

Private Litigation Under the California Consumer Privacy Act

CCPA REPORT | MAY 2021



ABOUT US

Because laws are incentives for changing behavior and achieving policy objectives, it is vital that the policymakers who create and shape our laws understand economic concepts and methods.

Since its inception in 1974, the Law & Economics Center has played a critical role as a leader in law and economics research and education. The LEC recognizes both the importance of timely, relevant, and unassailable research on public policy issues as well as the necessity of communicating research findings to those who are directly shaping our country's public policy discussions. With research divisions devoted to top-quality legal policy analysis and educational arms reaching out to judges, attorneys general, and other policymakers, the LEC is uniquely equipped to positively affect national policy outcomes.

The generous support of individuals, foundations, and corporations makes all LEC activities possible. A current list of LEC donors may be found on our website at www.masonlec.org

The mission of the Program on Economics & Privacy (PEP) is to promote the sound application of economic analysis to issues surrounding the digital information economy through original research, policy outreach, and education. The PEP is dedicated to studying the economic tradeoffs inherent to privacy, data security, and other digital information debates, and to produce relevant and original research and education programs for policymakers.

Acknowledgements

James C. Cooper was the principal investigator for this report. Rachel Burke, Sydney Dominguez, Jacob Hopkins, Andrew Mercado, and Peter van Ness provided outstanding research assistance in the preparation of this report.

Private Litigation Under the California Consumer Privacy Act

A REPORT BY

Program on Economics & Privacy
Law & Economics Center
George Mason University, Antonin Scalia Law School

TABLE OF CONTENTS

Introduction & Executive Summary	1
Overview of the CCPA	1
Private Litigation under the CCPA	2
Conclusion	5

INTRODUCTION & EXECUTIVE SUMMARY

In June of 2018, the Governor of California signed the California Consumer Privacy Act (CCPA) into law. The law went into effect on January 1, 2020, and the Attorney General promulgated regulations to implement the CCPA in August 2020. Broadly, the CCPA is designed to protect consumer privacy by providing transparency into the personal data that businesses collect and share, and giving consumers the right to prevent companies from sharing their data with third parties.

Although these core privacy provisions are enforced exclusively by the California Attorney General, the CCPA provides a private right of action when a business's failure to implement "reasonable security practices and procedures" results in the theft of personal information.¹ In this Report, we examine the private actions filed under the CCPA since its effective date. Key findings include:

- As of March 30, 2021, 83 actions have been filed under the CCPA, with 41% actions filed or transferred into the Northern District of California.
- 59% of the cases in our sample include at least two claims arising from the same alleged CCPA violation, and 77% of the cases in the sample use the same alleged violation of the CCPA as a predicate for either negligence or unfair competition law (UCL) claims.
- Over half (54%) of the cases are filed against the same 11 defendants.
- While the majority of cases are filed under the CCPA's data breach provisions, plaintiffs have filed a surprisingly large number of actions (19) alleging violations of the notice and choice provisions, either directly or as a predicate for a UCL claim.
- Currently, 66 cases are pending and 17 cases have settled or have been voluntarily dismissed.
- Only one court has yet to address CCPA claims on a motion to dismiss.

¹ CAL. BUS. & PROF. CODE § 1798.150(a)(1).

OVERVIEW OF THE CCPA

The core of the CCPA is a robust notice and choice regime for consumers.² Specifically, the CCPA requires covered businesses to notify consumers, before or at the time of collection, what "personal information" the business collects, for what purpose and how long the business intends to retain each kind of information.³ Perhaps the most well-known provision in the CCPA requires notice to consumers if their personal information is shared with third parties, and a visible option to stop this sharing through the "Do Not Sell My Personal Information" link.⁴ Further, regulations updated in March 2021 established that a business that sells personal information collected offline (e.g. at a brick-and-mortar location) must also inform consumers by an offline method of their right to opt-out.⁵

The CCPA has a broad definition of personal information, covering anything from names, to contact information, usernames, commercial records, internet history, employment or educational history, and geographic details.⁶ Importantly, personal information for the CCPA's data breach provisions, which are enforceable through a private right of action, relies on the narrower definition found in the California Consumer's Records Act (CCRA).⁷ Under the CCPA, businesses cannot collect or use any infor-

² CAL. BUS. & PROF. CODE § 1798.100(b)(e); § 1798.140(c). A business meeting any of the following criteria must meet CCPA provisions: Earns more than \$25 million in annual revenue; exchanges personal information from at least 50,000 consumers, devices or households; derives at least 50% of its revenue from selling consumers' personal information; or owns or is owned by a company meeting one of the above.

³ § 1798.100(b)-(e); § 1798.110(d).

⁴ § 1798.120(a)-(b).

⁵ CAL. CODE REGS. TIT. 11, § 999.306(b)(3) (effective Mar. 15, 2021)

⁶ § 1798.100(b)-(e); § 1798.140(o) defines personal information as anything "that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household." This includes real name, alias, postal address, unique personal identifier, online identifier, internet protocol address, email address, account name, social security number, driver's license number, passport number, or other similar identifiers, categories of personal information described in subdivision (e) of Section 1798.80, characteristics of protected classifications under California or federal law, commercial information (including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies), biometric information, internet or other electronic network activity information (including, but not limited to, browsing history, search history, and information regarding a consumer's interaction with an internet website, application, or advertisement), geolocation data, audio, electronic, visual, thermal, olfactory, or similar information, employment information, education information (defined as information that is not publicly available personally identifiable information as defined in the Family Educational Rights and Privacy Act), or inferences drawn from any of the information identified above to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.

⁷ CAL. CIV. CODE § 1798.81.5. The CCRA defines personal information as "unencrypted or unredacted" first and last names plus social security numbers, government issued ID numbers, or financial account numbers along with required access codes. Id.

mation for purposes beyond what they specify in their notice to consumers.⁸ The CCPA gives consumers a right to request that a business inform them which data it has collected about them in particular, how it was collected, for what purpose, and with what types of third parties the business may have shared the information.⁹ The CCPA also provides consumers deletion rights.¹⁰ Deidentification, complete erasure, or aggregation of the data can satisfy the deletion requirements.¹¹

The Act seeks to prevent retaliation as a result of a consumer's request pertaining to the CCPA by prohibiting businesses from treating the consumer differently in terms of price, quality, and product availability based on an opt out.¹² However, businesses may offer incentives for consumers to allow collection of personal data, with compliant notice from businesses and consent from consumers.¹³ If a business offers compensation for use of consumers' personal information, it must describe its means of determining the value of the incentive,¹⁴ and the business must consider a designated range of valuation methods, including the marginal, average, and aggregate values associated with data collection, sale, or deletion.¹⁵

Enforcement

The California Attorney General is authorized to enforce the CCPA,¹⁶ and the CCPA specifically provides that nothing in it serves as the basis for a private right of action under any other law.¹⁷ The CCPA does provide a private right of action related to data breaches. Specifically, if a consumer's personal information is subject to "unauthorized access" as a result of "a business's violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information," the consumer may pursue civil action to seek damages or other relief.¹⁸ Before commencing such action, the plaintiff must notify the defendant, who has 30 days to cure.¹⁹ As noted

⁸ § 1798.100(b).

⁹ § 1798.100(a); § 1798.110(a).

¹⁰ § 1798.105(b).

¹¹ CAL. CODE REGS. TIT. 11, § 999.313(d)(2).

¹² See § 1798.125(a)(1).

¹³ § 1798.125(a)(2), (b).

¹⁴ § 999.307(b).

¹⁵ § 999.337(a).

¹⁶ § 1798.155(b). Businesses are considered out of compliance with the CCPA if violations are not rectified within 30 days of notification, at which point fines up to \$2,500 for unintentional violations and \$7,500 for intentional violations are possible. *Id.*

¹⁷ § 1798.150(c). Through § 1798.192, the law does not allow agreed upon deviation from its directives, rendering any portion of contracts attempting to waive the enactments of the title void.

¹⁸ § 1798.150(a)-(b). The CCPA provides that a consumer can recover actual damages, or a minimum of \$100 and a maximum of \$750 per incident, whichever is greater. § 1798.150(a)(1)(A).

¹⁹ § 1798.150(b).

above, the definition of personal information for purposes of the CCPA's private right of action comes from the CCRA, which is narrower than the CCPA's broad definition of personal information.

PRIVATE LITIGATION UNDER THE CCPA

Although the California Attorney General's Office promulgated CCPA regulations in August 2020, it has yet to bring an enforcement action.²⁰ Private litigation under the CCPA, however, has been active since the beginning of 2020, when the law became effective. A search of federal and state civil dockets for private actions filed from January 1, 2020 through March 30, 2021 that included claims for some violation of the CCPA resulted in a sample of 83 cases, all but one which were filed as class actions. We provide more details about these cases below.²¹

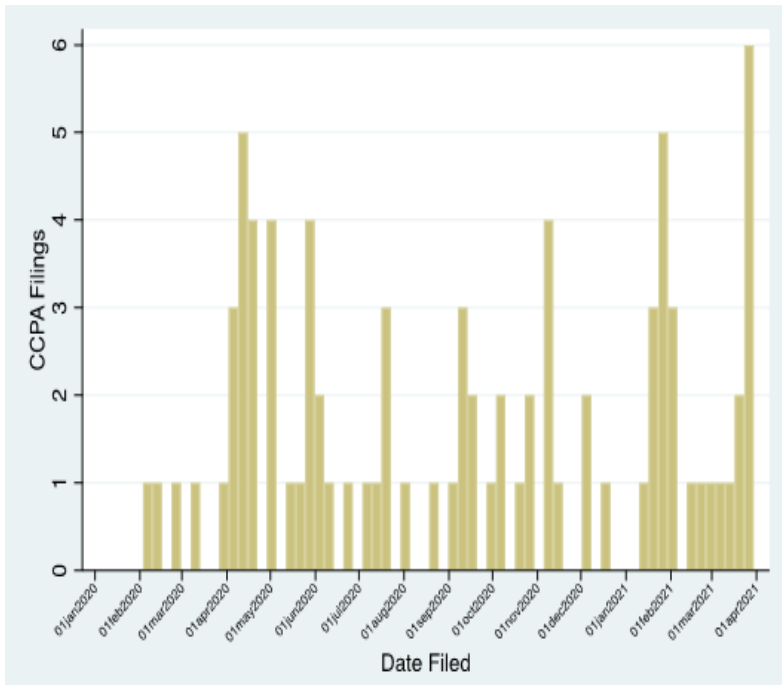
Timing and Venue

Figure 1 shows the timing of case filings. The first cases were filed at the beginning of February 2020, which would suggest that these early plaintiffs sent the thirty-day notice that must be provided to defendants before a suit can commence around January 1, 2020—the first effective day of the CCPA. The spikes in filings typically coincide with a rash of actions against a particular defendant. For example, all of the cases against Bank of America were filed between January 14, 2021 and March 26, 2021, and similarly, all of the cases against Zoom were filed between March 31, 2020 and May 13, 2020. Filings appear to slow down in August and December, coinciding with summer vacation and major holidays.

²⁰ See Office of California Attorney General, Attorney General Becerra Announces Approval of Additional Regulations That Empower Data Privacy Under the California Consumer Privacy Act (March 15, 2021) (noting that "Since CCPA enforcement began on July 1, 2020, the Department has seen widespread compliance by companies doing business in California, especially in response to notices to cure"), at <https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-approval-additional-regulations-empower-data>.

²¹ Research was performed on the Dockets database on Bloomberg Law. The search terms were "California Consumer Privacy Act," "CCPA," "1798.100," and "1798.150." Cases in which an amended complaint removed CCPA claims prior to the defendant filing a motion to dismiss are not included, although cases in which a plaintiff removes CCPA claims after the defendant files a motion to dismiss are included. We include four cases that had CCPA claims when filed, but were subsequently consolidated with other cases, and the consolidated complaint lacked a CCPA claim. Further, cases originally filed in state court, but removed to federal district court are counted as federal cases, although the original filing date in state court is retained as the filing date.

**FIGURE 1
TIMING OF CCPA CASE FILINGS**



**FIGURE 2
CASES BY COURT**

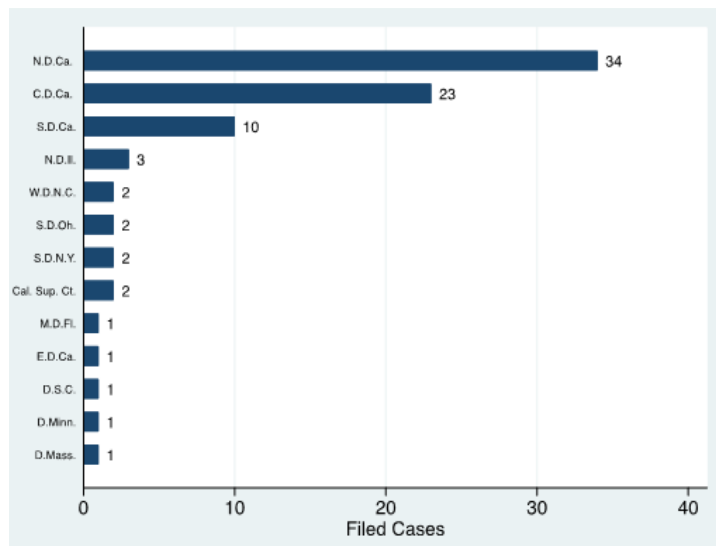


Figure 2 shows the venue for filed cases. Although CCPA cases have been filed in 13 separate courts, not surprisingly, the vast majority (84%) of cases were filed in California, with nearly half of the sample filed—or transferred to—the Northern District of California. Although seven cases were originally filed in California Superior Court, only two remain—defendants used the Class Action Fairness Act (CAFA) to remove the other five cases to federal court.²² The Northern District of Illinois has the most CCPA cases for a non-California Court, with all of these cases involving allegations that Clearview violated the Illinois Biometric Privacy Protection Act in addition to the CCPA.

Although our search found 83 separate CCPA actions, there are only 50 separate defendants. As Table 1 shows, over half (45) of the cases were filed by separate plaintiffs against the same 11 defendants for the same (or similar) alleged conduct. For example, plaintiffs have filed 14 consumer class actions cases against Bank of America, and 10 against Zoom, which together account for 29 percent of the private CCPA actions in the database.

TABLE 1
DEFENDANTS WITH MULTIPLE CCPA ACTIONS

Defendant	Number of Cases with CCPA Allegations	Courts
Bank of America	14	N.D. Cal.* S.D. Cal. C.D. Cal.
Zoom	10**	N.D. Cal.* C.D. Cal.
Blackbaud	3	C.D. Cal. D. S.C.*
Clearview	3	N.D. Ill.* S.D. N.Y.
Automatic Funds Transfer Service Plaid	3	C.D. Cal.
Luxottica	2	N.D. Cal.
Tandem Diabetes Care	2	S.D. Oh.
Dickey's Barbecue Restaurants	2	S.D. Cal.
Accellion	2	S.D. Cal.
Radnet	2	N.D. Cal.
		C.D. Cal.

²² The Class Action Fairness Act allows a defendant to remove a class action to federal court under certain circumstances. 28 U.S.C. § 1332(d). See Emery G. Lee, III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PENN. L. REV. 1723 (2008) (finding an increase in tort and state CPA class actions filed in, or removed to, federal courts after CAFA).

* District court where cases are being consolidated.

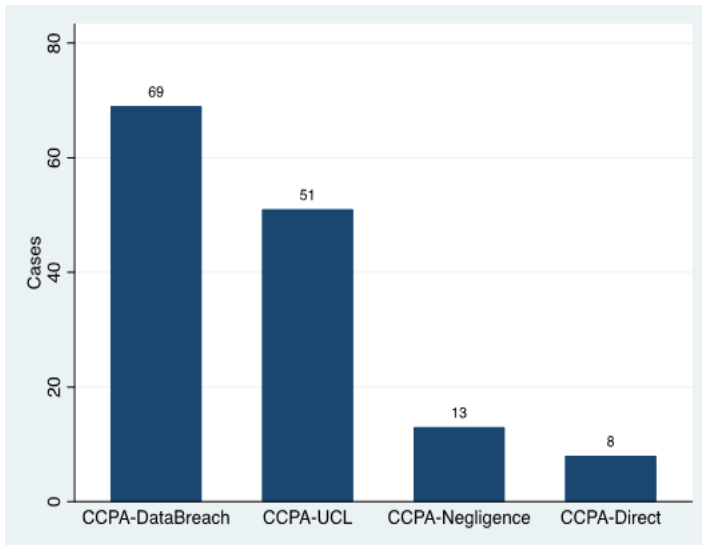
** 3 of the originally-filed Zoom class actions complaints with CCPA claims were later merged into the consolidated class complaint, which did not include CCPA claims. Plaintiffs in the remaining 7 cases either voluntarily dismissed their claims or otherwise were not listed as plaintiffs in the consolidated complaint.

Types of CCPA Claims

Although the CCPA only allows a narrow private right of action based on data breach, plaintiffs have been creative in their pleading, incorporating CCPA violations into their cases through common law negligence and California’s unfair competition law (UCL). Indeed, 49 (59%) of the cases include multiple claims for relief related to the same alleged CCPA violation.

Figure 3 shows the number of cases that contain the different types of CCPA claims plaintiffs include in their complaints. Data breach claims under §1798.150 are the majority of private actions, appearing in 69 (83%) of cases, but UCL claims predicated on violations of the CCPA are also found in 51 (61%) of cases, and 13 cases (16%) allege negligence based on a CCPA violation. The data show that 40 (48%) of the cases alleging a §1798.150 violation also plead the alleged CCPA violation as a predicate for a UCL violation. Further, 10 (12%) cases allege the practices violating §1798.150 constitute UCL violations and negligence.

FIGURE 3
CCPA CLAIMS FOR RELIEF



Some plaintiffs have brought claims directly under the core privacy provisions of the CCPA, which are not subject to the private right of action. For example, in *Henry v. Zoom*, the plaintiffs allege that Zoom violated § 1798.100(b) “by using customers’ information without providing the required notice . . . that it was disclosing their information to unauthorized parties,” and violated §1798.120(b) by failing to provide plaintiffs “the opportunity to opt out before it provided their information to unauthorized

parties.”²³ As shown in Figure 3, however, this strategy is rare: with only 8 cases directly alleging a violation of some provision of the CCPA other than §1798.150. Nonetheless, though plaintiffs appear hesitant to plead a direct violation of the non-data breach provisions of the CCPA, alleged violations of these provisions form the basis for nearly a quarter (23%) of all UCL claims.

Status

Given the length of class action litigation, most of these cases are still pending and none have been certified. As Table 2 illustrates, only 17 cases have settled or have been voluntarily dismissed by the plaintiff. Defendants have filed motions to dismiss in 13 cases. Theories for dismissal of the claims based on the CCPA have included:

- The consumer data at issue does not qualify as “personal information” under the statutory definition.²⁴
- Insufficient allegations to support a plausible inference that the defendant’s security practices were unreasonable.²⁵
- The defendant is not a California resident, and thus lacks standing to assert a CCPA claim.²⁶
- The defendants are “service providers,” not “businesses,” and thus not covered by §1798.150’s provisions.²⁷
- Insufficient allegations to support a plausible inference that data were “exfiltrated,” as required by the statute.²⁸
- The CCPA expressly precludes UCL claims predicated on a CCPA violation.²⁹
- The defendant cured the alleged violation after notice.³⁰

²³ Complaint at ¶¶97-98, *Henry v. Zoom*, No. 5:20-cv-02691-SVK (N.D. Cal. 2020). These claims were not included in the consolidated class action. See *In re Zoom Communications Privacy Litigation*, No. 5:20-cv-02155-LHK (N.D. Cal. Apr. 17, 2020).

²⁴ Memorandum in Support of Defendant’s Motion to Dismiss at 5, *Gardiner v. Walmart Inc.*, No. 20-cv-4618, (N.D. Cal. Dec. 14, 2020).

²⁵ Memorandum in Support of Defendant’s Motion to Dismiss at 21-22, *Burns v. Mammoth Media, Inc.*, No. 2:20-cv-04855-DDP-SK (C.D. Cal. Sept. 14, 2020).

²⁶ See *id.*

²⁷ Memorandum in Support of Defendant’s Motion to Dismiss at 9-10, *Karter v. Epid Systems, Inc.*, No. 8:20-cv-01385-CJC-KES (C.D. Cal. Sept. 4, 2020).

²⁸ *Id.* at 13-14.

²⁹ Memorandum in Support of Defendant’s Motion to Dismiss at 11-12, *McCreary v. Filters Fast, L.L.C.*, No. 3:20-cv-595-FDW-DCK (W.D.N.C. Jan. 29, 2021).

³⁰ *Id.* at 12-13.

TABLE 2
CASE STATUS

All Cases		Motion to Dismiss Filed		
Pending	Settled or Voluntarily Dismissed	Decided	Settled or Voluntarily Dismissed Before Decided	Pending
66	17	4	3	6

Although 4 motions to dismiss have been decided in our sample, only one court actually had to address the CCPA: plaintiffs appear to have voluntarily dismissed their CCPA claims after the defendant filed their motion to dismiss in two cases;³¹ and the district court decided against the plaintiff on standing grounds in the other.³²

Gardiner v. Walmart is the only case in our database in which the court directly addressed a CCPA allegation on a motion to dismiss.³³ In *Gardiner*, the plaintiff alleged, *inter alia*, that he suffered harm under §1798.150 because a data breach involving Walmart led to his personal information being available for sale on the “dark web.”³⁴ The district court held that *Gardiner* had failed to state a claim for two reasons. First, he failed to allege that the breach occurred after January 1, 2020, the date the CCPA went into effect.³⁵ Finding data on the dark web after January 1, 2020, was insufficient to support his claim, because the alleged unreasonable security practices that led to the breach of data must have taken place after January 1, 2020.³⁶ Second, *Gardiner* failed to plead that the information in question qualifies as “personal information,” under the CCPA’s data breach provisions, which key on the CCRA’s narrower definition. Although he generally alleged that the breach compromised “full names, financial account information, credit card information, and other PII of Walmart customers,” the court held that the failure to allege the specific information the CCRA requires—account numbers and the required security or access codes to access the accounts—was fatal.³⁷ The court also held that *Gardiner* could not premise his UCL claim on the dismissed CCPA claim.³⁸

CONCLUSION

In the sixteen months since the CCPA went into effect, plaintiffs have filed 83 cases alleging some violation of the CCPA, over half of which were filed against the same 11 defendants. Most of the cases allege violations of Section 1798.150 (directly, and as predicates for UCL and negligence claims), the provision of the CCPA that provides a private right action for data breaches that result in the theft of personal information. A non-trivial number of plaintiffs, however, have alleged claims based on the core privacy provisions of the CCPA, either directly or as predicates for UCL violations. So far, only one court has had the opportunity to weigh on the CCPA, ultimately dismissing the CCPA claims. Several other courts, however, soon will have the opportunity to help further clarify the metes and bounds of the private right of action under the CCPA.

³¹ *Flores-Mendez v. Zoosk, Inc.*, No. 3:20-cv-04929, 2021 WL 308543, (N.D. Cal. Jan. 30, 2021); *Shay v. Apple Inc.*, No. 3:20-cv-01629, 2021 WL 75690 (S.D. Cal. Jan. 8, 2021).

³² *Rahman v. Marriott Int’l, Inc.*, No. SA CV 20-00654-DOC-KES, 2021 WL 346421 (C.D. Cal. Jan. 12, 2021). Currently on appeal to the Ninth Circuit. See *Rahman v. Marriott Int’l, Inc.*, No. 21-55112 (9th Cir. Feb. 12, 2021).

³³ *Gardiner v. Walmart Inc.*, No. 20-cv-4618, (N.D. Cal. Jul. 10, 2020).

³⁴ Order Granting Defendant’s Motion to Dismiss at 1-2, *Gardiner v. Walmart Inc.*, No. 20-cv-4618 (N.D. Cal. Mar. 5, 2021).

³⁵ *Id.* at 2-3.




³⁶ *Id.* at 3.

³⁷ *Id.* at 5.

³⁸ *Id.* at 13.

GEORGE MASON UNIVERSITY ANTONIN SCALIA LAW SCHOOL



3301 Fairfax Drive
Arlington, VA 22201
P 703.993.8040 **F** 703.993.8181
www.MasonLEC.org
 @MasonLEC  @MasonLEC
 Law & Economics Center