

SECRETARIAT SPRING 2026

# ECONOMISTS INK

## THE **CLASS ACTION** IMPLICATIONS OF

# **AI-DRIVEN DECISIONS**

Competition and  
Market Structure of the  
U.S. Cannabis Industry

NIL, Revenue-Sharing,  
and the NCAA's Growing  
Antitrust Vulnerability

The Economics of Remedies  
to Restore Competition in  
*Epic v. Google*

Greetings from Secretariat and welcome to the first 2026 issue of *Economists Ink*. Whether you are an economist, attorney, or simply interested in ideas at the intersection of law and economics, we are glad you found us. This publication includes insights from leading economists about recent developments in law and economics that may significantly impact the field.

This issue explores recent topics in the economics of AI-based discrimination, antitrust remedies in Big Tech, market definition in the cannabis industry, and the evolving antitrust allegations in college athletics.

In the first article, Drs. Stuart Gurrea and Nicolas Suarez explore how economists may approach class-action litigation claims of discrimination involving AI-driven hiring and selection tools. They evaluate the circumstances under which such algorithmic systems might not form a common policy sufficient to support class certification and consider the implications for future AI-related class-wide litigation.

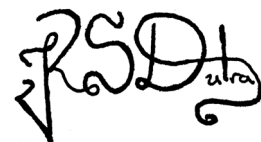
In the second article, Dr. Stephanie Khoury examines the proposed settlement in *Epic v. Google*, which includes revisions to the court-ordered injunction intended to open the Android app ecosystem to meaningful competition. The article highlights judicial and third-party concerns that the proposed changes may fall short of providing an adequate remedy and underscores the importance of market-wide economic considerations in shaping effective relief.

In the third article, Dr. Jéssica Dutra analyzes the evolving competitive landscape of the U.S. cannabis industry as more states adopt cannabis laws. She discusses how federal prohibition under the Controlled Substances Act (CSA) alongside state-specific regulatory frameworks have produced fragmented markets with localized supply chains without interstate commerce. She also considers the implications for competition policy, including market concentration and geographic market definition in retail cannabis markets.

Finally, Dr. Kira Stearns examines how prior NIL and revenue sharing settlements in college athletics may have shaped economic incentives contributing to the recent increase in antitrust allegations against the NCAA.

We hope you find the articles and news featured in this issue insightful. You can stay up to date on the latest from Secretariat's economists by following us on LinkedIn.

Best,



Jéssica Dutra, Director



Kira Stearns, Director

# ECONOMISTS INK

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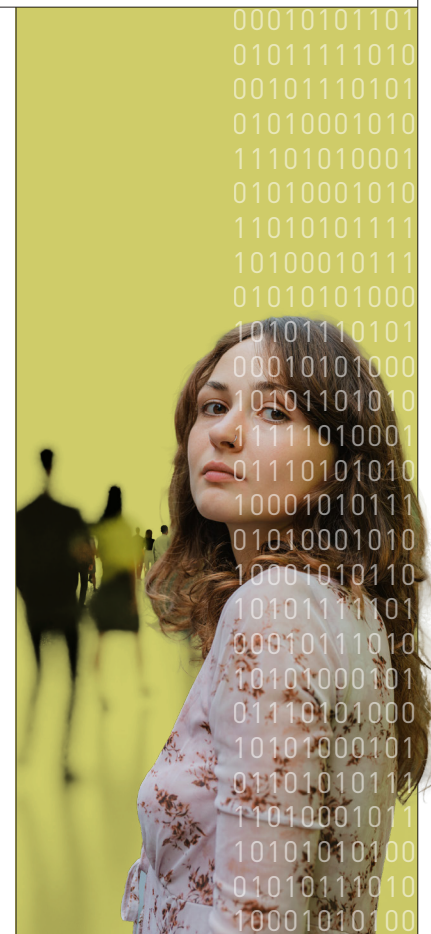
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# NEWS & NOTES

## Secretariat Supports NRG Acquisition from LS Power



On January 30, 2026, NRG completed its acquisition from LS Power of 18 natural-gas-fired generation facilities totaling about 13 GW and CPower, a 6 GW virtual power plant platform. A Secretariat team led by Managing Director **John Morris** provided competition analyses for NRG supporting the transaction.

Dr. Morris authored affidavits filed before the Federal Energy Regulatory Commission and the New York Public Service Commission, which approved the transaction on November 14 and November 17, 2025, respectively. The Secretariat team also consulted with NRG on the Hart-Scott-Rodino investigation before the U.S. Department of Justice, which closed its HSR investigation on January 23, 2026.

Dr. Morris was supported by Managing Director Su Sun and Directors Jeffrey Opgrand, William Schwartz, and Wei Tan. Outside counsel for NRG included Bracewell, McDermott Will & Schulte, Read & Laniado. For LS Power included Milbank, Willkie Farr & Gallagher, McDermott Will & Schulte, and Greenberg Traurig.

## Secretariat Active Across the Spring Antitrust Calendar

**S**ecretariat's teams maintained an active presence across the spring antitrust calendar, hosting an evening reception at Centrolina in Washington, D.C., on March 24, 2026, alongside the ABA Antitrust Spring Meeting.

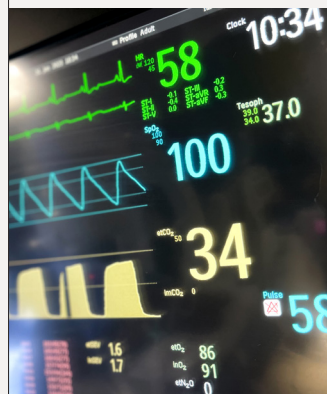
The reception welcomed clients, colleagues, and competition professionals as delegates convened for what is widely regarded as **Antitrust Week**. Secretariat's engagement continued with its sponsorship of the 15th Annual Antitrust Division Alumni Cocktail Party, held March 25 at Del Frisco's and hosted by the Department of Justice Antitrust Division-Criminal Enforcement Alumni in conjunction with Hogan Lovells LLP, Latham & Watkins LLP, Baker McKenzie LLP, Simpson Thacher & Bartlett LLP, Linklaters LLP and Crowell & Moring LLP. Secretariat also sponsored the 24th Annual International Industrial Organization Conference (IIOC) on April 10-12, 2026.



## Landmark Earnout Ruling in J&J-Auris Health Dispute

A Secretariat expert team, led by Managing Director **Richard Manning**, provided significant damages calculations and expert testimony in a landmark earnout dispute arising from **Johnson & Johnson's (J&J)** alleged breach of its merger agreement with **Auris Health, Inc.**

The team's work played a vital role in the Delaware Court of Chancery's precedent-setting decision that delivered a nearly \$811 million award to Auris' former stockholders—marking the largest earnout award in Delaware history. Retained by Selendy Gay PLLC on behalf of Auris (represented by Fortis Advisors), Dr. Manning provided expert testimony and presented a damages analysis that the Chancery Court adopted in rendering its decision following a ten-day trial in September 2024. In January 2026, the Delaware Supreme Court affirmed the lower court's findings as to breach of contract and fraud, and upheld the Court's damages methodology.



Upon remand, the Chancery Court entered a final stipulated judgment of nearly \$811 million. The Secretariat team working on the engagement with Dr. Manning included Managing Director Richard Brady, Director Kira Stearns, and Manager Jacob Miller.

## Kyle Kost Explores Forces Behind Stock Volatility

**W**hen it comes to explaining stock market volatility, the story is rarely straightforward. Director **Kyle Kost** has co-authored a recent article, "Policy News and Stock Market Volatility", published in the *Journal of Financial Economics*, which examines the complex drivers behind fluctuations in equity markets.

Dr. Kost and his coauthors revisit Robert Shiller's 1981 finding that stock market movements cannot be fully explained by realized future dividends. They introduce a newspaper-based Equity Market Volatility tracker spanning 1985 to the present, constructed to align with the VIX between 1985 and 2015.

Their research offers new data insights into how policy news and broader economic developments shape market volatility, with further analysis applied to firm-level stock price movements and the correlation structure of returns.



## ARTIFICIAL INTELLIGENCE

# THE CLASS ACTION IMPLICATIONS OF AI-DRIVEN DECISIONS

On May 16, 2025, United States District Judge Rita Lin granted a Motion for Conditional Certification of Collective Action in *Mobley v. Workday, Inc.* **The Plaintiff alleges age, race, and disability discrimination from Workday's AI-driven human resources tools that generate hiring recommendations.**

BY  
**DR. STUART GURREA**  
**DR. NICOLAS SUAREZ**

**S**imilar allegations regarding bias embedded in AI-driven decisions have been made in the insurance industry about wrongful coverage denials and discrimination in underwriting and claims processing. At the core of these cases is whether reliance on AI-based decision making constitutes a common policy sufficient to render putative class members similarly situated for purposes of class certification.

**AI DECISION-MAKING AND DISCRIMINATION RISK**

Organizations often make decisions that impact prospective and current employees or customers. A subject of concern that may lead to litigation is the disparate treatment of members of a protected class, such as age, race, or gender, in decisions, including admissions, underwriting, coverage, hiring, promotion, compensation and termination. Reliance on AI-based algorithmic decision-making is often intended to reduce subjective bias. Recent litigation, however, underscores that AI tools may not be bias-free and may incorporate, and even potentially accentuate, biases associated with the historical data on which these models are trained.



**WHY AI SYSTEMS MAY NOT CONSTITUTE A COMMON POLICY**

This qualification highlights a critical question: are outcomes of interest attributable to individual human actions or common AI rules? Several factors suggest that AI-based hiring systems might not always result in uniform policies.

First, even though predictive statistical models and algorithms provide information about objective metrics of performance, in practice, these objective metrics are often supplemented with human input to assess some subjective aspects of applications, such as cultural fit or interpersonal skills. In such cases, final decisions may not conform to a common policy and are better understood as the result of both model-driven analysis and a layer of human oversight involving individualized evaluation of a person's attributes. This will ultimately depend on how these screening systems are used. For example, if a recommendation system automatically rejects individuals above a certain age, with no human review, those applicants may plausibly be subject to a common policy.

Second, AI-based decision making may involve employer-specific customization, with parameters defined on a case-by-case basis, which may explain why the AI system does not operate in a unified way. For instance, screening models may be trained on employer-specific historical hiring data and tailored to each employer's criteria for a successful applicant. In such circumstances, disparate

In *Mobley v. Workday, Inc.*, the plaintiff claims that Workday's AI-based screening algorithm disproportionately disqualified applicants over 40 years old from employment opportunities. Workday operates a two-sided platform that allows job candidates to submit applications and employers to collect, process, and screen them. The plaintiff alleges that the algorithms were trained only on incumbent employee data, which resulted in a homogeneous workforce that was not representative of the applicant pool and was discriminatory against applicants over 40. In granting preliminary class certification, Judge Lin identified Workday's algorithmic decision-making tools as discriminatorily scoring applications based on age. Judge Lin further concluded that members of the proposed class were similarly situated because the basis for the denial of employment was that applicants were subject to the same common policy—in this case, the same algorithmic decision-making tools, regardless of any disparate impact across claimants. Judge Lin, however, explained that this preliminary decision did not preclude the possibility that AI recommendations are in fact the result of individual employer preferences and recommendations, in which case an AI-based common policy would not be identifiable.



outcome analyses may not be susceptible to common proof. Third, AI models evolve over time, which runs counter to the existence of a uniform policy and may be more consistent with a non-static policy.

A defining characteristic of AI models is their reliance on feedback loops as a basis to learn and improve decision-making over time. Performance data provides a basis for re-training and refining algorithmic decision-making. Feedback loops, however, do not necessarily self-correct. For example, if an algorithm is trained on historical data showing that a company often hires candidates under 40 years old, the algorithm may initially learn that bias and amplify it with successive self-reinforcing recommendations in favor of younger hirings.

**ECONOMIC EVIDENCE IN AI-BASED DISCRIMINATION CLAIMS**

For these reasons, AI systems do not necessarily impose common or uniform policies and the existence of common impact and harm becomes an empirical question. Generally, economists assess matters of alleged discrimination by analyzing observed hiring recommendations and then determining the impact of an applicant's characteristics over their likelihood of receiving a positive recommendation. A sharp difference in recommendation rates for applicants above versus below 40 years old, for example, may indicate age-based discrimination.

In the context of analyzing AI-based decision making, an economist may go beyond the conventional analyses of discrimination. For example, if an economist has access to the parameters and architecture of a machine learning model, they can emulate applicant profiles, vary protected characteristics, and observe changes in recommendations. This method allows economists to directly interrogate the algorithm itself, rather than infer discrimination indirectly from outcomes.

Despite its advantages, there might be challenges associated with this approach. In the case of the Workday platform, if every employer has trained their own hiring recommendation system, and if these models are being constantly re-trained with new data, it might be impossible to reconstruct the precise version of the system that generated each recommendation. Moreover, producing such data places substantial burdens on defendants, who may resist disclosure of their proprietary algorithms.

**IMPLICATIONS FOR CLASS-WIDE AI DISCRIMINATION CLAIMS**

In summary, the use of AI in decision making does not necessarily imply a uniform policy, particularly where human oversight or individualized input is involved. Whether AI driven outcomes reflect systemic bias remains an empirical question. As class-wide AI-related claims continue to emerge, economists now have an expanded set of tools to determine whether there is evidence of systemic discrimination. 🔗



**MANAGING DIRECTOR DR. STUART GURREA** has offered testimony in Federal Court about the statistical identification of discriminatory practices. [sgurrea@secretariat-intl.com](mailto:sgurrea@secretariat-intl.com)



**ECONOMIST DR. NICOLAS SUAREZ** has developed machine learning models to quantify economic impacts. [nsuarez@secretariat-intl.com](mailto:nsuarez@secretariat-intl.com)





# COMPETITION & MARKET STRUCTURE OF THE U.S. CANNABIS INDUSTRY

BY DR. JÉSSICA DUTRA

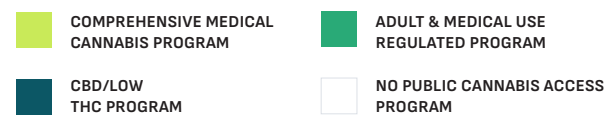
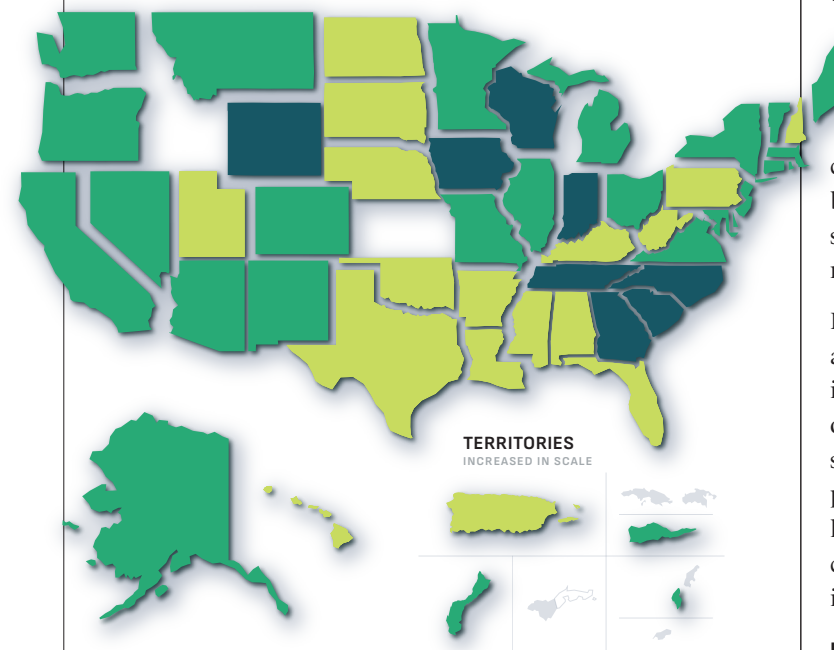
Cannabis legalization is expanding across U.S. states, and the cannabis sector has emerged as a significant regulated industry with growing competition policy implications.

The state of competition in the U.S. cannabis industry is uniquely complex due to the interplay between federal prohibition<sup>1</sup> and state-level legalization.<sup>2</sup> In states that have legalized medical or recreational use of cannabis, the sector has expanded rapidly.<sup>3</sup> This has created a patchwork of local markets with barriers to interstate commerce, that to some extent insulates regional operators from the broader competitive pressures. The map illustrates how state regulations differ across the country. Although the FTC and DOJ retain jurisdiction to apply federal competition law, the continued federal illegality of cannabis under the Controlled Substances Act has created institutional uncertainty regarding the scope and propriety of federal engagement. In practice, most competition disputes in the sector have been addressed by state attorneys general and private litigants.

These diverse state-level policies have, to some extent, shaped the structure of the modern U.S. cannabis industry,<sup>4</sup> which is best understood as a vertically structured supply chain rather than a single unified market. At the upstream level are cultivators that grow cannabis plants and manufacturers that process raw cannabis into derivative products such as concentrates, edibles, tinctures, and infused goods. Within this level, firms differentiate themselves through branding, potency, and product format.<sup>5</sup> Downstream are distributors (in some states) and retail dispensaries that sell directly to consumers. Because regulation varies by jurisdiction, some firms operate across multiple stages while others are restricted to a single level.

Potential antitrust issues can arise at every level of the U.S. cannabis industry under the current market structure. Horizontal concerns may occur among growers, manufacturers, or retailers competing within the same tier. In addition, vertical relationships—such as supply agreements, exclusivity provisions, and integration mandates—create potential vertical restraint issues linking different levels of the industry. Regulatory features including licensing caps and vertical integration requirements

**The cannabis industry continues to operate in an uncertain regulatory landscape, where antitrust enforcement is highly fragmented.**



Source: National Conference of State Legislatures. "State Medical Cannabis Laws." NCSL, 2024.

can amplify these concerns by limiting entry and altering competitive incentives.<sup>6,7</sup>

Regulators and policymakers have increasingly expressed concern regarding state cannabis regulatory frameworks,<sup>8</sup> in particular to the increased consolidation among MSOs.<sup>9</sup> Vertical integration requirements in some states—where licensees must control multiple stages of the supply chain—can limit competition by favoring larger, better-capitalized companies.<sup>10</sup> Additionally, licensing caps and residency requirements often restrict the entry of new competitors, which can lead to oligopolistic market structures. Courts have increasingly entertained constitutional and competition-related challenges to state protectionist rules, such as residency requirements for cannabis licenses.<sup>11</sup> These dynamics may unintentionally foster anti-competitive environments that could harm consumers and small businesses.

One particularly important issue that has thus far remained in the domain of state and private antitrust action is geographic market definition as it relates to retail cannabis sales. Because cannabis cannot legally cross state lines, one might assume relevant markets should be established within state borders.<sup>12</sup> However, antitrust analysis focuses on substitution patterns and consumer behavior rather than regulatory borders. It assesses how far consumers are willing to travel in response to a small but significant non-transitory price increase.<sup>13</sup> In many retail industries, including grocery stores and retail gasoline, enforcement agencies routinely define highly localized markets because consumers respond to price changes within short travel distances.<sup>14</sup> Cannabis retail competition appears to follow a similar pattern. In a recent matter analyzing dispensary competition in Washington, D.C., I found localized submarkets within the District and measurable cross-border competition between dispensaries near the D.C.-Maryland boundary despite differing regulatory regimes. These findings suggest local competitive constraints may be more economically meaningful than jurisdictional boundaries.<sup>15,16</sup>

In the meantime, the cannabis industry continues to operate in an uncertain regulatory landscape, where antitrust enforcement is highly fragmented. Consequently, there is considerable opportunity for state AGs and private parties to play key roles in shaping the industry in their localities. In this environment, any professional providing economic or legal analysis in cannabis-related antitrust matters must combine deep knowledge of competition principles with a practical understanding of the industry's shifting regulatory framework.

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**DIRECTOR DR. JÉSSICA DUTRA** specializes in antitrust and competition, applying economic principles and quantitative methods to complex litigation across industries, with particular expertise and testimony in cases involving the U.S. cannabis sector. [jdutra@secretariat-intl.com](mailto:jdutra@secretariat-intl.com)



# NIL, REVENUE-SHARING, AND THE NCAA'S GROWING ANTITRUST VULNERABILITY

BY DR. KIRA STEARNS<sup>1</sup>

**Antitrust scrutiny of the National Collegiate Athletic Association (NCAA) has a long history, rooted in tensions between the organization's role as a regulator of college sports and the requirements of U.S. competition law. Until 2014, the NCAA relied on amateurism as its primary defense against antitrust challenges, particularly regarding limits on athlete compensation.**

This framework was directly challenged in *O'Bannon v. NCAA* (2015), which focused on the NCAA's prohibition on compensating athletes for the use of their names, images, and likenesses (NIL), especially in video games and broadcasts. The Ninth Circuit ruled that while the NCAA could maintain some limits tied to amateurism, its complete ban on NIL-related compensation violated antitrust law. On July 1, 2021, a wave of state legislation and new NCAA policies allowed college athletes to begin signing endorsement deals and earn revenue on their NIL.

Another consequential recent ruling came in *NCAA v. Alston* (2021), where the Supreme Court unanimously affirmed that NCAA limits on education-related benefits—such as scholarships for graduate school, tutoring, or laptops—were unlawful restraints of trade. Notably, the court rejected the NCAA's broad claims that amateurism justified deference under antitrust law and openly questioned the legality of nearly all NCAA compensation restrictions. While *Alston* technically addressed only education-related benefits, its reasoning signaled broad skepticism toward the NCAA's business model.

The *House v. NCAA* settlement was the most recent antitrust resolution that significantly changed how college athletes at certain institutions may be compensated.<sup>2</sup> Approved in 2025, it resolved multiple lawsuits alleging that the NCAA had unlawfully restricted athlete pay in violation of federal antitrust law. As part of the settlement, schools are now permitted to share athletic revenue directly with athletes, subject to annual caps. While the settlement



does not classify athletes as employees, it effectively dismantles the NCAA's traditional amateurism model and marks a structural shift toward a revenue-sharing system in college sports.

Despite implementing these significant changes, the NCAA cannot reasonably expect the end of legal challenges on antitrust grounds. Recent cases suggest that the next battleground may revolve around the NCAA's eligibility rules.<sup>3</sup> As it currently stands, the NCAA provides student athletes with four years of athletic eligibility within a five-year period. According to the NCAA, this five-year clock begins once the athlete enrolls at any collegiate institution, regardless of whether its athletic programs operate within the NCAA. The clock does not reset when the athlete transfers to a different school.

Under the prior regime—before revenue-sharing and NIL agreements—the NCAA's eligibility requirements were relatively innocuous, from an economic perspective. Although many athletes received valuable in-kind benefits related to tuition and living expenses, participation in collegiate sports did not involve direct monetary compensation. As a result, for many athletes, the economic opportunities available outside of college were strictly superior to those available within it. This disparity was especially

importantly, this incentive is not limited to athletes without lucrative professional alternatives. Even in sports such as football and men's basketball, the opportunity cost of remaining in college for an additional year has fallen substantially. With the availability of NIL income and revenue-sharing arrangements, athletes now forgo less by staying in school an extra season to develop their skills and potentially improve their draft position. Indeed, a recent study of player's decisions to enter the NBA draft between 2019–2024 finds that, following the liberalization of NIL rules, more men's college basketball players choose to use their remaining collegiate eligibility.<sup>8</sup>

**T**his growing incentive to maximize one's time in college athletics likely holds for all but the very top prospects of high-paying professional leagues. For example, a top-five college quarterback projected as a second-round pick may hope to improve to a top-three quarterback, and first-round selection, after an additional year playing college football. Moving from a second-round selection to a first-round selection has significant economic upsides. For example, a player chosen in the first round of the National Football League (NFL) can expect average total compensation of \$21.7 million, versus \$8.6 million for a player chosen in the

**When combined with NIL income and revenue sharing from the university, the upside of staying in college an additional year is now significantly more economically appealing.**


pronounced for elite athletes in highly lucrative professional sports, such as football and men's basketball. For these athletes, the requirement that they compete without monetary pay in college—often due to age-based professional league restrictions—was widely understood as an economic sacrifice.<sup>4</sup>

**H**owever, under the current regime, and for a select group of individual athletes, the economic returns to remaining in college may now far exceed the income available outside of the NCAA. This dynamic is particularly pronounced for athletes in sports without highly paid professional leagues, such as gymnastics. As an extreme example, Louisiana State University (LSU) gymnast Olivia Dunne reportedly earned an estimated \$4.1 million in endorsement deals during her fifth year of eligibility.<sup>5</sup> Whether that level of brand value can be sustained beyond the college sports ecosystem remains to be seen.

Moreover, women's college basketball players may now earn substantially more through NIL arrangements than they would as professionals in the Women's National Basketball Association (WNBA). As of June 2025, top NIL earners in women's college basketball reportedly secured deals ranging from roughly \$300,000 to \$1.5 million, while the salary for a first-round WNBA draft pick begins at approximately \$75,000.<sup>6</sup> The highest paid WNBA player in 2025 commanded an annual average salary of \$252,450.<sup>7</sup> For players who fear that their marketability may diminish upon leaving a prominent college program, these disparities create a strong economic incentive to remain in college for an additional year.

second round. When combined with NIL income and revenue sharing from the university, the upside of staying in college an additional year is now significantly more economically appealing.

Taken together, these developments point to a new potential source of economic harm arising from the NCAA's position as the sole governing body of major college athletics. If an alternative collegiate athletic association existed, it might compete to attract athletes by offering more generous revenue-sharing arrangements, improved NIL opportunities, or more favorable terms governing the duration over which athletes can receive such compensation. While previous changes to the NCAA compensation rules sought to address alleged harm related to the first two dimensions, it did not meaningfully confront, and has perhaps exacerbated, the third.

In conclusion, as the economic value of participating in college athletics continues to rise, the antitrust implications of NCAA eligibility rules are likely to become more pronounced. Restrictions that limit how long athletes may participate—and therefore earn—within the collegiate system may increasingly be viewed as anticompetitive restraints. Whether courts or the NCAA itself will adapt in response to these pressures remains an open question. 

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**DIRECTOR DR. KIRA STEARNS** works on antitrust matters including market definition and monopolization claims, and brings firsthand experience from three years in the athletic department at a Division I university.  
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**Epic Games’ (Epic) suit against Google over the Google Play Store (GPS) and its payment system, Google Play Billing (GPB), continues to capture attention as one of the most closely watched recent U.S. antitrust battles. Now, however, the focus of the case has shifted from Epic’s jury win and Judge Donato’s injunction remedies to the parties’ settlement and proposed remedy changes. The parties’ proposal has engendered judicial skepticism, amici involvement, opinions from Court-appointed experts, and economic scrutiny that may derail the parties’ proposed deal.**

In 2020, Epic, creator of the popular *Fortnite* game, filed a lawsuit against Google alleging that the company unlawfully maintained monopoly control over Android app distribution and in-app billing. Epic argued that Google engineered the Android ecosystem to steer app developers and users toward GPS, which required the use of GPB and allowed Google to collect a commission on transactions. The complaint further alleged that Google systematically undermined alternative app stores and payment options through contractual restrictions, technical design choices, and financial incentives. These practices, Epic alleged, preserved Google’s monopoly power, inflated commissions taken by Google on purchases through GPS/GPB, and reduced competition and innovation.<sup>1</sup> Notably, Epic did not seek monetary relief, stating: “Google’s conduct has caused and continues to cause Epic financial harm, but Epic is *not* bringing this case to recover these damages; Epic is not seeking any monetary relief, but rather only an order enjoining Google from continuing to impose its anti-competitive conduct on the Android ecosystem.”<sup>2</sup>

After a multiweek trial in late 2023, a federal jury unanimously found Google liable for violating federal and state antitrust laws by monopolizing Android app distribution and in-app payments and unlawfully tying GPS to GPB.<sup>3</sup> Following the verdict, U.S. District Judge James Donato entered a permanent injunction mandating changes to GPS aimed at fostering competition. This included, among other things, requiring that Google allow alternative app stores to be available for download on GPS, allow alternative app stores to access the GPS app catalogue, and allow app developers to use payment options other than GPB.<sup>4</sup> Google appealed, but, on July 31, 2025, the Ninth Circuit unanimously upheld both the jury verdict and the permanent injunction.<sup>5</sup> Google continued to appeal the decision as the deadline to implement elements of the permanent injunction approached, requesting a partial stay from the Supreme Court, which was declined in October 2025.<sup>6</sup>

**THE PROPOSED SETTLEMENT** The next month, in November 2025, Epic and Google announced a settlement and proposed several modifications to the injunction. Among the changes, the proposal would allow Google to deny alternative app stores access to the GPS app catalog and continue to exclude the alternative app stores from distribution through GPS, instead only allowing that distribution through “sideloading” (installation outside of GPS). Additionally, unlike the original injunction, which did not have requirements related to commission rates, Google agreed to cap the commission rate on GPS. Despite the proposed capped fees, Google and Epic’s terms would modify the injunction’s requirement to break the GPS/GPB tie, instead allowing developers to bypass GPB but still be charged (capped) services fees by Google on those transactions.<sup>7</sup>

**JUDICIAL AND THIRD-PARTY SCRUTINY** The proposed modifications, which generally limited the reach of the injunction, were met with skepticism and concern. Injunctions are not typically modified unless, among other



# THE ECONOMICS OF REMEDIES TO RESTORE COMPETITION IN EPIC V. GOOGLE

DR. STEPHANIE KHOURY

potential reasons, there has been a significant change in circumstance. Judge Donato was not convinced that such a change was evident, noting: “The only changed circumstance that I can see right now is Epic and Google—two mortal enemies who pounded each other relentlessly in this courtroom for many years—are suddenly BFFs.”<sup>8</sup> Judge Donato further questioned if the proposal would “prov[e] an adequate remedy for Google’s wrongdoing.”<sup>9</sup>

**T**his scrutiny has raised the possibility that the settlement could be rejected or require significant modifications. In a December 2025 order, Judge Donato scheduled an evidentiary hearing for January 2026 to discuss the proposed modifications.<sup>10</sup> The Court also announced that it was

appointing an economist unaffiliated with either party, Prof. Nancy L. Rose,<sup>11</sup> to “assist the Court in evaluating whether the joint request to modify the injunction [...] is consistent with the jury verdict and the public interest in free and unfettered competition.”<sup>12</sup> Later, in a text order prior to the evidentiary hearing, Judge Donato noted that the signatories for the proposed settlement from each of the parties would be expected to testify.<sup>13</sup>

The proposed modifications to the injunction also drew several *amicus* briefs from outside parties that underscore the public-interest dimension of this case. The first of these briefs was filed by a group of “scholars of economics and law,” which included Paul Heidhues, Gene Kimmelman, Giorgio Monti, Fiona Scott Morton, Rupprecht Podszun, and Monika Schnitzer.<sup>14</sup> The *amicus* expressed concern that the suggested modifications to the injunction would effectively make Google’s monopoly a Google-Epic shared duopoly, continuing to keep out other potential rivals and stifle competition.<sup>15</sup>

Next, *amicus* briefs from Microsoft and the FTC were also filed.<sup>16</sup>

that it would be unlikely that he would grant the parties’ modifications.<sup>20</sup> One element that heightened concern was the disclosure of a commercial partnership between Epic and Google that surfaced during the proceedings.<sup>21</sup> Epic agreed to pay Google \$800 million over six years for collaboration involving Epic’s Unreal Engine and joint marketing efforts. Epic CEO Tim Sweeney noted that this would give Epic a chance to expand its market reach, when asked by Judge Donato what Epic was “getting out of this” part of the deal.<sup>22</sup> Judge Donato questioned whether this agreement may be influencing Epic’s and Google’s incentives regarding the proposed modifications.<sup>23</sup>

**A**lthough this partnership does not, by itself, determine the welfare effects of relief measures, it amplifies judicial demand for clear economic justification for the proposed modifications. Indeed, at the January hearing, Judge Donato called on Prof. Douglas Bernheim,<sup>24</sup> who served as Epic’s economic expert during the course of the litigation, questioning if Prof. Bernheim agreed with the modified injunction.<sup>25</sup> While

Prof. Bernheim stated that the modified injunction was “a better model for achieving sustainable competition,” Judge Donato was not convinced, noting his concern that the deal “put Epic and Epic alone, unlike any other developer or app provider, in a special relationship, vis-à-vis Google.”<sup>26</sup>

The skepticism of the Court and *amicus* submissions reinforce that this case is not just a private dispute between two parties, and thus, the proposed injunction is not only to benefit a given party. Instead, the case and



These, too, noted concerns with the economic effects of the proposed modifications to the injunction. Microsoft *amicus* noted that the modifications would “effectively allow Google to restore [its] unlawful tie.”<sup>17</sup> The FTC *amicus* raised concern that “private parties such as Google and Epic may barter away the public interest embedded in the court’s injunction for private gain.”<sup>18</sup> The commission “urge[d] the Court to consider the extent to which privately beneficial terms in the comprehensive settlement could have induced Epic to accept modifications that would not necessarily serve the public interest in competition.”<sup>19</sup>

**PARTNERSHIPS, INCENTIVES, AND COMPETITION**

At the January 2026 evidentiary hearing, Judge Donato indicated

resulting injunction are focused on benefiting *competition*, not just one *competitor*. Indeed, as discussed above, even in Epic’s complaint, it noted the importance of “enjoining Google from continuing to impose its anti-competitive conduct on the Android ecosystem,” rather than only making Epic financially whole. As such, the Court must consider these proposed modifications through an economic lens that encompasses the entirety of the market.

**ECONOMIC IMPLICATIONS FOR PLATFORM COMPETITION**

From an economic perspective, the key issue is whether the proposed modifications would meaningfully promote competition in the Android app ecosystem or instead preserve Google’s market power, albeit in a modified form.

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preserve Google’s market power, albeit in a modified form. The original injunction sought to reduce entry barriers, weaken Google’s network-effect advantages, and enable rival app stores and payment systems to reach viable scale, allowing meaningful competition in the market. By contrast, the proposed modifications replace structural openness with capped pricing and limited access. Economic theory and antitrust literature suggest that regulatory price caps (or similar constraints) can often be a poor substitute for actual competitive contestability. Rather than fostering genuine competition, such regulation can lead to an unlawful monopoly converting into a regulated monopoly or narrow duopoly.<sup>27</sup> Restricting alternative app stores to sideloading and allowing Google to impose fees even when GPB is bypassed may threaten to recreate the bottlenecks and tying dynamics that the jury found unlawful.

The settlement has also raised concerns about asymmetric benefits. Remedies that primarily advantage a single large developer (here, Epic) may increase that developer’s private surplus without improving outcomes for the rest of the market (e.g., smaller developers, consumers). This may also continue to deter market entry by signaling that individualized deals with the dominant platform (here, Google) are required in order to successfully compete. Antitrust remedies must be judged by their economic effects on market wide incentives that seek to encourage entry, multi-homing, and/or competition on price, quality, and innovation. Viewed in this light, the skepticism of the Court and *amici* reflects a concern that the proposed

modifications trade a market-wide competition-enhancing remedy for a privately efficient settlement, undermining the broader public-interest goals of antitrust enforcement.

This may serve as a test case for digital platform remedies in U.S. antitrust enforcement, where antitrust scrutiny and private litigation continue to focus. With settlement approval looking less likely, *Epic v. Google* continues to be a case to watch in 2026. *Epic v. Google* has expanded the role of economic analysis in antitrust litigation and could shape how courts assess competition and remedies in platform markets for years to come. 📌

*Note: Since this article was written and finalized, Google and Epic have filed amended proposed modifications to the Court’s injunction. On March 4, 2026, parties submitted a revised set of modifications, claiming that it “hears much more closely to the Existing Injunction than did the parties’ previous proposal and is designed to address the concerns raised at the January 22, 2026 hearing.” (Dkt. 1179) The status of the settlement, the injunction, and the newly proposed modifications remains ongoing. These developments underscore the importance of the economic considerations underlying remedies in antitrust matters, as discussed in this article, and reflect the parties’ continued efforts to craft a resolution that addresses both the Court’s concerns in the market, rather than only between parties.*

**ENDNOTES ON PAGE 15**

**DIRECTOR DR. STEPHANIE KHOURY** has extensive experience in antitrust and competition litigation, including Big Tech cases. She supported Dr. Steven Schwartz for the Match Group plaintiffs in the Google Play Store litigation. [skhoury@secretariat-intl.com](mailto:skhoury@secretariat-intl.com)



that may influence their structure, see Wang, Lucy Xiaolu, and Nicholas J. Wilson. “US State approaches to cannabis licensing.” *International Journal of Drug Policy* 106 (2022): 1037/55.

<sup>5</sup> Donnan, Jennifer, et al. “Characteristics that influence purchase choice for cannabis products: a systematic review.” *Journal of cannabis research* 4.1 (2022): 9 conduct a systematic review of characteristics impacting final consumer choice of cannabis products, and show that several aspects are taken under consideration, indicating an environment of competition of imperfect substitutes.

<sup>6</sup> Smart, Rosalie, and Rosalie Liccardo Pacula. “Early Evidence of the Impact of Cannabis Legalization on Cannabis Use.” *The Economic Journal*, vol. 129, no. 622, 2019.

<sup>7</sup> For academic analyses of cannabis license dynamics and competition in Washington state, see Hollenbeck, Brett, and Kosuke Uetake. “Taxation and market power in the legal marijuana industry.” *The RAND Journal of Economics* 52.3 (2021): 559-595; Thomas, Danna. “License quotas and the inefficient regulation of sin goods: Evidence from the Washington recreational marijuana market.” Available at SSRN 3312960 (2019).

<sup>8</sup> The FTC has reviewed large multi-state operator acquisitions — including the proposed Cresco Labs/Columbia Care transaction (see, for example, “Cresco Labs, Columbia Care Mutually Terminate \$2 Bln Merger.” *Reuters*, 31 July 2023, [www.reuters.com/markets/deals/cresco-labs-columbia-care-mutually-terminate-2-bln-merger-2023-07-31/](http://www.reuters.com/markets/deals/cresco-labs-columbia-care-mutually-terminate-2-bln-merger-2023-07-31/)). New York’s cannabis regulator has expressly justified ownership caps and vertical separation requirements as necessary to prevent excessive market concentration and dominance by large, well-capitalized operators (see “About the Office of Cannabis Management.” *New York State Office of Cannabis Management*, [cannabis.ny.gov/about-0](http://cannabis.ny.gov/about-0); “NY Cannabis Advisory Board Suggests Cap on Adult-Use Retail Licenses.” *MJBizDaily*, [mjbizdaily.com/news/ny-cannabis-advisory-board-suggests-cap-on-adult-use-retail-licenses/399363/](http://mjbizdaily.com/news/ny-cannabis-advisory-board-suggests-cap-on-adult-use-retail-licenses/399363/)). Massachusetts policymakers and oversight bodies have explicitly expressed concern that the state’s cannabis market has structurally favored larger, often out-of-state operators at the expense of local and social equity businesses,

**ARTICLE ENDNOTES**

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**Endnotes for *Competition and Market Structure of the U.S. Cannabis Industry***

<sup>1</sup> Cannabis remains a Schedule I substance under the Controlled Substances Act, preventing the federal government from formally regulating the market as it would other industries. While the DOJ has posted a proposal to transfer marijuana from schedule I of the Controlled Substances Act to schedule III in May 2024 (see *Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 FR 44597, May 21, 2024), followed by a reviewed proposal in August 2024 (see *Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 FR 70148, August 29, 2024). On December 18, 2025, President Trump issued an executive order directing the Attorney General to take all necessary steps to expeditiously move marijuana from Schedule I to Schedule III under the Controlled Substances Act (CSA) — while the executive order does not reclassify marijuana as a Schedule III drug, the administration is signaling its support for the move. Ultimately, the United States is still navigating the administrative and legal mechanics of potentially rescheduling.

<sup>2</sup> For a historical view of this process, see, for example, Congressional Research Service. *The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap*. Congressional Research Service, 2023. <https://crsreports.congress.gov>; Hudak, John. *Marijuana: A Short History*. Brookings Institution Press, 2016.

<sup>3</sup> For a comprehensive and updated list of state cannabis regulations, see Marijuana Legality by State. “DISA Global Solutions, [www.disa.com/marijuana-legality-by-state/](http://www.disa.com/marijuana-legality-by-state/); see also State Cannabis Legislation Database.” *National Conference of State Legislatures*, [www.ncsl.org/health/state-cannabis-legislation-database](http://www.ncsl.org/health/state-cannabis-legislation-database).

<sup>4</sup> For an analysis across multiple types of cannabis regulation in states and potential aspects

reflecting broader worries about market concentration and barriers to competition (“Senate Acts to Reform Cannabis Industry Oversight, Licensure.” *Massachusetts Legislature*, [malegislature.gov/PressRoom/Detail?pressReleaseld=296](http://malegislature.gov/PressRoom/Detail?pressReleaseld=296)). California, despite being often referred to as a counterexample for being a large market, regulators still acknowledge local concentration and foreclosure risks (see, for example, California Cannabis Market Outlook at <https://cdn.cannabis.ca.gov/wp-content/uploads/sites/2/2025/03/California-Cannabis-Market-Outlook-FNL.pdf>).

<sup>9</sup> See “Top 5 Largest Multi-State Cannabis Companies in the US (2025).” *CannStrategy*, <https://www.cannstrategy.com/post/top-5-largest-multi-state-cannabis-companies-in-the-us-2025>

<sup>10</sup> There is substantial variation in the vertical integration regulation across states, ranging from states that forbid vertical integration (e.g., Washington state - RCW § 69.50.328(2): “No licensed marijuana retailer may also be a licensed marijuana producer or processor”) to states that require it (e.g., Florida Statutes § 381.986(8)(e): “A licensed medical marijuana treatment center shall cultivate, process, transport, and dispense marijuana for medical use.”).

<sup>11</sup> See, for example, *Northeast Patients Group v. United Cannabis Patients & Caregivers of Maine*, 45 F.4th 542 (1st Cir. 2022).

<sup>12</sup> It is important to note that several states have already passed regulation which should allow and regulate interstate commerce for when federal restriction is lifted: Oregon’s State Senate Bill 582 from 2019 would permit the state to enter into agreements to export marijuana to other states; Washington SB 5069 from 2023 states “Effective Date: The bill takes effect on the earlier of the date on which federal law is amended to allow for the interstate transfer of cannabis between authorized cannabis-related businesses or the U.S. Department of Justice issues an opinion or memorandum allowing or tolerating the interstate transfer of cannabis between authorized cannabis-related businesses”; and California Senate Bill 1326 from 2022 also states that it “shall not take effect unless one of the following occurs: (1) Federal law is amended to allow for the interstate transfer of cannabis or cannabis products between authorized commercial cannabis businesses; (2) Federal law is enacted that specifically prohibits the expenditure of federal funds to prevent the interstate transfer of cannabis or cannabis products between authorized commercial cannabis businesses; (3) The United States Department of Justice issues an opinion or memorandum allowing or tolerating the interstate transfer of cannabis or cannabis products between authorized commercial cannabis businesses; (4) The Attorney General issues a written opinion, through the process established pursuant to Section 12519 of the Government Code, that state law authorization, under an agreement pursuant to this chapter, for medicinal or adult-use commercial cannabis activity, or both, between foreign licensees and state licensees will not result in significant legal risk to the State of California under the federal Controlled Substances Act, based on review of applicable law, including federal judicial decisions and administrative actions.”

<sup>13</sup> See, for example, Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUMBIA LAW REVIEW 7, 1805 (1990), p. 1806: “Definition of relevant market’ is an effort to describe the array of firms that currently produces or potentially will produce products that are sufficiently close substitutes to take business away from any firm or group of firms that attempts to exercise market power.”

<sup>14</sup> See, for example, *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011); *United States v. Bazaarvoice, Inc.*, 2014 WL 203966 (N.D. Cal. 2014); *United States v. Sunoco, Inc.*, Competitive Impact Statement, U.S. Department of Justice, 2018. See also Federal Trade Commission, “Analysis of Agreement Containing Consent Orders to Aid Public Comment,” *In the Matter of Dollar Tree, Inc. and Family Dollar Stores, Inc. File No. 141-0207*, § III. Competition in the Relevant Markets, (2015).

<sup>15</sup> *Robert Martin, et al. v. Sequential LLC, d/b/a Green Theory, et al.*, Case No. 2024-CAB-006014.

<sup>16</sup> Retail dispensaries in some jurisdictions also accept out-of-state medical cards, which may further facilitate cross-border demand substitution.

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**Endnotes for *NIL, Revenue-Sharing, and the NCAA’s Growing Antitrust Vulnerability***

<sup>1</sup> This article benefitted from excellent research assistance by Matthew Domke.

<sup>2</sup> The settlement only impacted athletes at Division I schools, though it is expected that Division II and Division III programs may need to adapt their business models in order to recruit talented athletes.

<sup>3</sup> For example, Jabarrek Hopkins, a football player at Prairie View A&M filed suit against the NCAA and its eligibility rules. This follows a suit by Diego Pavia, a star quarterback at Vanderbilt filed in 2024, also challenging the eligibility rules. See: *Hopkins v. Nat’l Collegiate Athletic Ass’n*, Case No. 4:26-cv-00014-RH-MJF (N.D. FL); *Diego Pavia v. National Collegiate Athletic Association*, Case No. 3:24-cv-01336 (U.S. District Court for the Middle District of Tennessee).

<sup>4</sup> Some professional athletes have waited out the age requirement by playing professionally outside of the United States.

<sup>5</sup> <https://www.si.com/college-basketball/highest-paid-college-athletes-via-nil-deals>.

<sup>6</sup> <https://www.foxsports.com/stories/womens-college-basketball/top-10-womens-college-basketball-players-highest-nil-valuations>, <https://www.spotrac.com/wnba/cba/minimum/>, <https://frontofficesports.com/how-much-will-2025-wnba-draft-picks-make/>. At the time of writing, the WNBA has put forth a collective bargaining agreement proposal that would considerably increase the salary cap. See, for example: [https://www.espn.com/wnba/story/\\_/id/47862248/wba-new-cba-proposal-includes-housing-provisions](https://www.espn.com/wnba/story/_/id/47862248/wba-new-cba-proposal-includes-housing-provisions).

<sup>7</sup> <https://www.si.com/wnba/highest-paid-wnba-players-now-and-all-time>.

<sup>8</sup> McDaniel, Cole, Brian Meehan, and E. Frank Stephenson (2025), “Should I Stay or Should I Go? The Effect of NIL and Transfer Rule Changes on College Basketball Players Entering the NBA Draft,” *Journal of Sports Economics* 26(5): 543–561.

**CONTINUED FROM PAGE 12**

**Endnotes for *The Economics of Remedies to Restore Competition in Epic v. Google***

<sup>1</sup> *In re: Google Play Store Antitrust Litigation*, Dkt 1.

Following Epic’s filing, several other cases were filed by a class of GPS consumers, a class of app developers, a coalition of state attorneys general, and the Match Group (owner of several dating apps, such as Tinder). These separate filings were consolidated into *In re: Google Play Store Antitrust Litigation*.

<sup>2</sup> *In re: Google Play Store Antitrust Litigation*, Dkt 1. (Emphasis in original.)

<sup>3</sup> Dkt 866

<sup>4</sup> Dkt 1017

<sup>5</sup> <https://www.law360.com/articles/2305370>

<sup>6</sup> [https://www.supremecourt.gov/orders/courtorders/100625zr\\_3fbh.pdf](https://www.supremecourt.gov/orders/courtorders/100625zr_3fbh.pdf)

<sup>7</sup> Dkt 760-1

<sup>8,9</sup> <https://www.law360.com/articles/2408618>

<sup>10</sup> Dkt 1130

<sup>11</sup> Nancy L. Rose is the Charles P. Kindleberger Professor of Applied Economics, Massachusetts Institute of Technology Department of Economics.

<sup>12</sup> Dkt 1131

<sup>13</sup> Dkt 1146

<sup>14</sup> Dkt 1156-1

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<sup>15</sup> Dkt 1156-1

<sup>16</sup> Dkt 1159-1, Dkt 1163-2

<sup>17</sup> Dkt 1159-1

<sup>18,19</sup> Dkt 1163-2

<sup>20,21,22,23</sup> <https://www.law360.com/articles/2433248>

<sup>24</sup> Douglas Bernheim is the Edward Ames Edmonds Professor of Economics, Stanford University Department of Economics.

<sup>25,26</sup> <https://www.law360.com/articles/2433248>

<sup>27</sup> Hovenkamp, Herbert (2021). “Antitrust and Platform Monopoly,” *The Yale Law Journal* 130(7):1952–2005.



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