Climate and Antitrust

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INTRODUCTION

In recent years, there has been growing concern that joint agreements among investors or corporations to reduce greenhouse gas emissions[1]—to reach net-zero emissions by a date certain or to otherwise address the climate crisis through joint action ("Climate Agreements")—may pose antitrust risks. Opponents of Climate Agreements have loudly warned of purported antitrust violations arising from such agreements in an attempt to discourage individuals and companies from participating in Climate Agreements. For example, in November 2022, five United States Senators wrote letters to 51 large law firms asserting that participation in Climate Agreements may violate U.S. antitrust laws.[2] In June 2024, the U.S. House Committee on the Judiciary issued an Interim Staff Report which alleged that a "climate cartel has declared war on the American way of life."[3] And, in November 2024, eleven states, led by Texas, sued BlackRock, Vanguard, and State Street Corporation, alleging that they violated Section 7 of the Clayton Act by encouraging coal companies in which they held shares to comply with net-zero goals.[4]

In light of those and other similar admonitions, companies have become increasingly wary of such agreements, with many even withdrawing from Climate Agreements they had previously joined, citing antitrust risks.[5] U.S. antitrust enforcers such as the Department of Justice and Federal Trade

1. Greenhouse gas emissions include carbon dioxide and methane, which come from burning fossil fuels such as gasoline or coal. Increased greenhouse gas emissions trap heat in the atmosphere and raise global temperatures. If nothing is done, most recent studies project a rise in global temperatures of as much as 4.4 degrees Celsius by the end of the century. Experts believe that an increase of that magnitude would constitute an existential threat to society as currently organized. United Nations Climate Action, *Climate Action Fast Facts*, https://perma.cc/28FK-HPWZ.

2. *See, e.g.*, Cotton et al., *Letters to Law Firms* (Nov. 3, 2022), https://perma.cc/9T2Q-W9XB ("Over the coming months and years, Congress will increasingly use its oversight powers to scrutinize the institutionalized antitrust violations being committed in the name of ESG, and refer those violations to the FTC and the Department of Justice. To the extent that your firm continues to advise clients regarding participation in ESG initiatives, both you and those clients should take care to preserve relevant documents in anticipation of those investigations.").

3. STAFF OF H.R. COMM. ON THE JUDICIARY, 118TH CONG., INTERIM STAFF REP., CLIMATE CONTROL: EXPOSING THE DECARBONIZATION COLLUSION IN ENV'T, SOC., AND GOVERNANCE (ESG) INVESTING (2024), p. iii [hereinafter House Judiciary Interim Staff Report].

4. Complaint at 39–40, Texas v. BlackRock, Inc., No. 6:24-cv-00437 (E.D. Tex. Nov. 27, 2024).

5. REUTERS, *Global Climate Coalitions Need Safer Harbour from Antitrust Turbulence* (April 5, 2023), https://www.reuters.com/business/sustainable-business/global-climate-coalitions-need-safer-h arbour-antitrust-turbulence-2023-04-05/ (reporting that MunichRe left Net Zero Insurance Alliance citing antitrust risks, followed by Zurich Insurance Group leaving GFANZ). *See also* House Judiciary Interim Staff Report, *supra* note 3, at 6–8.

Commission have not brought any enforcement actions concerning Climate Agreements, and no U.S. court has yet opined on the issue.

This Article analyzes whether Climate Agreements pose a legitimate risk of antitrust liability and concludes that most Climate Agreements are unlikely to violate U.S. antitrust laws.

I. ANTITRUST ANALYSIS OF CLIMATE AGREEMENTS

Climate Agreements are a form of concerted action, which would be analyzed under Section 1 of the Sherman Act. Section 1 of the Sherman Act prohibits agreements in restraint of trade[6] and applies to concerted action, while Section 2 covers both concerted and independent action, but only if that action "monopolizes or threatens actual monopolization."[7]

Courts have interpreted Section 1 of the Sherman Act to prohibit, among other things, collective agreements between firms to fix prices or reduce output, as well as other agreements that lead to higher prices, lower output, lower quality, or less innovation.[8] Critics of Climate Agreements reach beyond the long-accepted bounds of antitrust jurisprudence to argue that the joint nature of Climate Agreements violates Section 1 of the Sherman Act.

Much of the current attention began in September 2022, when, at a Senate Judiciary hearing, Senator Tom Cotton asked then Federal Trade Commission ("FTC") Chair Lina Khan[9] whether there is an antitrust exemption for Environmental, Social, and Governance ("ESG") efforts.[10] Chairwoman Khan responded in the negative, explaining, "[w]e've seen firms come to us and try to claim an ESG exemption and we've had to explain to them clearly that there is no such thing."[11] Similarly, Jonathan Kanter, Assistant Attorney General of the Antitrust Division of the Department of Justice ("DOJ") from 2021 to 2024, made clear that ESG agreements receive no exemption or special consideration

6. The Sherman Act, 15 U.S.C. § 1, declares illegal "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . ."

7. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 190 (2010).

8. *Antitrust Guidelines for Collaborations among Competitors*, DOJ & FTC, at 10 (April 2000), https://perma.cc/A6UP-VUB9 ("central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement."). The DOJ and FTC announced the withdrawal of these Guidelines on December 11, 2024. *See* Press Release, FTC, FTC and DOJ Withdraw Guidelines for Collaboration among Competitors (December 11, 2024), https://perma.cc/DF8Z-5Z9M; Withdrawal Statement, FTC & DOJ, Justice Department and Federal Trade Commission Withdraw Guidelines for Collaboration among Competitors, https://perma.cc/B2AB-VETT.

9. Chairwoman Khan served as head of the FTC from June 15, 2021 to January 20, 2025. *Lina M. Khan*, FTC, https://perma.cc/HHD4-AYRG.

10. Climate falls within the Environment prong of ESG.

11. Fred Ashton, *ESG Pledges Risk Antitrust Infractions*, American Action Forum (Mar. 2, 2022), https://perma.cc/XQS6-CQWY.

under the antitrust laws.[12] To date, neither the FTC nor the DOJ have issued any specific guidance on how companies can engage with climate and/or ESG-related coalitions while also complying with the antitrust laws.

This Article argues that most Climate Agreements are unlikely to violate the antitrust laws such that an exemption would be needed.[13] Regardless, we recommend that the DOJ and FTC issue guidance on Climate Agreements to avoid chilling participation in Climate Agreements due to the perceived risk of antitrust enforcement.

A. AGREEMENTS AMONG COMPETITORS ARE ANALYZED UNDER A *PER SE* OR RULE OF REASON STANDARD

Under the Sherman Act, agreements are generally analyzed under the *per se* or rule of reason standards.[14] *Per se* illegal agreements are restraints "that would always or almost always tend to restrict competition and decrease output" and are deemed unlawful without analysis of the restraint's reasonableness considering real market forces.[15]

Agreements that have been deemed *per se* unlawful include price-fixing and output agreements,[16] bid-rigging,[17] some group boycotts,[18] customer or market

12. *See* Remarks of Assistant Attorney General Jonathan Kanter and FTC Chairwoman Lina Khan, U.S. Senate Subcommittee on Competition Policy, Antitrust and Consumer Rights, Oversight of Federal Enforcement of the Antitrust Laws (Sept. 20, 2022), https://perma.cc/8TD2-E3KM. Chairwoman Khan stated that ESG cooperation or agreements are "always relevant" to the FTC "in as much as they can affect competition." *Id.*

13. The thorough investigation into climate change activist groups and legal analysis of the Democratic Staff Report issued in response to the House Judiciary Interim Staff Report reached a similar conclusion. *See* DEM. STAFF REP., H.R. COMM. ON THE JUDICIARY, 118TH CONGRESS, UNSUSTAINABLE AND UNORIGINAL: HOW THE REPUBLICANS BORROWED A BOGUS ANTITRUST THEORY TO PROTECT BIG OIL, at 100, https://perma.cc/6ETX-XB9Z ("Democratic Staff Report") ("We conclude that no plausible antitrust violation can be proven here; indeed, on the evidence before us, we cannot even say that one could properly be pleaded.").

14. *See* Nat'l Soc'y of Prof'l. Eng'rs v. United States, 435 U.S. 679, 692 (1978).

15. Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 877 (2007).

16. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 86 (1984) (price-fixing and output agreements are *per se* illegal).

17. United States v. Joyce, 895 F.3d 673, 675 (9th Cir. 2018) (bid-rigging is a *per se* violation of the Sherman Act).

18. The Supreme Court has described group boycotts as unlawful *per se*. *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458 (1986) (dentist's trade organization "policy constitutes a concerted refusal to deal on particular terms with patients covered by group dental insurance."); United States v. Gen. Motors Corp., 384 U.S. 127, 145 (1966) (eliminating discounters' access to market); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211–13 (1959) (agreement among manufacturers, distributors, and a retailer to limit another retailer's access to an open, competitive market available to other retailers). But the Court has also cautioned that not all boycotts are illegal *per se*, urging "some care" is needed to define "the category of concerted refusals to deal that mandate *per se* condemnation." Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 294 (1985). Further, the analysis of the actions of one organization's alleged group boycott actions may change over time. *Compare* Bassett v. Nat'l Collegiate Athletic Ass'n, 528 F.3d 426, 430 (6th Cir. 2008) (college coach fired for breaking NCAA rules alleges NCAA, school, and conference conspired to prevent him from

allocations,[19] and certain tying arrangements.[20] Once a plaintiff can show that it has suffered an antitrust injury as a result of *per se* unlawful agreement, a court need not further analyze the reasonableness of the restraint, procompetitive justifications, or study the relevant industry to establish illegality.[21] The Supreme Court has cautioned against using the *per se* standard when dealing with "new arrangements or to business relationships with which the courts are inexperienced."[22] Given the novel nature of Climate Agreements and the fact that most Climate Agreements' pledged conduct does not fit into an established category of *per se* liability, the *per se* standard is unlikely to apply.

More likely, the rule of reason standard will be used to evaluate whether a defendant's challenged restraint unreasonably impairs competition and has resulted in harm.[23] Under the rule of reason,

> the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.[24]

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coaching, but court finds NCAA rules "ensure fair competition in intercollegiate athletics," thereby making "NCAA's actions [] not commercial in nature," and not a violation of the Sherman Act), *with* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. at 120 (1984) (affirming conclusion that NCAA's plan for televising college football games curtails output and blunts the ability of member institutions to respond to consumer preference,restricting "the place of intercollegiate athletics") *and* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 90 (2021) (analyzing NCAA rules limiting education benefits paid to students as a joint venture among participating schools that harms competition for input provided by student athletes with "nowhere else to sell their labor").

19. Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 784 (9th Cir. 1996) (citing N. Pac. R.R. Co. v. United States, 356 U.S. 1, 5 (1958) (horizontal price fixing, division of markets, group boycotts, tying arrangements, and output limitations are ordinarily held to be unreasonable restraints on trade under the *per se* approach.)); United States v. Patel, No. 3:21-CR-220 (VAB), 2022 WL 17404509, at *10 (D. Conn. Dec. 2, 2022) (recognizing that no poach agreements that are market allocation agreements are analyzed under the *per se* rule).

20. Rick-Mik Enters., Inc. v. Equilon Enters. LLC, 532 F.3d 963, 971 (9th Cir. 2008) ("For a tying claim to suffer *per se* condemnation, a plaintiff must prove: (1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a 'not insubstantial volume of commerce' in the tied product market.").

21. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007); *Nw. Wholesale Stationers, Inc.*, 472 U.S. at 294; Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 41 (1977).

22. *Am. Ad Mgmt.*, 92 F.3d at 784 (citing *Ind. Fed'n of Dentists*, 476 U.S. at 458–59); *see Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 100, 104; Broad. Music, Inc. v. Columbia Broad. Sys. Inc., 441 U.S. 1, 9–10.

23. *See, e.g.*, *Cont'l T.V., Inc.*, 433 U.S. at 49.

24. Ohio v. Am. Express Co., 585 U.S. 529, 541–42 (2018).

To state a claim under Section 1 of the Sherman Act under a rule of reason analysis, a plaintiff must show "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition;" and (4) that they suffered antitrust injury.[25]

For the third element, a party "must generally show that the defendants have market power within a relevant market, meaning that the defendants have the ability to raise prices above those that would be charged in a competitive market."[26] The market must be defined as a specific product market and geographic market. Courts have held that a market share of "usually at least 50%" is necessary to establish market power in Section 2 cases.[27] Courts often accept a lower threshold in Section 1 cases.[28]

The fact that Climate Agreements are often signed by diverse participants in a variety of industries will make it difficult to show the signatories' collective market power in a specific product and geographic market. If the defendants do not have market power in a specific geographic and product market, the antitrust claim will fail under a rule of reason analysis.[29]

A court applying a rule of reason analysis will examine the nature of the restraint, the industry at issue, and the competitive effects of the restraint. A restraint will be deemed unreasonable if it substantially suppresses or destroys competition.[30] Anticompetitive effects may include proof of reduced output, increased prices, decreased quality of service, or substantial adverse effects on competition. In instances where there is an agreement among competitors without such anticompetitive effects, there is no antitrust violation.[31]

B. PUBLIC POLICY CONSIDERATIONS

Policy considerations[32] weigh against weaponizing the antitrust laws against agreements to mitigate climate change. Consumer protection is the long-recognized

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25. In re Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1150 (9th Cir. 2019).

26. *Id.* at 1151 (internal citations and quotations omitted).

27. Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 666–67 (7th Cir. 1987).

28. *See* Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15–16 (1984).

29. *See* Acad. of Allergy & Asthma in Primary Care v. Quest Diagnostics, Inc., No. 5:17-CV-1295-RCL, 2022 WL 980791, at *8 (W.D. Tex. Mar. 31, 2022) (dismissing complaint where plaintiffs failed to show Quest Diagnostic's market power in a properly defined market).

30. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978).

31. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 n.15, 512–13 (1940) (Sherman Act intended to control problems of "business competition").

32. The Supreme Court has declined to weigh public policy factors, such as public safety or the right to effective assistance of counsel, against agreements that inherently reduce competition. In *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978), the Supreme Court considered a professional engineering society's prohibition on competitive bidding in the name of safety, and held that the rule of reason did not support a defense to the Sherman Act based on the

public policy goal of the antitrust laws.[33] Both the DOJ and FTC have recognized that benefits to consumers may arise from competitor collaborations that enable the production of "goods or services that are cheaper, more valuable to customers, or brought to market faster than would be possible without the collaboration."[34] Courts applying a rule of reason analysis (*see supra* section I.A.) ask "whether a practice produces net benefits for consumers."[35] A failure to mitigate climate change will result in increasing negative effects on consumers and the world at large, including hotter temperatures, increased risk of drought, a warming ocean, loss of food, and poverty.[36]

C. EXCEPTIONS

Although there is not an explicit exemption from the antitrust laws for ESG or climate-related agreements, there are exemptions and affirmative defenses to the antitrust laws that may apply to such agreements.

1. Political Speech and the *Noerr-Pennington* Doctrine

Courts have carved out exceptions to the antitrust laws to protect the exercise of constitutional rights,[37] such as those protected by the First Amendment[38] and the Fourteenth Amendment.[39] For example, the *Noerr-Pennington* doctrine—

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assumption that competition was unreasonable, even where competition could result in cost cutting that was injurious to consumer safety. *See also* FTC v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411, 427–28 (1990) (rejecting claimed justification for horizontal boycott of protecting indigent defendants' right to effective assistance of counsel). Here, however, Climate Agreements are not a type of agreement known to inherently reduce competition, such as the big-rigging and group boycotts at issue in *National Society of Professional Engineers* and *Superior Court Trial Lawyer's Association*. The Supreme Court has weighed policy considerations in cases under the rule of reason, such as *National Association for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136–38 (1961).

33. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343–44 (1979) (quoting ROBERT BORK, THE ANTITRUST PARADOX 66 (1978) (available remedies under the Sherman Act and Clayton Act were intended as "means of protecting consumers"); Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999) (the antitrust laws are intended "to preserve competition for the benefit of consumers.").

34. *Antitrust Guidelines for Collaborations among Competitors*, DOJ & FTC, *supra* note 8, at 6.

35. Chi. Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 674 (7th Cir. 1992).

36. *Causes and Effects of Climate Change*, UNITED NATIONS CLIMATE ACTION, https://perma.cc/3XNY-LWX3.

37. Missouri v. Nat'l Org. for Women, Inc., 467 F. Supp. 289, 305 (W.D. Mo. 1979) ("there are areas of our economic and political life in which the precepts of antitrust must yield to other social values.").

38. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

39. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

named for a pair of cases—protects certain rights to petition the government[40] such that joint petitioning activity may not be prohibited by the Sherman Act. The *Noerr-Pennington* doctrine has been used to insulate joint political activity that is not commercially motivated from antitrust scrutiny.[41] Here, Climate Agreements advance social and/or political objectives rather than marketplace objectives, and the *Noerr-Pennington* doctrine may, therefore, insulate such agreements from antitrust liability.[42]

2. Trade Associations/Professional Organizations

Although trade associations and professional organizations typically involve agreements among competitors, the Supreme Court has cautioned against condemning actions of professional associations as *per se* unlawful, particularly when the "economic impact" is "not immediately obvious."[43] Courts have generally found that the admissions practices of such organizations, which could resemble a group boycott, may be permissible and serve a legitimate purpose needed to properly function.[44] However, courts and U.S. antitrust enforcers, while recognizing potential procompetitive benefits of collective standard setting within an industry, have still found that agreements in that context might subject

40. *See, e.g.*, E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 136–38 (1961) (finding the Sherman Act did not apply to a railroad publicity campaign to promote stricter trucking industry regulations, even though it was motivated by an anticompetitive purpose, because the activity was "mere solicitation of governmental action with respect to the passage and enforcement of laws."); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 665–66 (1965) ("a union may make wage agreements with a multiemployer bargaining unit" to obtain the same terms from multiple employers but there is no exemption from the antitrust laws when union "has agreed with one set of employers to . . . eliminate competitors from the industry").

41. *See Nat'l Org. for Women, Inc.,* 467 F. Supp. at 296, *aff'd*, 620 F.2d 1301, 1303–04, 1319 (8th Cir. 1980) (finding the National Organization for Women's actions—invitation to boycott, strong motive for concerted action, knowledge that others were acting similarly—were "sufficient to find conspiracy under the Sherman Act" but that the antitrust laws were not applicable because the boycott involved "political opponents, not commercial competitors; and political objectives, not market place goals."); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907, 926–27 (1982) (recognizing that nonviolent boycott may have caused economic losses, but it was "a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments."). *Claiborne Hardware Co.* also recognizes cooperation to achieve collective policy goals as a fundamental element of American politics. 458 U.S. at 907 (citing Citizens Against Rent Control Coal. for Fair Housing v. Berkeley, 454 U.S. 290, 294 (1981)) ("the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.").

42. *See also* Democratic Staff Report, *supra* note 13, at 99–100 (commitment to a shared aspiration, and concerted lobbying to achieve those goals, would be afforded complete Section 1 immunity pursuant to *Noerr-Pennington*, "even if the government policies resulting from this concerted lobbying activity could be shown to harm competition.").

43. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458–59 (1986).

44. *See, e.g.*, Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 293–95 (1985); Flaa v. Hollywood Foreign Press Ass'n, 55 F.4th 680, 690–91 (9th Cir. 2022); Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advert. Ass'n, 672 F.2d 1280, 1285 (7th Cir. 1982).

the participants to antitrust liability.[45] Some Climate Agreements, such as the Climate Action 100's Net Zero Company Benchmark discussed *infra*, have characteristics of standard-setting organizations that may shield them from antitrust scrutiny.

3. The State Action Doctrine

The United States, as a signatory to the Paris Agreement, has expressed a national policy goal of reaching net-zero emissions by 2050.[46] When conduct that would otherwise violate the antitrust laws is carried out by non-state actors in accordance with state policy, courts apply the test set forth in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* to determine whether the act is subject to state action antitrust immunity.[47] Under *Midcal*, "[f]irst, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively *supervised by the State*."[48] Here, the goal to reduce greenhouse gas emissions to achieve net zero by 2050 has been clearly articulated by the federal government. The federal government, however, does not appear to be actively supervising private actors' greenhouse gas reductions. Without active supervision of private decarbonization, Climate Agreements will not qualify for antitrust immunity under the state action doctrine.[49]

II. CLIMATE AGREEMENTS

Climate Agreements include global participants in a variety of industries, often committing to goals to reduce greenhouse gas emissions by a date certain. Their goal to reduce greenhouse gas emissions can be accomplished in a number of ways. While it is true that at first glance this may appear to satisfy one element of a potential antitrust violation, *i.e.*, an agreement among competitors, the operation of these agreements lacks other required elements, most importantly, actual

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45. *See, e.g.*, *Ind. Fed'n of Dentists*, 476 U.S. at 458–59 (applying rule of reason analysis to dental association rule requiring members to refuse to cooperate with insurers' requests for x-rays and finding it unlawful); Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982) (standard setting organization and member company held liable for conspiracy to find a competitor failed to meet certain safety codes, in order for the member company to maintain its dominant marketplace position by excluding that competitor).

46. U.S. Dept. of State & U.S. Exec. Off. of the President, The Long-Term Strategy of the United States (2021) ("This 2021 Long-Term Strategy [. . .] lays out how the United States can reach its ultimate goal of net-zero emissions no later than 2050."). In 2021, the United States rejoined the Paris Agreement, set an ambitious Nationally Determined Contribution to reduce net greenhouse gas emissions by 50-52% in 2030, launched the Global Methane Pledge, and undertook additional concrete actions to advance climate action domestically and internationally.

47. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

48. *Id.* at 105 (internal quotations omitted).

49. *Id.* at 97–98 (finding no active supervision with respect to wine prices where the state did not "establish prices, review the reasonableness of price schedules, review the reasonableness of price schedules, regulate the terms of fair-trade contracts, monitor market conditions, or engage in any 'pointed reexamination' of the program.").

injury to competition. Further, the antitrust laws' exceptions, exemptions, and affirmative defenses provide further support for the conclusion that collectively seeking to effect climate-related goals is not an antitrust violation. To the extent that private agreements track the requirements of the Paris Agreement or similar intergovernmental agreements, it is unlikely these agreements would violate the antitrust laws. On their faces, they are not *per se* antitrust violations, such as agreements to reduce output or fix prices. Nor are they group boycotts prohibited under the Sherman Act.

In sum, several factors weigh against finding that Climate Agreements violate the antitrust laws, including that: (1) Climate Agreements are intergovernmental in nature and non-commercial in motive; (2) reductions on carbon emissions are not output restrictions; and (3) even the most aggressive of Climate Agreements, such as agreements to stop financing coal or fossil fuel projects, occur in the market for project finance for which countless competitors exist (and are thus unlikely to affect enough of the market to constitute an illegal group boycott). The below analysis of the organization and operation of some of the largest Climate Agreements highlights the applicability of these factors and the inapplicability of antitrust law.

A. THE PARIS AGREEMENT

The Paris Agreement is an intergovernmental pact signed by 193 countries, including the United States and the European Union, to limit the global temperature increase this century to 2 degrees Celsius (and endeavor to limit the temperature increase to 1.5 degrees Celsius) by reducing net emissions to zero by 2050.[50] The Paris Agreement was adopted at the UN Climate Change Conference held in Paris, France on December 12, 2015 (COP21) and went into effect on November 4, 2016.[51] Given its 193-country participant scope, the Paris Agreement is one of the most influential Climate Agreements and its goal of reducing emissions to net-zero by 2050 serves as a model for many other Climate Agreements.

B. THE UN RACE TO ZERO

One of the most prominent Climate Agreements is the United Nations Race to Zero, which over ten thousand non-state actors have joined, including corporations, financial institutions, cities, states, regions, and healthcare and educational institutions.[52] The "minimum pledge for participation in Race to Zero is to reach

50. Jake Schmidt, *Paris Climate Agreement Explained: What Actions Did Countries Commit to Implement?*, NAT'L RES. DEF. COUNCIL (Dec. 21, 2015), https://perma.cc/J8UP-J92P; *For a Livable Climate: Net-zero Commitments Must be Backed by Credible Action*, UNITED NATIONS, https://perma.cc/MX4B-SPA7. Pursuant to the Paris Agreement, the United States committed to cut economy-wide emission of greenhouse gases by 26-28% below its 2005 level by 2028. Schmidt, *supra.*

51. *The Paris Agreement*, UNITED NATIONS CLIMATE CHANGE, https://perma.cc/95DR-ZCKS.

52. *The Race to Zero Campaign*, UNITED NATIONS CLIMATE CHANGE, https://perma.cc/BM5X-N242.

net-zero by midcentury."[53] Generally, UN Race to Zero requires that the head of each participating organization pledge that the organization will endeavor to reduce greenhouse gases by 50% by 2030 and reach net-zero emissions by 2050 at the latest. Additionally, each Race to Zero member is encouraged to actively phase out all development, financing, or facilitation of new unabated[54] fossil fuel assets.[55] Participants commit to five "Ps":[56]

> **(1) Pledge:** In addition to the 2030 and 2050 targets already discussed, participants must set an interim target to achieve in the next decade, which reflects maximum effort toward or beyond a fair share of the 50% global reduction in CO2 by 2030. For business entities, targets must include all emissions by subsidiaries and affiliates; for governmental entities, targets must include all emissions within the territory of the government; for financial entities, targets must include emissions by all portfolio/financed/facilitated/insured entities;
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> **(2) Plan:** Within 12 months of joining, participants must publicly disclose a plan that outlines how all UN Race to Zero criteria will be met, including what actions will be taken within the next 12 months, within two to three years, and by 2030;
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> **(3) Proceed:** Participants agree to take immediate action through all available pathways toward achieving net-zero emissions, including by focusing research on emission reductions where possible;
>
> **(4) Publish:** Participants agree to publicly report their progress against both interim and longer-term targets on an annual basis; and
>
> **(5) Persuade:** Within 12 months of joining, each participant agrees to align external policy and engagement, including membership in associations, to the goals of the UN Race to Zero.

This Pledge is the relevant commitment for purposes of antitrust analysis.

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53. *Id.*

54. Notably, the qualifier "unabated" refers to the burning of fossil fuels without using technology to capture carbon dioxide emissions and is subject to intense debate. Matteo Civillini, *What Does "unabated" Fossil Fuels Mean?*, CLIMATE HOME NEWS (June 6, 2023), https://perma.cc/BW4G-E8W5; Kate Abnett & Simon Jessop, *U.S., Canada among 20 Countries to Commit to Stop Financing Fossil Fuels Abroad*, REUTERS (Nov. 4, 2021), https://www.reuters.com/business/cop/19-countries-plan-cop26-deal-end-financing-fossil-fuels-abroad-sources-2021-11-03/. Abatement efforts can come in the form of carbon dioxide removal, which mitigates climate change by removing carbon dioxide pollution from the atmosphere, or carbon capture and storage (CSS), which captures emissions from their source to prevent them from entering the environment. James Mulligan et al., *6 Ways to Remove Carbon from the Atmosphere*, WRI INDON. (Mar. 17, 2023), https://perma.cc/4Y98-MLY7. By including the term "unabated," UN Race to Zero participants are not committing to stop using fossil fuels but committing to stop using fossil fuels without abatement efforts.

55. Race to Zero Expert Peer Review Group, *Interpretation Guide*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (June 2022), https://perma.cc/4ZCW-RXD4.

56. *Id.* at n.6.

C. THE CLIMATE PLEDGE

Signatories of the Climate Pledge commit to become net-zero by 2040[57]–ten years ahead of the Paris Agreement.[58] They also agree to:

(1) measure and report Greenhouse gas emissions regularly;

(2) implement decarbonization strategies in line with the Paris Agreement through real business changes and innovations, including efficiency improvements, renewable energy, materials reductions, and other carbon elimination strategies; and

(3) neutralize any remaining emissions with additional, quantifiable, real, permanent, and socially-beneficial offsets to achieve net-zero annual carbon emissions by 2040.

More than 400 companies, including Amazon.com, Reckitt, and Sony have joined the Climate Pledge.[59]

D. UNITED NATIONS NET-ZERO BANKING ALLIANCE

The UN Net-Zero Banking Alliance is an industry-led and UN-convened group of banks representing over 40% of global banking assets that are "committed to aligning their lending and investment portfolios with net-zero emissions by 2050."[60] The UN Net-Zero Banking Alliance is a part of the UN Race to Zero.[61] Its members commit to the following principles:

(1) Alignment: align business strategy to be consistent with and contribute to individuals' needs and society's goals, as expressed in the Sustainable Development Goals, the Paris Climate Agreement, and relevant national and regional frameworks;

(2) Impact & Target Setting: continuously increase positive impacts while reducing the negative impacts on, and managing the risks to, people and the environment resulting from participants' activities, products, and services. To this end, participants agree to set and publish targets that will have the most significant impacts;

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57. *Driving Climate Solutions*, AMAZON, https://perma.cc/94J4-FWQV.

58. The Paris Agreement is a legally binding international treaty on climate change adopted by 196 parties at the UN Climate Change Conference (COP21) in Paris, France on December 12, 2015. *The Paris Agreement*, UNITED NATIONS CLIMATE CHANGE, https://perma.cc/E3H4-QF43.

59. *The Climate Pledge Now Has 400 Signatories*, THE CLIMATE PLEDGE (Feb. 14, 2023), https://perma.cc/NN38-K98E.

60. *Net-Zero Banking Alliance*, UNEP FIN. INITIATIVE, https://perma.cc/V3ZJ-TLJK.

61. *Id.*

> **(3) Clients & Customers**: work responsibly with clients and customers to encourage sustainable practices and enable economic activities that create shared prosperity for current and future generations;
>
> **(4) Stakeholders**: proactively and responsibly consult, engage, and partner with relevant stakeholders to achieve society's goals;
>
> **(5) Governance & Culture**: implement commitment to these Principles through effective governance and a culture of responsible banking; and
>
> **(6) Transparency & Accountability**: periodically review individual and collective implementation of these Principles and be transparent about and accountable for the participants' positive and negative impacts and contribution to society's goals.[62]

The members also commit to, among other things, "transition all operational and attributable GHG emissions from [their] lending and investment portfolios to align with pathways to net-zero by mid-century, or sooner, including CO2 emissions reaching net-zero at the latest by 2050, consistent with a maximum temperature rise of 1.5˚C above pre-industrial levels by 2100."[63] The agreement defines GHG emissions expansively, to include (1) direct emissions; (2) emissions from purchased electricity; and (3) emissions from loans and investments.[64]

E. CLIMATE ACTION 100+

Climate Action 100+ ("CA100") is an investor-led initiative that urges corporations (in which the investors hold shares) to not only curb their greenhouse gas emissions per the Paris Agreement's net-zero 2050 emissions goals but also to be transparent about the actions they are taking in accordance with climate-change financial disclosure guidance.[65] CA100 is currently focused on 171 companies in

62. *Principles for Responsible Banking*, UNEP FIN. INITIATIVE, https://perma.cc/MZY9-DD66.

63. *Id.*

64. John Mandyck, *What If Banks Had to Disclose the Impact of Their Investments?*, HARV. BUS. REV. (May 20, 2022), https://perma.cc/3CJ8-MZYS.

65. *See The Three Goals*, CLIMATE ACTION 100+, https://perma.cc/8LUY-QWNF (The organization has three goals: "(1) Implement a strong governance framework which clearly articulates the board's accountability and oversight of climate change risk; (2) Take action to reduce greenhouse gas emissions across the value chain, including engagement with stakeholders such as policymakers and other actors to address the sectoral barriers to transition. This should be consistent with the Paris Agreement's goal of limiting global average temperature increase to well below 2˚C above pre-industrial levels, aiming for 1.5˚C. Notably, this implies the need to move towards net-zero emissions by 2050 or sooner; and (3) Provide enhanced corporate disclosure and implement transition plans to deliver on robust targets. This should be in line with the final recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) and other relevant sector and regional guidance, to enable investors to assess the robustness of companies' business plans and improve investment decision-making.").

specific sectors for engagement.[66] The volume of investors and value of investments is substantial, involving "[o]ver 700 investors, responsible for $68 trillion in assets under management" and making CA100 "the largest ever global investor engagement initiative on climate change, with growing influence and impact."[67] The organization provides members with "numerous engagement tools" that they may "choose to use" at their discretion.[68]

A key element of CA100's work is the development of the Net-Zero Company Benchmark, which "assesses the performance of focus companies against the initiative's three high-level goals: emissions reduction, governance, and disclosure."[69] The Company Benchmark "sets a standard from which the level of ambition in companies' climate strategies can be measured, and provides a framework from which signatories can develop targeted engagement approaches where company actions are inconsistent with limiting global warming."[70] However, the Benchmark "does not specifically seek to score or rank companies, nor does it use overall numeric or alphabetic ratings" and instead is "intended to draw investor attention to the most significant aspects of corporate decarbonization strategy and a company's climate action or inaction."[71] The Benchmark incorporates the goal of the Paris Agreement to limit global warming to 1.5° C in the indicators within the Disclosure Framework, evaluating companies commitment to net-zero emissions by 2050, emissions alignment against various 1.5° C scenarios, and lobbying activities in line with the Paris Agreement, among other things.

CA100 has been publicly scrutinized as potentially violating antitrust laws through its actions to address climate change that have been construed as a group boycott.[72] In 2022, Arizona Attorney General Mark Brnovich,[73] along with other

66. *See Companies*, CLIMATE ACTION 100+, https://perma.cc/YV6J-7J48 (indicating sectors covered, which encompass industries where environmental concerns are often focused, such as airlines, automobiles, chemicals, coal mining, oil and gas, paper, and shipping).

67. *See About Climate Action 100+*, CLIMATE ACTION 100+, https://perma.cc/7W8C-822N.

68. *See Engagement Process*, CLIMATE ACTION 100+, https://perma.cc/2J3D-GYJ2.

69. *See Frequently Asked Questions: Net Zero Company Benchmark*, CLIMATE ACTION 100+, https://perma.cc/A8MY-FLQP.

70. *Id.*

71. *Id.*

72. *See* Antitrust News: House Judiciary Committee Members Warn Climate Action 100+ That Its ESG Activities May Violate Antitrust Laws, Request Documents, 2022 WL 17484206 (expressing concern that the coordinated effort between banks, money managers, and Climate Action 100+ to restrict investments in coal, oil, and gas is driving up energy costs worldwide, empowering America's adversaries abroad, and may be violating U.S. antitrust laws).

73. Mark Brnovich, *ESG May Be an Antitrust Violation*, WALL ST. J. (Mar. 6, 2022), https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-re tirement-investment-political-agenda-coordinated-influence-11646594807; Mark Brnovich et al., Letter to Mr. Laurence D. Fink, CEO, BlackRock Inc., at 1 (Aug. 4, 2022), https://perma.cc/MYP2-5N8K; Letters to Mindy Lubber from Rep. Jim Jordan et al. (Dec. 6, 2022 and Dec. 31, 2022), https://perma.cc/42H3-BCM7.

state attorneys general[74] and members of the U.S. House Judiciary Committee,[75] announced investigations into the organization's purported violations of Section 1 of the Sherman Act by facilitating collusion and harming competition. Specific issues raised include whether the organization is pressuring oil companies to drill for less oil or whether its members are boycotting energy companies.[76]

Unsurprisingly, individual members of CA100 disclaimed any antitrust violations. For example, BlackRock, Inc. (a top asset manager) stated that it joined the CA100 investor group in January 2020 "to participate in dialogue with companies and financial institutions on matters important to our clients."[77] BlackRock further stated that it "acts independently in its investment decisions."[78] "We don't co-ordinate investment decisions with any members of Climate Action 100+, and we do not buy, sell, hold or vote our shares together with any Climate Action 100+ signatory."[79]

Nevertheless, in February 2024, in what many viewed as a response to government investigations of businesses that support environmental policies, BlackRock announced it had scaled back its involvement in CA100 and transferred its participation from its U.S. division to its international division. BlackRock cited its concern about legal risks from CA100's announcement that its next phase would require participants to "tak[e] action to actively reduce greenhouse gas emissions across the value chain."[80] BlackRock specifically noted its concern that the coalition's new goals surrounding decarbonization "would raise legal considerations, particularly in the U.S."[81]

Following BlackRock's announcement, other large investors and asset managers, including JP Morgan Chase, State Street, and PIMCO, announced their withdrawal from CA100, also citing legal risks as well as inconsistencies with their

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74. Letter from Mark Brnovich, Ariz. Att'y Gen., et al., to Laurence D. Fink, CEO, BlackRock, Inc. (Aug. 4, 2022), https://perma.cc/B46M-52S2.

75. Letters from Rep. Dan Bishop et al., to Mindy S. Lubber, Inv. Network Rep., and Simiso Nzima, Inv. Rep., N. Am., Climate Action 100+ (May 5, 2023), https://perma.cc/E2YZ-7NYD.

76. Antitrust News: Sen. Cotton Objects to BlackRock's Participation in Climate-change Group, 2022 WL 2980514. Senator Cotton alleged BlackRock's participation "threatens our national security" and "hurts Americans struggling to buy a tank of gas."

77. Gina Gambetta, *BlackRock Pushes Back against Arkansas Senator over CA100+ Involvement*, RESPONSIBLE-INVESTOR.COM (July 15, 2022), https://perma.cc/Z3KL-PKSJ.

78. *Id.*

79. *Id.*; *see also* Dominic Webb, *BlackRock 'Disturbed' by Anti-ESG Movement, Slams 'Inaccurate Statements*,*'* RESPONSIBLE-INVESTOR.COM (Sept. 8, 2022), https://perma.cc/2W4L-LWHX (BlackRock denies boycotting energy companies, highlights launch of "voting choice" offering to pension fund clients to vote their own shares, and indicates it is "disturbed by the emerging trend of political initiatives that sacrifice pension plans' access to high-quality investments – and thereby jeopardise pensioners' financial returns.").

80. Rachael Frazin, JP MORGAN, *State Street Leave Major Investor Climate Group*, THE HILL (Feb. 15, 2024), https://thehill.com/business/4470677-jpmorgan-state-street-leave-major-investor-cl imate-group/; Andrew Ross Sorkin et al., Wall Street's Climate Retreat, N.Y. TIMES (Feb. 16, 2024), https://www.nytimes.com/2024/02/16/business/dealbook/wall-streets-climate-retreat.html.

81. Sorkin et al., *supra* note 80.

independent business policies as the bases for their withdrawal.[82] Other Climate Agreements, such as Net Zero Asset Managers (NZAM), have also experienced member attrition and challenges to their continued operation under the changing political climate. Vanguard left NZAM as early as 2022,[83] and BlackRock exited in January 2025.[84] Shortly after BlackRock's departure, NZAM announced they were pausing their efforts, citing recent legal inquiries by public officials as a reason for the suspension.[85]

F. EACH CLIMATE AGREEMENT LEAVES MEMBERS WIDE DISCRETION ON HOW TO MEET THEIR CLIMATE GOALS

Under each of the major Climate Agreements, participants are given wide latitude in how to implement their transition to net-zero carbon emissions. They may choose to focus on any or all of a variety of methods to reduce emissions, including:

- Reducing or eliminating emissions from airplane travel;
- Reducing or eliminating emissions from car travel;
- Reducing or eliminating emissions from construction;
- Reducing or eliminating emissions from manufacturing or plant operations;
- Reducing electricity used to power offices and factories;
- Purchasing carbon offset credits;
- Transitioning the energy used to power offices, factories, or other facilities to sustainable sources; and
- Eliminating ownership and investment in fossil fuel production.

As an example, Amazon's approach to meeting its goal to reach net-zero by 2040 involves expanding the use of zero-emission transportation, such as electric vans, and transitioning to renewable energy sources.[86] Even the largest fossil fuel producers have committed to achieving net-zero greenhouse gas emissions by a certain date. Exxon,[87] TotalEnergies,[88] Chevron,[89] and Shell[90] have all promised

82. *Id.*; *see also* David Gelles, *More Wall Street Firms Are Flip-Flopping on Climate. Here's Why*, N.Y. TIMES (Feb. 19, 2024), https://www.nytimes.com/2024/02/19/business/climate-blackrock-state-street-jpmorgan-pimco.html.

83. Jonathan Stempel & Carolina Mandl, BlackRock, *Vanguard, State Street Sued by Republican States over Climate Push*, REUTERS (Nov. 29, 2024), https://www.reuters.com/legal/blackrock-state-street-vanguard-sued-by-republican-states-over-climate-accords-2024-11-27/.

84. Simon Jessop & Ross Kerber, *Exclusive: Investor Climate Group Suspends Activities after BlackRock Exit*, REUTERS (Jan. 13, 2025), https://www.reuters.com/sustainability/sustainable-finance-reporting/investor-climate-group-suspends-activities-after-blackrock-exit-2025-01-13.

85. *Id.*

86. *Driving Climate Solutions*, AMAZON, https://perma.cc/94J4-FWQV.

87. *ExxonMobil Announces Ambition for Net Zero Greenhouse Gas Emissions by 2050*, EXXONMOBIL (Jan. 18, 2022), https://perma.cc/28M3-SPN5.

88. *A Two-pillar Multi-energy Strategy*, TOTALENERGIES, https://perma.cc/7FBH-9LDS.

89. *Chevron Sets Net Zero Aspiration and New GHG Intensity Target*, CHEVRON (Oct. 11, 2021), https://perma.cc/8UJU-5YNS.

90. *Our Climate Target*, SHELL, https://perma.cc/B8GT-B42T.

to achieve net-zero by 2050. BP has promised to achieve net-zero emissions by 2050 "or sooner."[91]

III. ATTEMPTED AND THREATENED ANTITRUST ENFORCEMENT

There has not yet been any litigation by U.S. antitrust enforcement agencies, such as the FTC or DOJ, concerning any of the Climate Agreements described above. Nor has any private enforcement action ever successfully challenged corporate participation in such agreements. However, there has been at least one government investigation of a pro-climate agreement involving car companies, and one multi-state lawsuit challenging investment firms' involvement in Climate Agreements to the detriment of coal producers.[92] Despite the limited legal actions targeting Climate Agreement participants, and the fact that these agreements are largely restricted to setting greenhouse gas reduction targets, participants in Climate Agreements have nevertheless received numerous threats of antitrust enforcement by members of Congress and state attorneys general.

A. ATTEMPTED LEGAL ENFORCEMENT

In 2019, the DOJ initiated an investigation into whether Ford, Volkswagen, Honda, and BMW violated antitrust laws when they voluntarily committed to abide by California's fuel economy targets, which were more aggressive than required by federal law at the time.[93] The DOJ subsequently closed the investigation in 2020 without taking action.[94] Although that particular agreement did not result in liability for its participants, the investigation serves as a reminder of the possibility of a government investigation or litigation concerning pro-climate agreements in the future.

On November 27, 2024, Texas and ten other states[95] brought suit against asset investment and management firms BlackRock, Vanguard, and State Street for violations of Section 7 of the Clayton Act, Section 1 of the Sherman Act, and state antitrust laws.[96] Specifically, the complaint alleges the investment managers' involvement in climate initiatives, such as Net Zero, amounted to a *per se* illegal horizontal agreement to restrict coal producers' output and substantially restricted competition in the relevant markets. In addition, the lawsuit alleged

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91. *Getting to Net Zero: Climate Advocacy in the U.S.*, BP, https://perma.cc/B6PN-8FW9.

92. Texas v. BlackRock, No. 24-cv-000437 (E.D. Tex. Nov. 27, 2024).

93. Coral Davenport, *Justice Department Drops Antitrust Probe against Automakers That Sided with California on Emissions*, N.Y. TIMES (Feb. 7, 2020), https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html.

94. *Id.*; *see also* U.S. DEP'T OF JUST., REP. 24-079, PRELIMINARY REVIEW OF ALLEGATIONS CONCERNING THE ANTITRUST DIVISION'S HANDLING OF THE AUTOMAKERS INVESTIGATION (July 2024) https://perma.cc/5URG-Y66W.

95. Including Alabama, Arkansas, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska, West Virginia, and Wyoming. *See* Texas v. BlackRock, No. 24-cv-000437 (E.D. Tex. Nov. 27, 2024).

96. *Id.*

that by owning shares in multiple coal companies and pressuring those companies to reduce greenhouse gas emissions, the defendants were able to influence the policies across numerous horizontal competitors, thereby bringing about a substantial lessening of competition in the markets for coal. The complaint alleged that this common ownership violated Section 7 of the Sherman Act.[97] In support of their allegations, the states allege that the defendants' mere participation in CA100 and the Net Zero Asset Managers Initiative offers evidence of an agreement to coordinate. In an action likely taken in response to this lawsuit, BlackRock quit the Net Zero Asset Managers Initiative in January 2025.[98]

B. THREATENED ENFORCEMENT

Beginning in early 2022 and continuing through the present, several members of Congress and state attorneys general have voiced concerns that Climate Agreements violate the antitrust laws.

First, in March 2022, Mark Brnovich, the former Attorney General of Arizona, published an op-ed in the Wall Street Journal expressing his intent to investigate Climate Agreements under the antitrust laws. The letter specifically mentioned a climate investment collaborative—CA100—as an example of an initiative that was potentially illegally harming competition.[99] In August 2022, nineteen state attorneys general adopted the same position by issuing a letter to the CEO of BlackRock regarding its participation in CA100, suggesting that mere involvement "could be a violation of Section 1 of the Sherman Antitrust Act."[100]

Second, in October 2022, a group of nineteen state attorneys general launched an antitrust investigation into six major U.S. banks regarding their membership with the United Nations Net-Zero Banking Alliance.[101] The probe centered around the Alliance's requirement that participants commit to financing "no new unabated coal."[102] While the probe did not ultimately lead to litigation, it did lead

97. Section 7 of the Clayton Act is primarily used to challenge mergers. It provides that "[n]o person . . . shall acquire . . . any part of the stock . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly[.]" 15 U.S.C. § 18. Some scholars have argued that common ownership of horizontal competitors should be taken into account in the merger process, but the provision has not previously been held to impose liability outside of the merger context. *See generally* Fiona Scott Morton & Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, 127 YALE L.J. 2026 (2018) (arguing that ownership of horizontal competitors by equity funds leads to raised prices in a horizontal market).

98. Lynn Cavanaugh, *BlackRock Quits Net Zero Climate Group, After Ongoing Pushback against ESG Investing*, BENEFITS PRO (Jan. 10, 2025), https://perma.cc/M9FY-7HED.

99. Brnovich, *supra* note 73.

100. Brnovich, *supra* note 74.

101. Rochelle Toplensky, *Antitrust Threats Cloud Business Climate Action*, WALL ST. J. (Jan. 4, 2023), https://www.wsj.com/articles/antitrust-threats-cloud-business-cooperation-on-climate-act ion-11672857017; *Net-Zero Banking Alliance*, UNEP FIN. INITIATIVE, https://perma.cc/V3ZJ-TLJK (last visited Aug. 18. 2023).

102. Toplensky, *supra* note 101.

the Alliance to alter its requirements by making participants' commitment to phase out fossil fuels voluntary.[103]

Third, in November 2022, Senators Marsha Blackburn, Tom Cotton, Charles E. Grassley, Michael S. Lee, and Marco Rubio issued letters to 51 U.S. law firms about impending antitrust-related inquiries into climate initiatives.[104] The letter threatened that Congress would "increasingly use its oversight powers to scrutinize the institutionalized antitrust violations being committed in the name of ESG and refer those violations to the FTC and the Department of Justice."[105]

Fourth, on June 14, 2023, the Chair of the U.S. House Judiciary Committee, Rep. Jim Jordan, issued a subpoena seeking information from Ceres, a sustainability nonprofit organization, regarding alleged antitrust violations.[106] Jordan expressed concern that Ceres, which sponsors CA100, is "appear[ing] to facilitate collusion" by advancing ESG-related goals.[107] The subpoena followed a series of communications between Ceres and Rep. Jordan and other members of Congress, which began on December 6, 2022. The December 6th letter requested the production of all documents and communications regarding Ceres' relationship to CA100 and its efforts to "advance ESG-related goals."[108]

Fifth, on July 6, 2023, Rep. Jim Jordan and other members of Congress sent letters to leadership of top investment firms BlackRock,[109] Vanguard,[110] and State Street,[111] as well as to two prominent decarbonization investment initiatives, the Net Zero Asset Managers Initiative ("NZAM") and Glasgow Financial Alliance for Net Zero ("GFANZ"),[112] that reflect the same antitrust concerns that were the subject of the 2022 attorneys general probe. The letters also requested the production of documents related to the organizations' potential collaboration and communication with one another toward the advancement of climate-related goals.

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103. *Id.*

104. *Cotton et al.*, *supra* note 2.

105. *Id*.

106. Ross Kerber, *US House Judiciary Leader Subpoenas Documents from Climate Groups*, REUTERS (June 15, 2023), https://www.reuters.com/sustainability/us-house-judiciary-leader-subpoenas-documents-climate-groups-2023-06-14/.

107. Letter from Rep. Jim Jordan, Judiciary Comm. Chair, to Matthew E. Miller, Counsel, Ceres, (June 14, 2023), https://perma.cc/52WF-Q3XM.

108. Bishop et al., *supra* note 75, at 3–10 (letters of Dec. 6 and Dec. 31, 2022).

109. Letter from Rep. Jim Jordan et al., Judiciary Comm. Chair, House of Representatives, to Larry Fink, Chairman & Chief Exec. Officer, BlackRock, Inc. (July 6, 2023), https://perma.cc/S7YD-5G5Q.

110. Letter from Rep. Jim Jordan et al., Judiciary Comm. Chair, House of Representatives, to Tim Buckley, Chairman & Chief Exec. Officer, The Vanguard Group, Inc. (July 6, 2023), https://perma.cc/6C6H-SZ7M.

111. Letter from Rep. Jim Jordan et al., Judiciary Comm. Chair, House of Representatives, to Yie-Hsin Hung, President & Chief Exec. Officer, State Street Global Advisors (July 6, 2023), https://perma.cc/M7BM-8QJ2.

112. Letter from Rep. Jim Jordan et al., Judiciary Comm. Chair, House of Representatives, to Michael R. Bloomberg, GFANZ Co-Chair (July 6, 2023), https://perma.cc/38A8-3CWS.

Sixth, on August 1, 2023, Rep. Jim Jordan and other members of Congress sent a request for documents to As You Sow, and other investor groups that are part of CA100 or NZAM, citing antitrust concerns regarding purported collusion with other members to force American corporations to decarbonize and reduce emissions to net-zero.[113] A few months later, unsatisfied with As You Sow's and GFANZ's responses, Rep. Jim Jordan issued subpoenas to As You Sow[114] and GFANZ[115] on November 1, 2023, concerning potential antitrust violations stemming from the groups' ESG-related activities.

Seventh, on June 11, 2024, the U.S. House Judiciary Committee issued an Interim Staff Report on an investigation claiming to have evidence of a "climate cartel" consisting "of left-wing environmental activists and major financial institutions" colluding "to force American companies to 'decarbonize' and reach 'net zero.'"[116] The House Judiciary Interim Staff Report also touted multiple withdrawals by asset managers and members from climate action groups, attributing these withdrawals to the "Committee's aggressive oversight."[117]

IV. ANTITRUST ANALYSIS OF CLIMATE AGREEMENTS

As set forth herein, a thorough legal analysis reveals that most Climate Agreements are unlikely to violate the antitrust laws.[118] First, Climate Agreements, which will be analyzed under the rule of reason, are not price-fixing conspiracies or output restrictions because any restrictions on output relate to greenhouse gases, a byproduct for which no consumer market exists. Second, Climate Agreements do not constitute an illegal group boycott because, among other reasons, Climate Agreements have a non-commercial motive, and it is unlikely that the boycotting entities have market power in a definable consumer market. Further, these agreements are politically motivated and align with the goals of the Paris Agreement, which further insulates them from antitrust scrutiny.

A. MOST CLIMATE AGREEMENTS ARE NOT UNLAWFUL PRICE-FIXING CONSPIRACIES OR OUTPUT RESTRICTIONS

Price fixing and output restrictions (where competitors agree to reduce the output of a product they are selling) have long been held *per se* unlawful under the

113. Letters from Rep. Jim Jordan, Judiciary Comm. Chair (Aug. 1, 2023), https://perma.cc/2F5H-LG6H.

114. Letter from Rep. Jim Jordan, Judiciary Comm. Chair, House of Representatives, to Andrew Herman, Counsel, As You Sow (Nov. 1, 2023), https://perma.cc/GW8B-UB45.

115. Letter from Rep. Jim Jordan, Judiciary Comm. Chair, House of Representatives, to John Eichlin, GFANZ Counsel (Nov. 1, 2023), https://perma.cc/R5YE-U8WK.

116. STAFF OF H.R. COMM. ON THE JUDICIARY, 118TH CONG., INTERIM STAFF REPORT, CLIMATE CONTROL: EXPOSING THE DECARBONIZATION COLLUSION IN ENV'T, SOC., AND GOVERNANCE (ESG) INVESTING (2024), p. i.

117. *Id*. at iv, 6–8.

118. It is notable that none of the letters threatening antitrust liability examined meaningfully analyze these agreements under existing antitrust jurisprudence.

antitrust laws. A "naked restriction on price or output" is unlawful and requires no proof of market power.[119] A "horizontal agreement [is] 'naked' if it is formed with the objectively intended purpose or likely effect of increasing price or decreasing output in the short run, with output measured by quantity or quality."[120]

Climate Agreements fit poorly into that framework. As an initial matter, in many industries, greenhouse gas emissions can be reduced through innovation and efficiencies without lowering the output of the end product. Moreover, a company's reduction of its greenhouse gas emissions, even if accomplished alongside others pursuant to a joint agreement to reduce emissions, does not entail either fixing prices or limiting output in any market. Companies do not *sell* greenhouse gas emissions and there is no market for such emissions. Nor are emissions a product feature that consumers affirmatively seek out when determining which product to purchase, unlike, for example, product interoperability.[121] Antitrust jurisprudence has long recognized that distinction between products and byproducts.[122]

Because greenhouse gas emissions are a byproduct and not sold to consumers, Climate Agreements are unlikely to be deemed a restraint on output in any definable product market. An antitrust product market is defined as "all products reasonably interchangeable *by consumers* for the same purposes."[123] Restrictions on greenhouse gas emissions will be treated differently than sustainability efforts that *are* naked output restrictions on a consumer product, such as jointly limiting fish harvests to prevent overfishing.[124] There is, of course, a consumer market for fish, and this type of agreement is likely to be deemed *per se* unlawful despite its sustainability goals. While most Climate Agreements are far more akin to permissible standard-setting than to illegal collusion under antitrust laws, agreements that blatantly fix prices or reduce output in the name of environmental or sustainability goals will be subject to antitrust scrutiny.[125]

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119. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100, 104 (1984).

120. HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1905, at 210 (1998).

121. *See, e.g.*, In re: Keurig Green Mountain Single Serve Coffee Antitrust Litigation, No. 14-md-02542 (S.D.N.Y. 2022).

122. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 776 (1999) (in a case alleging advertising restrictions by non-profit dental industry group were anticompetitive, the relevant question was "whether the limitation on advertisements obviously tends to limit the total delivery of dental services"); Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986) (distinguishing between prohibited monopolistic exclusion of rivals and permitted exclusion of rivals as a byproduct of competition).

123. United States v. Microsoft Corp., 253 F.3d 34, 52 (D.C. Cir. 2001) (emphasis added) (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956)).

124. *See, e.g.*, Jonathan H. Adler, *Conservation through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV. 3 (2004).

125. An example of a "sustainability agreement" with antitrust exposure is the Forum Letter, an open letter signed by hundreds of fashion designers and retailers that sought to further environmental goals by, among other things, agreeing to "discount at the end of season in order to allow for more full-price selling." This agreement appears to be a naked price fixing agreement. Open Letter to the Fashion

B. MOST CLIMATE AGREEMENTS ARE NOT ILLEGAL GROUP BOYCOTTS

Climate Agreements that raise group boycott concerns by critics, such as CA100 or the UN Net-Zero Banking Alliance, generally involve multiple firms agreeing to reduce greenhouse gas emissions or cease financing of certain projects, such as coal. For the reasons set forth below, most Climate Agreements are not illegal group boycotts under the Sherman Act as they are politically motivated and align with a governmental goal. Moreover, these groups often comprise members from a variety of industries and geographic locations, and it would be difficult to show that these agreements raised prices or excluded competition within a relevant market.

1. Climate Agreements Are Politically Motivated, Which May Insulate Them from Liability Under the Sherman Act

The Supreme Court has held that coordinated boycotts aimed at achieving a political objective are protected from antitrust liability by the First Amendment, even if they have economic consequences.[126]

NAACP v. Claiborne Hardware is the leading case excluding political boycotts from the scope of the Sherman Act. That case involved a boycott organized by civil rights organizations and leaders against businesses in Claiborne County, Mississippi, which failed to comply with the Civil Rights Act of 1964.[127] In 1966, seventeen boycotted merchants sued the organizations and individuals who organized and enforced the boycott. Among other claims, the plaintiffs alleged the defendants violated Mississippi's competition law, which (like many state antitrust statutes) mirrored the federal Sherman Act. In finding the politically motivated boycott protected by the First Amendment, the Court reasoned that statutes aimed at regulating economic activity cannot "justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change"—even where that boycott was not aimed at the government itself.[128]

The distinction between commercial and non-commercial objectives remains in place. For example, in 2008, the Sixth Circuit in *Bassett v. National Collegiate Athletic Association* relied on that distinction in upholding an NCAA prohibition against its member institutions hiring a disgraced former football coach unless he and the member school seeking to hire him first appeared before the NCAA

Industry 1, https://perma.cc/XL7M-9PFS. EU antitrust regulators raided fashion companies shortly after the letter's release. *See* Foo Yun Chee, *EU Cartel Raids Target Fashion Designers Proposing Sales Periods, Discount Changes - Sources*, REUTERS (June 14, 2022), https://perma.cc/KFD3-8RR4.

126. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907, 926–27 (1982); *see also* Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959) ("[T]he Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives").

127. *Claiborne Hardware*, 458 U.S. at 888–89.

128. *Id*. at 914–15.

committee on infractions.[129] In upholding the group hiring restriction, the court explained that the relevant inquiry is whether the rule itself is commercial in nature.[130] Similarly, in *Missouri v. National Organization for Women, Inc.*, the State of Missouri alleged that a women's rights organization, the National Organization for Women ("NOW"), was engaged in an unlawful group boycott when its members agreed to boycott holding conventions in states that had not ratified the Equal Rights Amendment.[131] The court explained that the Sherman Act does not prohibit joint efforts to attempt to persuade the legislature or the executive branch to "take particular action with respect to a law that would produce a restraint or a monopoly."[132] The court concluded that the Sherman Act did not apply to NOW's convention boycott campaign and explained "there are areas of our economic and political life in which the precepts of antitrust must yield to other social values."[133] Whereas committing to reduce greenhouse gas emissions is not a direct attempt to petition the government for action, it *does* attempt to enforce non-commercial social objectives and to comply with the terms of the intergovernmental Paris Agreement. These factors weigh against antitrust enforcement.

Under those precedents, we believe the Climate Agreements discussed in Part II fall outside the scope of the Sherman Act's prohibition on group boycotts. Each agreement has a non-commercial objective, such as pressuring corporations to take meaningful action in response to an accelerating climate crisis (*e.g.*, CA100) or committing to reduce greenhouse gas emissions to mitigate climate change (*e.g.*, the UN Race to Zero and the Climate Pledge). The *bona fide* non-commercial motives of such agreements, which do not contain naked price or output restrictions, will likely insulate them from antitrust liability. Further, certain Climate Agreements and associated group petitioning activities may be protected speech under the First Amendment and *Claiborne Hardware*. As the Supreme Court explained in *Claiborne Hardware*, the idea of "persons sharing common views banding together to achieve a common end is deeply embedded in the American political process" and "effective advocacy" is "undeniably enhanced by group association."[134] As an example, CA100's activities to jointly pressure companies to take action on climate change and increase transparency of such efforts would likely be held to be protected speech.[135]

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129. 528 F.3d 426 (6th Cir. 2008).

130. *Id.* at 433.

131. 467 F. Supp. 289, 291–296 (W.D. Mo. 1979). Further, unlike *Superior Court Trial Lawyers Association*, agreements to reduce greenhouse gas emissions are not naked restraints on price or output.

132. *Nat'l Org. for Women, Inc.*, 467 F. Supp. at 302.

133. *Id.* at 305; *but see* FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 414 (1990) (where a restraint is a naked restraint between competitors on price and output, "proffered social justifications for the restraint of trade do not make the restraint any less unlawful.").

134. *Claiborne Hardware*, 458 U.S. at 907–08.

135. The House Judiciary Interim Staff Report acknowledges the importance of free speech but contends that lobbying activities, like those of CA100 which could reduce output of disfavored products and impact public policy, serve "no legitimate procompetitive" purpose because they may restrict

2. Climate Agreements Would Be Analyzed Under the Rule of Reason

Depending on their characteristics, group boycotts are analyzed under the *per se* or rule of reason standards.[136] Here, the Climate Agreements analyzed do not satisfy the *per se* standard (*i.e.*, they could not be presumed to be illegal without further analysis) and are likely to be analyzed under the rule of reason to the extent they are not found to be non-commercial protected speech exempt from antitrust scrutiny.

a. Group Boycotts Under a Per Se *Analysis*

In *Northwest Wholesale Stationers*, the Supreme Court explained that a group boycott is "generally" *per se* illegal if: (a) the boycotting firms possess a dominant position in the relevant market; (b) the firms "cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete;" and (c) the practice is "not justified by plausible argument that [it was] intended to enhance overall efficiency and make markets more competitive."[137] However, the Court explained that a concerted refusal to deal need not possess all these traits to merit *per se* treatment. In *NYNEX Corp. v. Discon, Inc.*, the Supreme Court held that a boycott can only be deemed *per se* unlawful when the competitive harm stems from a horizontal agreement among direct competitors where there is no purpose other than to disadvantage the target of the boycott.[138]

Here, Climate Agreements involve participants at varying levels of a variety of industries. Although horizontal competitors are participating in such agreements, it cannot be said that the only purpose of such agreements is to disadvantage a particular target of a boycott. Rather, the primary purpose of Climate Agreements is to limit greenhouse gas emissions to slow global warming. Moreover, courts are hesitant to apply the *per se* rule to professional organizations or trade associations.[139] For these reasons, the *per se* rule will likely not apply.

A modified *per se* prohibition applies where "some or all" of the following characteristics are met:

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corporate speech and "do not serve the best interests of the target companies." House Judiciary Interim Staff Report, *supra* note 3, at 24. This view of model "competition," which benefits large powerful corporations and leaves them as uninterrupted as possible to create wealth, has been criticized as "an imminent threat to people and planet." Marios Iacovides, *Why Aligning Antitrust Policy with Sustainability is a Moral Imperative*, PROMARKET (Mar. 22, 2022), https://perma.cc/V5ZY-7YJX (finding "ample evidence of an overlap between market dominance and unsustainable business practices").

136. *Nw. Wholesale Stationers, Inc.*, 472 U.S. at 296 ("Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted.").

137. *Id.* at 294.

138. NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 128 (1998); *see also* Honey Bum, LLC v. Fashion Nova, Inc., 63 F.4th 813, 820 (9th Cir. 2023).

139. *See, e.g.*, Flaa v. Hollywood Foreign Press Ass'n, 55 F.4th 680, 690–91 (9th Cir. 2022).

> (1) the defendant's restriction "cut[s] off access to a supply, facility, or market necessary to enable the boycotted firm to compete;"
>
> (2) the defendant "possesse[s] a dominant position in the relevant market;" and
>
> (3) the defendant's restriction is "not justified by plausible arguments that [it is] intended to enhance overall efficiency and make markets more competitive."[140]

Here, even the most aggressive of the UN Race to Zero's goals, such as stopping the financing of new coal projects, fails this test, as financial institutions cannot be said to possess a dominant position in the market that would cut off access to a market necessary to enable the boycotted firm to compete. Courts have held that the asset at issue in financial services and insurance is "money, which may be supplied on a moment's notice."[141]

b. Group Boycotts Under the Rule of Reason

Courts will apply the rule of reason when the *per se* rule does not apply. The rule of reason requires a claimant to "prove the relevant market and to show the effects of competition within that market" to show injury.[142] Under the rule of reason, "a plaintiff must allege that the defendant has market power within a relevant market. That is, the plaintiff must allege both that a 'relevant market' exists, and that the defendant has power within that market."[143] Market power is commonly understood as the power to control prices or exclude competition.[144] "Determination of the relevant product and geographic markets is a necessary predicate to deciding whether" a defendant's practices violate the antitrust laws.[145]

In this analysis, a party seeking to prove the anticompetitive effects of a Climate Agreement would bear the burden of showing that the Climate Agreement had raised prices or excluded competition within a "relevant market." Here, Climate Agreements such as the UN Race to Zero or The Climate Pledge include participants from a wide variety of industries around the globe.[146] Therefore, defining a relevant product and geographic market from a standpoint of showing effects on price

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140. *Honey Bum, LLC*, 63 F.4th at 821 (quoting *Nw. Wholesale Stationers, Inc.*, 472 U.S. at 294 (1985)).

141. Reazin v. Blue Cross and Blue Shield of Kan., Inc., 635 F. Supp. 1287, 1329 (D. Kan. 1986); *see also* Ala. Ass'n of Ins. Agents v. Bd. of Governors, 533 F.2d 224, 250–51 (5th Cir. 1976) (financial services in general are competitive because of the ease of moving money), *modified*, 558 F.2d 729 (1977).

142. Adaptive Power Sols., LLC v. Hughes Missile Sys. Co., 141 F.3d 947, 951 (9th Cir. 1998).

143. *Flaa*, 55 F.4th at 693 (internal quotations omitted).

144. *Id.*

145. United States v. Marine Bancorp., Inc., 418 U.S. 602, 618 (1974).

146. *Who's In?*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://perma.cc/DCL3-TRHD; *Signatories*, THE CLIMATE PLEDGE, https://perma.cc/Q7F7-4BJU (the Climate Pledge includes 427 signatories in 56 industries in 38 countries).

or excluded competition in the market for products sold by Climate Agreement signatories would be challenging, and further complicated by the fact that Climate Agreements are not agreements to increase prices or output of consumer goods.

Likewise, as discussed *supra*, agreements to stop financing new coal projects are unlikely to constitute an illegal group boycott because the relevant product market would include all financing sources.

Moreover, some Climate Agreements that appear to boycott fossil fuels, such as UN Race to Zero, only restrict use of fossil fuels *without abatement efforts*. Thus, there is no true boycott as the signatories are free to keep utilizing fossil fuels so long as they also engage in abatement efforts, such as purchasing carbon offset credits.[147]

For these reasons, it would be difficult to make the case that Climate Agreements constitute an illegal group boycott under a rule of reason analysis, and their alignment with the Paris Agreement and non-commercial objectives, discussed *supra*, further supports that these agreements do not violate the antitrust laws.

C. CLIMATE AGREEMENTS' ALIGNMENT WITH THE PARIS AGREEMENT WEIGHS AGAINST ANTITRUST ENFORCEMENT

The fact that many Climate Agreements align with the goals of the intergovernmental Paris Agreement weighs against antitrust enforcement because (a) governments may not be held liable for antitrust violations, and (b) efforts to petition governments are likewise immune from antitrust scrutiny.

Courts have long held that governments, including foreign governments, are not subject to the Sherman Act under the political question and act of state doctrines.[148] *First,* the political question doctrine holds that federal courts do not have jurisdiction over political questions. It "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[149] *Second*, the act of state doctrine provides a "substantive defense on the merits" where "the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts."[150] In *Spectrum Stores, Inc. v. Citgo Petroleum Corp*., the Fifth Circuit held that a case alleging oil companies conspired with OPEC member nations to fix prices of crude oil and refined

147. *See* sources cited *supra* note 54.

148. *See* Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 227 (7th Cir. 1975) ("The Sherman Act does not apply to otherwise valid governmental action that results in a restraint of trade or monopoly.") (citation omitted).

149. Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986) (discussing the political question doctrine).

150. Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004) (discussing the act of state doctrine).

petrol products was barred by the political question and act of state doctrines.[151] Here too, U.S. and foreign governments' commitments to limit carbon emissions are policy determinations that should be excluded from antitrust scrutiny under these doctrines.

Similarly, efforts to *petition* the government are immune from antitrust scrutiny. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, twenty-four railroads designed a campaign to foster the adoption and retention of legislation and the enforcement of existing laws regarding motor carriers and the trucking industry.[152] The court in *Noerr* explained that the Sherman Act does not prohibit joint efforts to attempt to persuade the legislature or the executive branch to "take particular action with respect to a law that would produce a restraint or a monopoly."[153] The Court explained that petitioning immunity reflects not only First Amendment concerns but also a limitation on the scope of the Sherman Act. In other words, *Noerr* ruled that the Sherman Act does not extend to joint efforts to influence government officials.[154] The *Noerr* Court expressly declined to hold that the First Amendment overrides the Sherman Act.[155]

In light of that reasoning, courts have found that the Sherman Act similarly permits coordinated petitioning of foreign governments.[156] While there is limited precedent applying the *Noerr* doctrine to inter-governmental organizations like the UN, given the scope and goals of *Noerr* immunity, courts are likely to favor loosened antitrust scrutiny of companies' agreements to abide by their country's commitments.

V. INTERNATIONAL APPROACHES SUPPORT LIMITED ANTITRUST SCRUTINY OF CLIMATE AGREEMENTS

Although the United States has historically been a leader in encouraging other nations to implement fair business practices and antitrust policies, other transnational organizations and countries are now leading the way in finding ways to integrate sustainability, climate change, and environmental stewardship goals with their existing competition policies.

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151. 632 F.3d 938 (5th Cir. 2011); *see also* Int'l Assoc. of Machinists & Aerospace Workers v. Org. of Petroleum Exporting Countries (OPEC), 477 F. Supp. 553, 572 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981) (members of OPEC could not be named as defendants in antitrust case because foreign governments cannot be sued under U.S. antitrust laws).

152. 365 U.S. 127, 129.

153. *Id.* at 136.

154. *Id*. at 138.

155. *Id.* at 132 n.6.

156. *See* Cont'l Ore Co. v. Union Carbide & Carbon Corp., 289 F.2d 86, 94 (9th Cir.1961), *rev'd on other grounds*, 370 U.S. 690 (1962) ("[W]e do not see how such efforts . . . to persuade and influence the Canadian Government through its agent are within the purview of the Sherman Act."); Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1365 (5th Cir. 1983) ("We see no reasons why acts that are legal and protected if done in the United States should in a United States court become evidence of illegal conduct because performed abroad.").

For example, the European Commission's July 2023 Guidelines on "horizontal co-operation agreements," akin to the FTC's and DOJ's Horizontal Merger Guidelines, incorporated an entirely new chapter with guidance on sustainability efforts.[157] These European Commission Horizontal Guidelines indicate the Commission's willingness to (1) provide informal guidance about potential sustainability agreements,[158] (2) recognize that sharing data on providing sustainable products or production processes could create potential efficiencies that the European Commission will credit when considering agreements and their potential effect on competition,[159] and (3) affirmatively state that sustainability agreements between competitors that "do not negatively affect parameters of competition, such as price, quantity, quality, choice or innovation [] are not capable of raising competition law concerns."[160] Other categories of agreements that are unlikely to raise competition concerns are those that ensure compliance with international treaties and agreements,[161] address internal corporate conduct and seek to increase environmental responsibility within an industry,[162] and sustainability standardization agreements falling within the "soft safe harbour" parameters.[163]

Individual countries have also addressed how their competition laws would address and could ultimately allow sustainability efforts. Some, like Finland and France, have not altered their existing competition law framework, but instead changed how "consumer benefits" or "consumer welfare" would be interpreted to include future benefits to society, including environmental benefits, in connection with ESG efforts.[164] Others have updated their laws and regulations to provide specific exemptions for sustainable and pro-environmental behaviors. For example, a dedicated unit within Australia's Competition & Consumer Commission is

157. *See* European Commission, Guidelines on the Applicability of Article 101 on the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, (2023/C 257/01), ch. 9, Sustainability Agreements, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01). The European Commission Horizontal Guidelines also note the Commission's commitment "to the attainment of the objectives of the Green Deal for the European Union," *id.* at C 257/7, and that "[h]orizontal cooperation agreements can lead to substantial economic benefits, including sustainability benefits," *id.* at C 259/11.

158. *Id.* at C259/110.

159. *Id.* at C259/91.

160. *Id.* at 259/112, ¶ 527.

161. *Id.* at 259/112, ¶ 528.

162. *Id.* at 259/113, ¶ 529. *See also* 259/114, ¶¶ 538–48 (providing parameters for sustainability standardization agreements, allowing competitors to work together on environmental goals as long as the agreements do not disguise price fixing, market or customer allocation, or limitations on output, quality, or innovation).

163. *Id.* at 259/115, ¶ 549.

164. *See Finland: Sustainability and Competition Law – From Words to Action*, MONDAQ, https://perma.cc/R77D-NPC7. Parties may also seek specific guidance from authorities under the Finnish Administrative Procedure Act if they are unsure about their proposed ESG initiatives and compliance with the Finnish Competition Act. Under existing French laws, when the French Competition Authority (Autorité de la Concurrence or "ADLC") "takes decisions on merger control, it takes into account the preservation of consumer welfare, which is also characterized by its environmental dimension."

authorized to provide exemptions for certain conduct, including mergers and otherwise anticompetitive arrangements, that provides net public benefits (including longer-term environmental benefits) while not implicating competition.[165] Similarly, Belgium's legal framework now also considers environmental issues as part of the competitive assessment of anticompetitive and merger control cases, providing possible exemptions when (1) the addressed environmental issue is pertinent to the relevant market in the short to medium term and can objectively justify the negative competitive impact of the agreement, concentration, or practice; or (2) there are out-of-market benefits for society that also benefit those impacted by a negative effect on competition and the restrictive measures are necessary to achieve the benefits.[166]

It would be timely to consider how U.S. antitrust laws and related guidance could incorporate similar approaches to encourage sustainability efforts.

CONCLUSION

Climate Agreements generally do not violate antitrust laws. Indeed, Climate Agreements that align with the goals of the Paris Agreement and commit to reaching net-zero greenhouse gas emissions by a specific date are particularly unlikely to violate antitrust laws. While the potential for antitrust liability exists for agreements that fix prices or reduce output in pursuit of sustainability goals, Climate Agreements seeking to limit greenhouse gas emissions, other than those that operate through agreed limitations on product output, are not anticompetitive restraints within a definable consumer product market. Moreover, most Climate Agreements do not constitute illegal group boycotts; even the most restrictive directives of Climate Agreements to stop financing new coal or fossil fuel projects are likely to withstand antitrust scrutiny. As threats of antitrust enforcement loom from members of Congress and others, we encourage the FTC and DOJ to provide guidance on antitrust liability and enforcement relating to Climate Agreements so that participants in Climate Agreements can confidently continue their pursuit of climate-related goals.[167]

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165. *See* Organisation for Economic Co-operation and Development ("OECD"), Sustainability and Competition – Note by Australia and New Zealand (Dec. 1, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)62/en/pdf.

166. *See* OECD, Environmental Considerations in Competition Enforcement – Note by Belgium (Dec. 1, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)47/en/pdf.

167. Others have called for similar action. *See, e.g.*, Democratic Staff Report, *supra* note 13, at p. 101 (proposing DOJ and FTC revise the joint Antitrust Guidelines for Collaborations among Competitors); Cynthia Hanawalt, Denise Hearn & Chloe Field, *Recommendations to Update the FTC & DOJ's Guidelines for Collaborations among Competitors*, SABIN CENTER FOR CLIMATE CHANGE LAW (May 2024), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1225&context=sabin_climat e_change.