrust law, which treats only extreme anticompetitive conduct, like price-fixing, as *per se* unlawful.⁸¹ Critics additionally argue that removing consideration of procompetitive effects may actually protect competitors rather than innovators or consumers.⁸² While the City Bar recommended that the abuse-of-dominance standard be dropped in its entirety, it suggested that if included, “language [should be] added to clarify that the intent is to protect competition, not competitors, and not to regulate prices,” as well as “to make clear that abuse of dominant position is a lesser offense than monopolization.”⁸³

Taking cues from the City Bar, the CLRC may consider providing clear definitions for what constitutes “abuse” and “dominant position” to avoid penalizing procompetitive business practices to ensure that such definitions are more targeted to address “big tech” conduct concerns. For example, the CLRC might require at least a 50% market share to support monopolistic behavior. S933A has dropped the requirement that plaintiffs define the market, which could allow assertions of market dominance in artificially narrow markets. However, even under federal law, it is worth noting that some courts do not require the definition of a relevant market in monopolization cases where there are direct anticompetitive effects observable in a market, such as reduced output, higher prices, or decreased quality.⁸⁴ Thus, consistent with federal law, the CLRC may consider *not* requiring market definition where there is evidence of direct effects caused by anticompetitive conduct. Given the critiques of the abuse-of-dominance standard for vagueness, if adopted, the CLRC could reserve clearly defined powers for the California Attorney General to issue rules to enforce the standard as case law develops. Such rules could further be subject to bipartisan committee oversight.

The CLRC should also note that S933A allows for the recovery of treble damages and for plaintiffs

and the attorney general to recover fees and costs.⁸⁵ The absence of such provisions deters plaintiffs from bringing claims if they cannot bear the costs, which can be in the millions of dollars for economists alone over the several years a monopoly lawsuit may span. The CLRC should consider the effect these damages and fee-shifting provisions could have on enforcement.

C. REMOVAL OF PLEADING REQUIREMENTS TO ALLEGE MONOPOLIZATION UNDER CALERA

CALERA seeks to lessen the burden on plaintiffs bringing lawsuits against monopolies by removing several court-created prerequisites for certain claims, such as showing that a prior course of conduct was terminated in unilateral refusal-to-deal cases or proving a probability of recoupment in predatory-pricing cases. Removing these elements from monopoly claims would diverge from Supreme Court jurisprudence. For example, the *Brooke Group* decision held that predatory pricing does not violate the law unless the below-cost pricing may be recouped by a monopolist later in time—a requirement that CALERA now specifically removes.⁸⁶ Critics of CALERA argue that removing these prerequisites will chill procompetitive conduct in the market, including the technology sector, which is “dynamic” and needs flexibility to support innovation and mergers.⁸⁷ Critics contend that without these court-created requirements, “proving innocence can be impossible even when the defendants are in the right,” causing critics to claim that many procompetitive businesses will be liable under CALERA for harmless actions.⁸⁸ Proponents of this bill argue that Supreme Court precedent has been far too lenient on monopolistic conduct and that the legislation is a necessary reform.⁸⁹ Proponents argue that the removal of court-created requirements is the removal of “tools [that] are often manipulated by defendants [] who can adjust their business arrangements so as to limit their exposure from liability . . . [and] these tools supply courts with pretexts for disposing of cases they dislike.”⁹⁰

Given the strong presence of technology companies of all sizes in California, the CLRC should think

carefully about the effect that removing court-created prerequisites will have on rapidly innovating technology markets. It may make it harder for large companies to defend themselves against antitrust suits, to the benefit of smaller companies.

D. THE APPRECIABLE-RISK STANDARD UNDER CALERA

One of the most significant changes proposed by CALERA is the introduction of the appreciable-risk standard. This approach of prohibiting mergers that create “an appreciable risk of lessening competition” arguably offers a more stringent standard than the Clayton Act, which prohibits mergers that may “substantially lessen” competition.

However, the language has been criticized as being “confusing and garbled,” and for potentially leading to large numbers of frivolous suits blocking procompetitive combinations.⁹¹ The vagueness of the language may cause federal agencies to expend significant time and money on lawsuits to clarify the meaning of this standard in court. Supporters have argued that the appreciable-risk standard in CALERA would overturn federal precedent that has limited antitrust liability.⁹² Members of Congress, however, have spoken out in opposition to changing any standard for mergers under CALERA, arguing instead that existing laws are adequate but that enforcement agencies need more resources to uphold current standards.⁹³ Thus, if the CLRC adopts an appreciable-risk standard, it may consider adding more-detailed definitions of what constitutes an “appreciable” risk.

IV. CONCLUSION

As the significant proposals captured in S933A and CALERA demonstrate, momentum has grown in favor of updating antitrust laws in the United States. As our economy changes rapidly and becomes increasingly digitalized, state and federal governments are taking notice and calling for changes to existing legislation. The CLRC has an opportunity to lead this conversation by updating the Cartwright Act and must think carefully about

whether and to what extent it wants to diverge from existing standards into novel, but perhaps justified, revisions to the antitrust laws.

1. Susannah Torpey serves as a litigation partner in the Winston & Strawn LLP New York office and is co-chair of the firm's Technology Antitrust Group; she has nearly 20 years of experience in representing Fortune 500 companies in complex antitrust class actions, international investigations, and high-tech competitor litigations. Brandon Annette is a senior associate in the Winston & Strawn LLP Los Angeles office who focuses his practice on antitrust and complex commercial litigation matters. Quinlan Cummings is a junior associate in the Winston & Strawn LLP New York office who focuses her practice on antitrust matters.
2. See Cal. Bus. & Prof. Code § 16720; 15 U.S.C. § 1.
3. 15 U.S.C. § 2.
4. See Cal. Bus. & Prof. Code § 16720.
5. See generally Gordon M. Cowan, *California's Single-Firm Monopoly Loophole*, 18 CAL W. L. REV. 240 (1982).
6. See *Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vt.*, 845 F.2d 404, 407–09 (2d Cir. 1988), *aff'd*, 492 U.S. 257 (1989).
7. *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); see also *Walker Process Equip., Inc. v. Food Mach. Corp.*, 382 U.S. 172, 175–78 (1965) (finding illegal enforcement of a fraudulently obtained patent by a single firm).
8. See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 457 F. Supp. 404, 419 (S.D.N.Y. 1978), *rev'd*, 603 F.2d 263 (2d Cir. 1979).
9. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608–11 (1985).
10. See Cowan, *supra* note 5, at 240–43.
11. *The Twenty-First Century Antitrust Act (S.8700-A)*, Hearing on S.8700-A Before the S. Standing Comm. on Consumer Protection of the Leg. of the State of N.Y., 2019–2020 Reg. Sess. (N.Y. 2020) (written testimony of Jay L. Himes) [hereinafter Himes testimony], https://www.nysenate.gov/sites/default/files/jay_himes_written_testimony.pdf (raising concerns that there had not been a significant DOJ lawsuit under Section 2 since *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001)).
12. See N.Y. State Assem., *New York State Assembly Bill Tracker: S933A*, https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=S00933&term=2021&Summary=Y&Actions=Y (last visited July 10, 2023) (showing that S933A passed the NY Senate and was delivered to Assembly on May 25, 2022).
13. See Himes Testimony, *supra* note 11, at 3.
14. See S933A, 2021–2022 Reg. Sess. § 2(a)–(b) (N.Y. 2021).
15. See N.Y. City Bar, *Report on Legislation by the Antitrust and Trade Regulation Committee* (June 2022), <https://www.nysenate.gov/legislation/bills/2021/A1812> (“The legislature further finds and declares that unilateral actions which seek to create a monopoly or monopsony are as harmful as contracts or agreements of multiple parties to do the same and should be treated similarly under the law.”).
16. See *id.* (“The City Bar notes that there has been extensive debate about the appropriate contours of competition law provisions relating to single-firm conduct . . . [and] there has been much debate about the wisdom of the U.S. Supreme Court’s application of Sherman Act § 2.”); Himes Testimony, *supra* note 11, at 10.
17. Himes Testimony, *supra* note 11, at 10; *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001).
18. See S933A, 2021–2022 Reg. Sess. § 2(b).
19. Himes Testimony, *supra* note 11, at 2–4, 10.
20. See *id.* at 2.
21. See *id.*; Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2012 O.J. (C 326) at 89 (formerly Article 82 TEC).
22. Perry Lange et al., *Developments in Antitrust Law: Keep an Eye on New York*, Program on Compliance and Enforcement (Mar. 16, 2021), https://wp.nyu.edu/compliance_enforcement/2021/03/16/developments-in-antitrust-law-keep-an-eye-on-new-york/#_ftn22.
23. *Id.*
24. See S933A, 2021–2022 Reg. Sess. § 2(b).
25. *Id.* at § (2)(b)(i)(3).
26. *Id.* at § (2)(b)(i)(2).
27. Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2012 O.J. (C 326) at 89 (including examples such as direct or indirect

- imposition of unfair prices or trading conditions; limiting production, markets, or technical development to the prejudice of consumers; and unequal treatment of similar competitors).
28. Eur. Comm'n, *Procedures in Article 102 Investigations*, https://competition-policy.ec.europa.eu/antitrust/procedures/article-102-investigations_en (last visited July 11, 2023).
 29. S933A, 2021–2022 Reg. Sess. § (2)(b)(i)(2).
 30. See *United States v. U.S. Steel Corp.*, 251 U.S. 417, 444 (1920).
 31. See S933A, 2021–2022 Reg. Sess. § (2)(c)(iii) (“Attorney general shall issue guidance on how it will interpret market shares and other relevant market conditions to achieve the purposes of paragraph (b) of this subdivision while taking into account the important role of small and medium-sized businesses in the state’s economy”).
 32. *Id.* at § (2)(c)(ii).
 33. See Lange et al., *supra* note 22.
 34. *The Twenty-First Century Antitrust Act (S.8700):Hearing Before the N.Y. State Standing Comm. on Consumer Prot.*, 2019–2020 Reg. Sess. (N.Y. 2020) (oral testimony of Ken Polansky and Lev Ginsburg) [hereinafter Pokanlsky & Ginsburg Statement], <https://www.bcnys.org/news/testimony-new-york-state-senate-standing-committee-consumer-protection-twenty-first-century>; TechNet, *Memorandum in Opposition Re: S8700, submitted to the State Standing Committee on Consumer Protection of the Legislature of the State of New York on The Twenty-First Century Antitrust Act (S.8700-A)* (Sept. 14, 2020), https://www.nysenate.gov/sites/default/files/technet_memo_in_opp.pdf (claiming the new abuse-of-dominance standard could have a chilling effect on emerging technology markets).
 35. Polansky & Ginsburg Statement, *supra* note 34, at 3.
 36. *Id.*
 37. See Himes Testimony, *supra* note 11, at 5 (“European enforcers and private litigants have ‘a more flexible tool than the Sherman Act to deal with the new problems posed by high tech/big data,’ as well as those posed by dominant firms operating in the ‘brick and mortar’ economy. The United States has fallen behind Europe and other parts of the world in responding to single-firm conduct that significantly restricts effective competition.”) (quoting Eleanor Fox, *Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide*, 98 NEB. L. REV. 297, 305–06 (2019)).
 38. See Himes Testimony, *supra* note 11, at 9; see also *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283–84 (6th Cir. 1898) (warning that the “relaxation of the rules for determining the unreasonableness of restraints of trade [would cause antitrust laws to] set sail on a sea of doubt”); U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), <https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf> (“Competition and consumers are best served if section 2 standards are sound, clear, objective, effective, and administrable. After more than a century of evolution, section 2 standards have not entirely achieved these goals, and there has been a vigorous debate about the proper standards for evaluating unilateral conduct under section 2.”).
 39. See Himes Testimony, *supra* note 11, at 9–12 (Sept. 14, 2020).
 40. *Id.* at 4.
 41. Press Release, *Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement* (Feb. 4, 2021) [hereinafter Klobuchar Press Release], <https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement>; see also STAFF OF S. COMM. ON ANTITRUST, COM., AND ADMIN. LAW OF THE COMM. ON THE JUDICIARY, H.R. 117th CONG., INVESTIGATION OF DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS, 390–93 (2020) [hereinafter House Judiciary Committee Report], https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.
 42. Jonathan Kanter, Assistant Attorney Gen., Dep’t of Justice, Antitrust Div., *Keynote at the University of Chicago Stigler Center* (Apr. 21, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler> (claiming “Section 2 was very near death” merely five years ago, with “no significant cases in nearly twenty years,” and promising to “vigorously enforce Section 2”); Michael Acton, *US DOJ stands ready to bring criminal charges in Section 2 monopolization cases*, Powers says, MLEX (Mar. 2, 2022), <https://content.mlex.com/#/content/1363181> (detailing comments from the Deputy Assistant Attorney General for Criminal Enforcement that “market concentration and consolidation is not only a civil antitrust issue,” and that if “a criminal charge

based on a Section 2 violation is warranted, then that's what we'll do").

43. See Competition and Antitrust Law Enforcement Reform Act (CALERA) of 2021, S. 225, 117th Cong. § (2)(b)(2)–(4)(b)(3) (2021).
44. *Id.*
45. *Id.* at § (26)(a)(e)(1); see, e.g., *In re Adderall XR Antitrust Litig.*, 754 F.3d 128, 135 (2d Cir. 2014) (dismissing a refusal-to-deal claim where the defendant “did not terminate any prior course of dealing—let alone a ‘presumably profitable one’”) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)).
46. CALERA, S. 225, 117th Cong. § (26)(a)(e)(1)–(6).
47. See, e.g., Samuel Bowman et al., *The Competition and Antitrust Law Enforcement Reform Act*, INT’L CNTR. L. & ECON.: TL; DR (Feb. 2021), <https://laweconcenter.org/resources/tldr-the-competition-and-antitrust-law-enforcement-reform-act/>; U.S. Chamber of Comm., *Competition & Antitrust Law Enforcement Reform Act (CALERA) Exclusionary Conduct*, https://www.uschamber.com/assets/archived/images/calera_u.s._chamber_analysis_-_exclusionary_conduct_-_final_.pdf (last visited July 10, 2023) (“But changes to antitrust law that would expand enforcement beyond the consumer welfare standard or create short-cuts to rule of reason analysis would harm consumers, our economy, incentives to innovate, and our global competitiveness.”).
48. See, e.g., Samuel Bowman et al., *supra* note 47 (“The bill would also explicitly overturn several cases that undermine much of modern antitrust. For example, it would throw out the Supreme Court’s *Brooke Group* decision, which holds that below-cost “predatory” pricing doesn’t harm consumers unless it’s likely it can be recouped by the exercise of monopoly power.”).
49. Eric A. Posner, *Senator Klobuchar’s Bill Doesn’t Go Far Enough*, PROMARKET (Mar. 22, 2021), <https://www.promarket.org/2021/03/22/senator-klobuchars-antitrust-bill-doesnt-go-far-enough/>.
50. Opinion, *Want to Reform Antitrust? Amy Klobuchar Knows Where to Start.*, WASH. POST (Feb. 8, 2021), https://www.washingtonpost.com/opinions/want-to-reform-antitrust-amy-klobuchar-knows-where-to-start/2021/02/08/49131606-6a4e-11eb-ba56-d7e2c8defa31_story.html.
51. CALERA, S. 225, 117th Cong. § 13(b) (2021).
52. See *Intel Corp Inc. v. European Commission* (C-413/14 P); *Generics (UK) Ltd v. CMA*, ECLI:EU:C:2020:52 144–72.
53. See Joseph Coniglio, *All Things Are Possible with Antitrust—CALERA, Capability Standards, and Looking to Europe to Reinvigorate U.S. Antitrust Enforcement*, COMPETITION POL’Y INT’L: NORTH AM. COLUMN (Apr. 4, 2021), <https://www.competitionpolicyinternational.com/all-things-are-possible-with-antitrust-calera-capability-standards-and-looking-to-europe-to-reinvigorate-u-s-antitrust-enforcement/> (last visited July 11, 2023); Elisabeth Bogomoloni, *Tackling Big Tech in the United States and the European Union—A Comparison of the DMA and the CALERA*, 54 NYU J. L. INT’L POL. 235, 243–45 (2022) (comparing the similar approaches of EU legislation and CALERA in “tackling big tech,” including “presumptions and burden shifting, the reduction of the importance of a specific market definition in the digital economy, and the strengthening of antitrust enforcement agencies in terms of increased mandate and finances”).
54. House Judiciary Committee Report, *supra* note 41, at 332–33.
55. See U.S. Chamber of Comm., *Competition & Antitrust Law Enforcement Reform Act (CALERA) Exclusionary Conduct*, https://www.uschamber.com/assets/archived/images/calera_u.s._chamber_analysis_-_exclusionary_conduct_-_final_.pdf (last visited July 10, 2023) (“Accordingly, CALERA leaves in scope a wide range of conduct that might adversely impact a competitor, even where it arguably has procompetitive justifications. CALERA’s aim is clearly to discredit and avoid consideration of procompetitive benefits that may arise from conduct that excludes competition.”).
56. Klobuchar Press Release, *supra* note 41.
57. Cal. Law Revision Comm’n, *Antitrust Law—Study B-750*, <http://www.clrc.ca.gov/B750.html> (last visited July 10, 2023).
58. See generally Cal. Law Revision Comm’n, *Memorandum 2022-50 Antitrust Law: Introduction of Study* (Nov. 3, 2022), <http://www.clrc.ca.gov/pub/2022/MM22-50.pdf> (last visited July 10, 2023).
59. See S933A, 2021–2022 Reg. Sess. § 2(a)–(b) (N.Y. 2021).
60. N.Y. City Bar, *supra* note 15, at 2 (“[T]he City Bar recommends that to ensure the Bill tracks Section 2 of the Sherman Act, the words ‘any business’ and ‘or the furnishing of any service’ be stricken from the Bill.”).
61. See New Yorkers for a Fair Econ., *Why the 21st Century Antitrust Act is Critical for New York Small Business* (May 2022), <http://www.economicliberties.us/wp-content/uploads/2022/05/NYFE-Paper-3.pdf>; see also Small

- Business Rising, *Memorandum in Support of the Twenty-First Century Antitrust Act* (May 9, 2022), <https://www.smallbusinessrising.net/updates/small-business-groups-urge-new-york-assembly-to-pass-the-21st-century-antitrust-act>.
62. See, e.g., Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710 (2017); Himes Testimony, *supra* note 11, at 9–12.
 63. Khan, *supra* note 62, at 710.
 64. See Himes Testimony, *supra* note 11, at 5–8.
 65. See *id.* at 4 (“An abuse of dominance approach therefore is capable of prohibiting single-firm conduct that is largely beyond the coverage of U.S. antitrust law—such as monopoly leveraging, predatory pricing, margin squeezes, foreclosure of competitors through product pricing strategies, and even excessive pricing”); see generally *Brooke Group Ltd. v. Brown Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (ruling against predatory pricing claims, and requiring that plaintiff show defendant had a reasonable chance of recouping below-cost price).
 66. S933A, 2021–2022 Reg. Sess. § 340 (2)(b)(ii) (N.Y. 2021).
 67. N.Y. City Bar, *supra* note 15, at 5.
 68. *Id.*
 69. See Himes Testimony, *supra* note 11, at 5–8; New Yorkers for a Fair Econ., *Why the 21st Century Antitrust Act is Critical for New York Small Business* (May 2022), <http://www.economicliberties.us/wpcontent/uploads/2022/05/NYFE-Paper-3.pdf>.
 70. See New Yorkers for a Fair Econ., *Memorandum in Support New York's "Twenty-First Century Antitrust Act" S933A (Gianaris) A1812A (Dinowitz)* (May 6, 2022), <https://alignny.org/resource/memorandum-in-support-new-yorks-twenty-first-century-antitrust-act/>.
 71. *Id.* (“For decades, courts have undermined antitrust laws by re- and mis-interpreting them, making it too difficult to hold corporations accountable when they abuse their market power.”).
 72. *Id.* (“The thresholds defining dominance are a key feature of the [S9330], aiming to hold the largest corporations accountable for their anti-competitive behaviors, not small or medium-sized firms.”).
 73. See Himes Testimony, *supra* note 11, at 5–8.
 74. Small Business Rising, *Memorandum in Support of the Twenty-First Century Antitrust Act* (May 9, 2022), <https://www.smallbusinessrising.net/updates/small-business-groups-urge-new-york-assembly-to-pass-the-21st-century-antitrust-act>; see also Press Release, Am. Econ. Liberties Project, *Economic Liberties Applauds Senate Committee Passage of NY Antitrust Reform Act* (Jan. 12, 202), <https://www.economicliberties.us/press-release/economic-liberties-applauds-senate-committee-passage-of-ny-antitrust-reform/> (“The 21st Century Antitrust Act is a vital piece of legislation that will help New York address decades of corporate consolidation, empowering the state to protect workers and small businesses from the abusive practices of dominant corporations.”).
 75. See Lipskey et al., *Comment to the New York Senate Committee on Consumer Protection in Connection with Its Pending Consideration of the Twenty-First Century Antitrust Act (S.933)*, George Mason L. & Econ. Research Paper No. 21-12, 7 (June 4, 2021) (“It thereby creates a substantial likelihood of imposing excessive costs of administration and compliance and threatens to discourage the very type of competitive conduct that should be encouraged under antitrust standards.”)
 76. See Ashley Ranslow, Opinion, *Commentary: This legislation would hurt New York's small businesses*, TIMES UNION (Apr. 25, 2022), <https://www.timesunion.com/opinion/article/Commentary-This-legislation-would-hurt-New-17123520.php>.
 77. See *id.*; Greater Binghamton Chamber of Com., *Memorandum in Opposition to the 21st Century Antitrust Act* (2022), <https://greaterbinghamtonchamber.com/memo-in-opposition-to-a-1812a-dinowitz-s-933a-gianaris-21st-century-antitrust-act.pdf>.
 78. Greater Binghamton Chamber of Com., *supra* note 77.
 79. New York City Bar, *supra* note 15, at 2–3.
 80. *Id.*
 81. *Id.* at 5.
 82. *Id.*
 83. *Id.* at 5–6.
 84. See, e.g., *Broadcom v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007); Daniel A. Crane, *Market Power Without Market Definition*, NOTRE DAME L. REV. 90, 31 (2014).
 85. See S933A, 2021–2022 Reg. Sess. § 342-d (N.Y. 2021).
 86. See generally *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

87. Jennifer Huddleston, *Implications of the Competition and Antitrust Law Enforcement Reform Act*, AMERICAN ACTION FORUM (Feb. 10, 2021), <https://www.americanactionforum.org/insight/implications-of-the-competition-and-antitrust-law-enforcement-reform-act/>.
88. See Bowman et al., *supra* note 47; U.S. Chamber of Comm., *Competition & Antitrust Law Enforcement Reform Act (CALERA) Exclusionary Conduct*, https://www.uschamber.com/assets/archived/images/calera_u.s._chamber_analysis_-_exclusionary_conduct_-_final_.pdf (last visited July 10, 2023).
89. See, e.g., Posner, *supra* note 49.
90. *Id.*
91. See U.S. Chamber of Comm., *Competition & Antitrust Law Enforcement Reform Act (CALERA) Exclusionary Conduct*, https://www.uschamber.com/assets/archived/images/calera_u.s._chamber_analysis_-_exclusionary_conduct_-_final_.pdf (last visited July 10, 2023).
92. See Posner *supra* note 49.
93. See Opinion, *Want to Reform Antitrust? Amy Klobuchar Knows Where to Start.*, WASH. POST (Feb. 8, 2021), https://www.washingtonpost.com/opinions/want-to-reform-antitrust-amy-klobuchar-knows-where-to-start/2021/02/08/49131606-6a4e-11eb-ba56-d7e2c8defa31_story.html.