MEMORANDUM 2026-10

Antitrust Study: Single Firm Conduct
(Staff Draft Final Recommendation, Update to Commission-Approved Language, and Public Comment)

This memorandum presents the staff draft final recommendation for Single Firm Conduct (SFC) for the Commission's consideration.[1] At its December 2025 meeting, the Commission approved and directed the staff to circulate the tentative recommendation for SFC for public comment.[2] The staff made several technical edits and minor changes to the tentative recommendation. While the technical edits are not described in detail, the staff suggests minor improvements to the proposed statutory suggestions that are detailed below.

This memorandum also contains public comments the Commission received in response to the tentative recommendation and two comments the Commission received shortly prior to its December 2025 meeting.[3]

STAFF DRAFT FINAL RECOMMENDATION & PUBLIC COMMENTS

[1] Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website. Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

[2] Memorandum 2026-1 p. 5. Tentative Recommendation (December 2025). Public comments were requested by January 12, 2026.

[3] The Commission was provided copies of the December 3, 2025 letters from the California Chamber of Commerce and California Life Sciences at its December 4, 2025 meeting, but these letters were not previously included in a staff memorandum.

As with prior memoranda, a brief description of each commentator is below.

American Bar Association Antitrust Law Section

This comment was submitted by Renata Hesse, Chair of the American Bar Association Antitrust Law Section. According to the American Bar Association Antitrust Law Section's website:

> We are a prominent legal community comprising of professionals specializing in competition, consumer protection, and data privacy. Our primary objective is to create valuable content, organize informative events, and provide networking opportunities to our members. Our section strives to promote policies that safeguard competition and consumer rights, enabling professionals in the industry to enhance their productivity and success.

American Economic Liberties Project, California Nurses Association, CAMEO Network, Consumer Federation of California, Democracy Policy Network, Economic Security California Action, End Poverty in California, Institute for Local Self Reliance, Public Good Law Center, Small Business Majority, TechEquity Collaborative, United Domestic Workers (UDW/AFSCME Local 3930), United Food and Commercial Workers Western States Council (UFCW), Writers Guild of America West

This comment was submitted by Lee Hepner, Senior Legal Counsel, on behalf of the American Economics Liberties Project and cosigned by the entities above. According to its website:

> The American Economic Liberties Project launched in February 2020 to help translate the intellectual victories of the anti-monopoly movement into momentum

> towards concrete, wide-ranging policy changes that begin to address today's crisis of concentrated economic power.
>
> As concern over concentrated economic power has broadened beyond the community of antitrust reformers, Economic Liberties has quickly grown into a hub for organizing a diverse set of leading policy experts and advocates in areas impacted by concentrated power, ranging from community development to national security to entrepreneurship.

ASM Games

This comment was submitted by Alfred Mai on behalf of ASM Games. According to its website:

> ASM Games (part of ASM Holdings LLC) believes that games should not only be fun, but should also build meaningful connections. That's why our mission is to create games that bring people together to laugh, talk and build memories.

Bay Area Council (BAC)

BAC submitted a comment signed by Peter Leroe-Muñoz, General Counsel & SVP, Technology and Innovation Policy, and joined the December 3, 2025, coalition letter. According to its website:

> The Bay Area Council has been at the intersection of business and civic leadership, shaping the future of the Bay Area since 1945. Today, our vision is to make the Bay Area the best place to live and work. More than 375 of the largest employers in the region are members of the Bay Area Council and are committed to working with public and community leaders to keep the Bay Area the most innovative, globally competitive, inclusive, and sustainable region in the world.

California Chamber of Commerce

The California Chamber of Commerce submitted a comment signed by Eric Enson of Crowell & Moring LLP, and joined the December 3, 2025, coalition letter. According to its website:

> The California Chamber of Commerce (CalChamber) is dedicated to supporting businesses across the state with tools, resources, and advocacy to thrive in California's dynamic economy. From navigating California labor laws to ensuring HR compliance, CalChamber HR services provide everything employers need to succeed

California Life Sciences (CLS)

CLS submitted comments in December 2025 as part of a coalition, and in January 2026 signed by Benjamin O'Brien, Director, State Policy Analysis, on behalf of CLS. According to its website:

> California Life Sciences (CLS) is the state's leading advocacy organization for the life sciences. CLS advances public policy that promotes innovation and improves access to transformative technologies. With offices in South San Francisco, San Diego, Sacramento, Los Angeles, and Washington DC, CLS has spent the past 30 years supporting organizations of all sizes, from early-stage innovators and startups to established leaders in the fields of biotechnology, pharmaceuticals, and medical technology. CLS' core mission is to advocate for a world class life sciences ecosystem in California, whose innovation leads to healthier lives around the world.

Chamber of Progress

Chamber of Progress submitted a comment signed by Vidushi Dyall, Director of Legal Analysis, and joined the December 3, 2025, coalition letter. According to its website:

> Chamber of Progress is a tech industry coalition devoted to a progressive society, economy, workforce, and consumer climate. We back public policies that will build a fairer, more inclusive world in which all people benefit from technological leaps.

Connected Commerce Council (3C)

This comment was submitted by Shanthi Ramakrishna, 3C Community Engagement Lead, on behalf of the Connected Commerce Council. According to its website:

> 3C ensures that policymakers understand the essential intersection of technology and small business, and advocates for policies that respect the interests of digitally-empowered small businesses.

Daniel Francis

This comment was submitted by Daniel Francis, Associate Professor of Law, NYU School of Law. According to his letter:

> I am a law professor at NYU School of Law, where I teach and write about antitrust and regulation. I previously served at the U.S. Federal Trade Commission in a series of roles in the Bureau of Competition (Senior Counsel to the Director, Associate Director for Digital Markets, and Deputy Director). My work at the FTC focused in large part on monopolization, mergers, and tech markets. Previously I worked in private practice for around ten and a half years, specializing in antitrust. I write as a scholar of federal antitrust with a long-standing interest in monopolization, not as an expert on state antitrust law or California law.
>
> I do not work for or represent private clients of any kind, and have not done so since I began government service in 2018. My research is funded only by NYU School of Law; my wife is an antitrust attorney in private practice.

Information Technology & Innovation Foundation (ITIF)

This comment was submitted by Joseph Van Coniglio, Senior Counsel and Director, Antitrust & Innovation Policy, on behalf of ITIF. According to its website:

> Founded in 2006, ITIF is an independent 501(c)(3) nonprofit, nonpartisan research and educational institute that has been recognized repeatedly as the world's leading think tank for science and technology policy. Its supporters include corporations, charitable foundations, and individual contributors, and it has repeatedly earned a seal of transparency from Candid and three stars from Charity Navigator.
>
> ITIF's mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress. ITIF's goal is to provide policymakers around the world with high-quality information, analysis, and actionable recommendations they can trust. To that end, ITIF adheres to a high standard of research integrity with an internal code of ethics grounded in analytical rigor, original thinking, policy pragmatism, and editorial independence.

Tech Freedom

This comment was submitted by Bilal Sayyed, Senior Competition Counsel, on behalf of Tech Freedom. According to its website:

> TechFreedom digs deep into the hard policy and legal questions raised by technological change. We're bullish on the future: for the most part, it'll be great — if we let it. If those in power can resist the all-too-natural impulse for stability and control. We craft policy frameworks that allow for experimentation, innovation, and evolution, that help people adapt to change, instead of trying to fight it, that focus on clear problems. In short, we teach policymakers how to be friends, not enemies, of the future.

Bay Area Council, California Building Industry Association, Civil Justice Association of California, Los Angeles County Business Federation (BizFed), San Mateo County Economic Development Association, San Jose Chamber of Commerce, California Chamber of Commerce (Coalition Letter)

This comment was submitted by a coalition of the business groups referenced above.

U.S. Chamber of Commerce

This comment was submitted by Sean Heather, Senior Vice President of International Regulatory Affairs & Antitrust, on behalf of the U.S. Chamber of Commerce. According to is website:

> The Chamber of Commerce of the United States is the world's largest business

organization. Our members range from the small businesses and chambers of commerce across the country that support their communities, to the leading industry associations and global corporations that innovate and solve for the world's challenges, to the emerging and fast-growing industries that are shaping the future. For all of the people across the businesses we represent, the U.S. Chamber of Commerce is a trusted advocate, partner, and network, helping them improve society and people's lives.

Y Combinator

This comment was submitted by Luther Lowe, Head of Public Policy, on behalf of Y Combinator. According to its letter:

> Founded in 2005, Y Combinator pioneered the modern startup accelerator model and has since funded thousands of companies now collectively valued in the hundreds of billions of dollars. Many of our alumni—such as Airbnb, Stripe, Reddit, and Instacart—have become industry leaders. This track record gives YC a broad view of the startup ecosystem and the competitive challenges new companies face.

SUMMARY OF PUBLIC COMMENTS

The Commission has welcomed and received over one hundred public comments throughout the Antitrust Law Study process, representing a wide range of views.[4] The public comments received in response to the Tentative Recommendation circulated for public comment track comments previously considered by the Commission. The staff will provide a summary of the public comments received in response to the Tentative Recommendation in a supplement to this memorandum.

UPDATE TO COMMISSION-APPROVED LANGUAGE

The staff recommends renumbering the proposed statutes in response to recently enacted legislation which added Section 16729 to the Business and Professions Code.[5] Previously the code section numbers for the proposed statutes were 16729, 16730, and 16731. The staff proposes renumbering those code sections to 16730, 16731, and 16732, with conforming changes. In addition, the staff recommends that the purpose statement appear first to be consistent with accepted legislative drafting practices, which generally

[4] See Antitrust Law Study webpage, Index of Public Comments.

[5] Cal. Stats. 2025, ch. 338, § 1 (AB 325, Aguiar-Curry) added § 16729 to the Bus. & Prof. Code to prohibit the use or distribution of a common pricing algorithm (1) as part of a contract, combination in the form of a trust, or conspiracy to restrain trade or commerce or (2) if the person coerces another person to set or adopt a recommended price or commercial term recommended by the common pricing algorithm for the same or similar products or services in the jurisdiction of this state. This newly added section does not substantively impact the draft final recommendation.

order purpose statements before the operative language.[6] Finally, the staff recommends deleting reference to the purpose statement in the judicial guidance section because the guidance pertains to interpretation of the proposed operative provision.

The proposed changes are:

SEC. ___. Section ~~16731~~ <u>16730</u> is added to the Business and Professions Code, to read:

(a) The purpose of this section and Sections ~~16729~~ 16731 and <u>16732</u> is the promotion and protection of free and fair competition, which is fundamental to a healthy marketplace that protects all trade participants, including workers and consumers, and to an environment that is conducive to the preservation of our democratic, political, and social institutions.

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

(c) The California Supreme Court has determined that the Cartwright Act is "broader in range and deeper in reach" than the federal Sherman Act; courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors "maximizing effective deterrence of antitrust violations;" and that the Cartwright Act is not modeled on the Sherman Act. Further, California courts have recognized that the Cartwright Act departs from the Sherman Act in many respects, including, but not limited to, inclusion of indirect purchaser recovery, use of a proximate cause test for Cartwright Act standing, recognition of broader harms and per se conduct, lower actionable market shares, structured rule of reason analysis, and differing burdens of proof.

(d) Federal case law on the subject of this article is not binding on California courts, but courts may consider federal case law as persuasive authority to the extent they find it consistent with California law, including Section ~~16729~~ <u>16730</u>.

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

SEC. ___. Section ~~16729~~ <u>16731</u> is added to the Business and Professions Code, to read:

(a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events:

(1) In restraint of trade; or,

(2) To monopolize or monopsonize, to attempt to monopolize or monopsonize, to maintain a monopoly or monopsony, or to combine or

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[6] See e.g., the Unfair Trade Practices Act, Bus. & Prof. Code §§ 1700-17101, which begins with the title and purpose, followed by judicial guidance (§§ 17000 – 17002).

conspire with another person to monopolize or monopsonize in any part of trade or commerce.

(b) As used in this section, "restraint of trade" shall include, but not be limited to, any actions, measures, or acts included or cognizable under Section 16720, whether directed, caused, or performed by one or more persons.

(c) Anticompetitive effects in one market from the challenged conduct may not be offset by purported benefits in a separate market; and the harm to a person or persons from the challenged conduct may not be offset by purported benefits to another person or persons.

SEC. ___. Section ~~16731~~ 16732 is added to the Business and Professions Code, to read:

Although the following nonexclusive list may constitute evidence of a violation of ~~Sections 16729 and 16731~~ Section 16731, California law does not require a finding of any of the following to establish liability:

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

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

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

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

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

(f) In cases where a defendant's business is a multi-sided platform, ~~that~~ the defendant's conduct presents harm to competition on more than one side of the multi-sided platform, or ~~that~~ the harm to competition on one side of the multi-sided platform outweighs any benefits to competition on any other side(s) of the multi-sided platform.

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

(h) The rivals whose ability to compete has been reduced or harmed are as efficient, or nearly as efficient, as the defendants.

(i) A single firm or person has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power.

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

In addition, the staff made several technical changes to the draft tentative recommendation.[7]

The staff is not recommending any changes based on public comments received on the draft tentative recommendation. However, the Commission may disagree and direct the staff to make changes to the final recommendation in response to public comments. The draft final recommendation is attached as Exhibit 01.

The Commission should decide whether to approve the staff draft final recommendation, with or without the additional changes.

Respectfully submitted,

Sharon Reilly
Executive Director

Sarah Huchel
Chief Deputy Director

[7] See e.g., Memorandum 2026-1, p. 5.

#B-750

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT FINAL RECOMMENDATION

Antitrust Law: Single Firm Conduct

January 2026

California Law Revision Commission
c/o Legislative Counsel of California
925 L St., Ste. 275
Sacramento, CA 95814
clrc.ca.gov

SUMMARY OF TENTATIVE RECOMMENDATION

In 2022, the Legislature passed Assembly Concurrent Resolution 95 (2022 Cal. Stat. res. Ch. 147), which tasked the California Law Revision Commission with a substantive review of California's antitrust laws. Specifically, the Legislature directed the Commission to study and report on three antitrust topics:

(1) Whether the law should be revised to outlaw monopolies by single companies as outlawed by Section 2 of the Sherman Act, as proposed in New York State's "Twenty–First Century Anti–Trust Act" and in the "Competition and Antitrust Law Enforcement Reform Act of 2021" introduced in the United States Senate, or as outlawed in other jurisdictions.

(2) Whether the law should be revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices.

(3) Whether the law should be revised in any other fashion such as approvals for mergers and acquisitions and any limitation of existing statutory exemptions to the state's antitrust laws to promote and ensure the tangible and intangible benefits of free market competition for Californians.

To assist the Commission, the Commission retained an antitrust expert and assembled eight Working Groups comprised of leading antitrust academics and practitioners to examine various aspects of antitrust law. After considering these reports and presentations by the Working Groups and public comment, the Commission recommends that California's laws be revised to outlaw anticompetitive conduct by single companies, but those laws should not be revised in the context of technology companies. While the Commission is also considering recommendations to address mergers and acquisitions, the present recommendation reflects only its deliberations on single firm conduct. This recommendation also includes ancillary language describing the proposed statute's purpose and guidance to the judiciary for its interpretation.

This recommendation was prepared pursuant to Resolution Chapter 147 of the Statutes of 2022.

EX 3

ANTITRUST LAW: SINGLE FIRM CONDUCT

ANTITRUST LAW: SINGLE FIRM CONDUCT

BACKGROUND

LEGISLATIVE ASSIGNMENT AND COMMISSION PROCESS

The Legislature[1] enacted Assembly Concurrent Resolution 95 in 2022,[2] which directed the California Law Revision Commission to study California's antitrust laws and determine the following:

> (1) Whether the law should be revised to outlaw monopolies by single companies as outlawed by Section 2 of the Sherman Act, as proposed in New York State's "Twenty–First Century Anti–Trust Act" and in the "Competition and Antitrust Law Enforcement Reform Act of 2021" introduced in the United States Senate, or as outlawed in other jurisdictions.
>
> (2) Whether the law should be revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices.
>
> (3) Whether the law should be revised in any other fashion such as approvals for mergers and acquisitions and any limitation of existing statutory exemptions to the state's antitrust laws to promote and ensure the tangible and intangible benefits of free market competition for Californians.

To facilitate the Commission's understanding of these issues, the Commission retained an antitrust expert[3] and assembled eight Working Groups of leading academics and practitioners to examine different aspects of antitrust law. These economists and attorneys were selected to represent a range of perspectives on Single Firm Conduct, Mergers and Acquisitions, Concerted Action, Consumer Welfare Standard, Technology Platforms, Enforcement and Exemptions, Concentration in California, and Artificial Intelligence.[4]

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[1] Any California Law Revision Commission document referred to in this recommendation can be obtained from the Commission. Most materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

All Commission meetings are recorded and available for viewing on the Commission's video archive, including Commission deliberations and oral public testimony on the Antitrust Study.

[2] 2022 Cal. Stat. res. Ch. 147 (ACR 95, Cunningham & Wicks).

[3] Memoranda 2023-7, pp. 4-5; 2023-37, pp. 2-4; Minutes of Commission Meeting on October 19, 2023, p. 5.

[4] The Working Groups were composed of the following individuals: *Single Firm Conduct*: Professor

The Working Groups produced their reports independently of the Commission and each is different in form and substance. After the Working Groups finished their individual reports, they circulated them to the other Working Groups for comments prior to submitting them to the Commission. Although the groups were initially directed not to advocate for ultimate results,[5] the groups interpreted this direction variously.[6]

While the Working Groups prepared their reports, the Commission received an overview of antitrust law during a series of lectures from January through December 2023.[7] Representatives of each Working Group presented their reports to the Commission over a series of Commission meetings in 2024.[8] Following each presentation, the Commission heard from panels of individuals and organizations providing different perspectives on the same topics addressed by the Working Groups. Throughout the Antitrust Law Study process, the Commission received and considered robust public commentary from a wide range of individuals and organizations, with approximately 100 written submissions as of November 2025.[9] In addition, the Antitrust and Consumer Protection Section of the California

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Aaron Edlin, UC Berkeley Law; Professor Doug Melamed, Stanford Law School; Sam Miller, UC Law San Francisco (visiting scholar); Professor Fiona Scott Morton, Yale School of Management; and Professor Carl Shapiro, UC Berkeley Law; *Mergers and Acquisitions*: Professor Richard Gilbert, UC Berkeley Economics; Professor Prasad Krishnamurthy, UC Berkeley Law; Professor John Kwoka, Northeastern University, Economics; Professor Daniel Sokol, USC Gould School of Law, Marshall School of Business; and Professor Guofu Tan, USC Dornsife, Economics; *Concerted Action*: Professor Peter Carstensen, University of Wisconsin School of Law; Professor Josh Davis, UC Law San Francisco; Professor Joseph Farrell, UC Berkeley Economics; Professor Christopher Leslie, UC Irvine School of Law; Julie Pollock, Berger Montague; Sarah Van Culin, Zelle LLP; and Judith Zahid, Zelle LLP; *Consumer Welfare Standard:* Professor Jorge Contreras, University of Utah College of Law; Professor Warren Grimes, Southwestern Law School; Professor Douglas Melamed, Stanford Law School; Heather Nyong'o, Cleary Gottlieb; and Professor Barak Orbach, University of Arizona, James E. Rogers College of Law; *Technology Platforms:* Abiel Garcia, Kesselman Brantly Stockinger LLP; David Kesselman, Kesselman Brantly Stockinger LLP; Professor Mark Lemley, Stanford School of Law; Professor Justin McCrary, Columbia Law School; Brantley Pepperman, Quinn Emanuel; Professor Steve Tadelis, UC Berkeley Economics; and Kevin Teruya, Quinn Emanuel; *Enforcement and Exemptions:* Kathleen Foote, California Department of Justice, Antitrust Section (ret.); Professor Roger Noll, Stanford Economics (emeritus); Marc Seltzer, Susman Godfrey LLP; and Dena Sharp, Girard Sharp; *Concentration in California:* Dean Harvey, Leiff Cabraser Heimann & Bernstein; Cheryl Johnson, California Department of Justice (ret.); Diana Moss, Progressive Policy Institute; Professor Barak Richman, Duke Law School; and Shana Scarlett, Hagens Berman; *Artificial Intelligence:* Abiel Garcia, Kesselman Brantly Stockinger, LLP; David Kesselman, Kesselman Brantly Stockinger, LLP; Professor Sam Miller, UC Law San Francisco; Diana Moss, Progressive Policy Institute; and Professor Fiona Scott Morton, Yale School of Management. For additional biographical information, see Memoranda 2023-11, 2023-16, and 2023-22.

[5] Memorandum 2023-7, p. 1.

[6] See e.g., Memoranda 2024-15, pp. 15-18 and 2024-26, pp. 11-12.

[7] See Antitrust Law Study page and Memoranda 2023-7, 2023-37, 2023-49.

[8] Single Firm Conduct: Memorandum 2024-15; Mergers and Acquisitions: Memorandum 2024-25; Concerted Action: Memorandum 2024-34; Consumer Welfare Standard: Memorandum 2024-33; Technology Platforms: Memorandum 2024-26; Enforcement and Exemptions: Memorandum 2024-35; Concentration in California: Memorandum 2024-14; Artificial Intelligence: Memorandum 2024-47.

[9] A list of written public comments with links can be found in the Index of Public Comments on the Antitrust Law

Lawyers Association dedicated its Spring 2023 Competition Law Journal to articles relevant to the Commission's antitrust study.[10]

At its October 2024 meeting, to prepare the Commission for decisions at its next meeting, the staff presented a memorandum that summarized the reports, materials and written and public comments received to date during the course of the Antitrust Law Study, including arguments for and against reform.[11] In January 2025,[12] the Commission directed the staff to propose draft statutory language to regulate single firm conduct (SFC) at the state level. The Commission further specified that this language should be distinct from federal law and not be industry specific.[13] At its September 2025 meeting, the Commission voted to bifurcate its SFC recommendation from its deliberations on mergers and acquisitions and directed staff to draft a Tentative Recommendation on Single Firm Conduct for its meeting in December 2025.[14]

SINGLE FIRM CONDUCT

Current Federal and California law

The SFC Working Group explored how California and federal antitrust laws treat anticompetitive conduct by an individual company. Their report explains:

> [Single firm] conduct can be purely unilateral, as when a firm designs its product to exclude rivals, discriminates against its rivals, or refuses to deal with them. Such conduct also can involve an agreement between the firm in question and other firms.[15]

The main law addressing SFC is Section 2 of the federal Sherman Antitrust Act, which states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…"[16]

California's main antitrust law, the Cartwright Act,[17] generally does not apply to conduct by a single firm to monopolize, exclude its competitors, or cause other anticompetitive harms. Rather, it focuses on the actions of "two or more persons."[18]

Study page.

10 California Lawyers Association, *Competition,* Vol. 33, No.1 (Spring 2023).

11 Memorandum 2024-46.

12 Minutes of Commission Meeting on January 23, 2025, p. 4; see also Memorandum 2025-11, pp. 3-7.

13 Minutes of Commission Meeting on January 23, 2025, p. 4.

14 Minutes of Commission Meeting on September 18, 2005 , p. 5.

15 Memorandum 2024-15, p. 4.

16 15 U.S.C. § 2.

17 Bus. & Prof. Code §§ 16700 - 16770.

18 Bus. & Prof. Code § 16720; see also *Asahi Kasei Pharma Corporation v. Cotherix, Inc*. (2012) 204 Cal.App.4th 1, 8 ("[t]he Cartwright Act bans combinations, but single firm monopolization is not cognizable under the Cartwright Act"); *Flagship Theaters of Palm Desert LLC v. Century Theaters, Inc*. (2011) 198

California also has the Unfair Practices Act, (UPA) [19] which was designed to "safeguard the public against the creation or perpetuation of monopolies,"[20] and the Unfair Competition Law (UCL),[21] which protects the fairness of business practices. However, neither is written to effectively address the behavior targeted by the Sherman Act's Section 2. Although the UPA explicitly prohibits below cost pricing,[22] locality discrimination,[23] secret rebates and allowances,[24] and loss leaders,[25] each prohibition has its own specific limitations and defenses. This complex statutory scheme, together with its lack of singular focus on overall competition, hinders its usefulness as an enforcement vehicle.[26] Similarly, while expansive, the UCL is not an effective tool against single firm conduct because, among other reasons, it does not allow for compensatory damages or automatic attorney's fees, unlike existing provisions of the Cartwright Act and the federal antitrust laws.[27] This significantly limits the feasibility of pursuing most antitrust cases under the UCL.[28] Accordingly, despite the UCL, most efforts to challenge the anticompetitive conduct of a single company are brought in federal court under Section 2 of the Sherman Act.[29]

Cal.App.4th 1366, 1386 ("[T]he Cartwright Act contains no provision parallel to the Sherman Act's prohibition against monopolization (15. U.S.C. § 2), and the Cartwright Act applies only to a 'combination' involving 'two or more persons' (§ 16720), not to unilateral conduct."); *Freehand Corp. v. Adobe* (N.D.CAL. 2012) 852 F.Supp.2d 1171, 1185 (Cartwright Act does not address unilateral conduct); Memorandum 2024-15, pp. 9-20.

[19] Bus. & Prof. Code §§ 17000 - 17101.

[20] Bus. & Prof. Code § 17001. However, this retroactive declaration of purpose was made after the individual provisions of the UPA were enacted between 1913 and 1939; all were codified as the UPA in 1941 (1941 Cal. Stat. ch. 526). See California Lawyers Association, *California Antitrust and Unfair Competition Law*, Section 17.01 (2023 LexisNexis).

[21] Bus. & Prof. Code §§ 17200 - 17210.

[22] Bus. & Prof. Code §§ 17043, 17048.5.

[23] Bus. & Prof. Code § 17040.

[24] Bus. & Prof. Code § 17045.

[25] Bus. & Prof. Code § 17044.

[26] See generally California Lawyers Association, *California Antitrust and Unfair Competition Law*, § 17.01 (2023 LexisNexis); Second Supplement to Memorandum 2024-13, EX 6.

[27] Bus. & Prof. Code § 16750 (a), (d), (i); see also *Carver v. Chevron U.S.A. Inc.* (2004) 119 Cal.App.4th 498, 504 (Noting that the public policy implicit in the unilateral fee shifting provision of Cartwright Act is to encourage injured parties to broadly and effectively enforce Cartwright Act in situations where they otherwise would not find it economical to sue.) The Clayton Act, which governs enforcement of federal antitrust laws, mandates that successful plaintiffs are entitled to treble damages and reasonable attorney fees. Specifically, the statute states: "...any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S.C. §15(a)). This provision ensures that plaintiffs who successfully enforce antitrust laws are compensated for their legal expenses, encouraging private enforcement of these laws. See also *Uneedus v. California Shoppers, Inc.* (1978) 86 Cal.App.3d 932.

[28] Memorandum 2024-15, p. 11.

[29] Federal courts have exclusive jurisdiction to hear cases brought under the Sherman Act or other federal antitrust laws. See 15 U.S.C. §15(a); *Gen. Inv. Co. v. Lake Shore & Mich. S. Ry.* (1922) 260 U.S. 261, 287. Moreover, as noted by the Enforcement and Exemptions Working Group, "Since passage of the federal Class

Section 2 generally prohibits anticompetitive conduct by a single firm that results in substantial market power or that creates a "dangerous probability"[30] of obtaining substantial market power.[31] Substantial market power is not illegal if it is obtained through fair means, like creating a better product.[32] However, it is unlawful if someone obtains a substantial market power through anticompetitive exclusionary conduct, like prohibiting a competitor from obtaining the materials it needs to create a rival product.[33]

Section 2 is very brief, and in the absence of specific statutory direction, the federal courts have developed case law that explains which types of behaviors are anticompetitive.[34] Despite the fact that Section 2 has remained basically unchanged since its enactment in 1890, judicial interpretations have varied considerably over time and narrowed the scope of its application.[35] Moreover, the antitrust laws have not kept up with modern developments, as noted by the SFC Working Group:

> For example, the United States Supreme Court has held that low prices are lawful if the prices remain above cost. Although the Supreme Court acknowledged that aggressive price cuts can harm competition even if the prices remain above cost, it reasoned that a rule that required courts to make case-by-case determinations of the lawfulness of above cost prices would lead to too many mistakes and uncertainty about the law and would thus deter desirable price reductions. Thus, under federal antitrust law, a plaintiff asserting a claim for predatory pricing must show that the defendant's prices are below cost and that the market structure is such that the defendant has a reasonable probability of recouping its losses from below-cost sales once rivals are driven from the market. However, the continued usefulness of the federal predatory pricing rule is questionable when we observe that a rule created thirty years ago, when the digital economy was in its infancy, is poorly suited to products and services with very low or zero marginal costs, as it immunizes virtually all prices from predation claims for such products.[36]

The widespread recognition of the increasing inadequacy of state and federal antitrust laws to assure free and fair competition prompted the California Legislature's request to study antitrust law reform in the context of the modern

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Action Fairness Act of 2005, most consumer class actions to enforce Cartwright [Act claims] have been heard in federal court." Memorandum 2024-35, p. 3. Further, it is "...federal court judges who now most often are those called upon to interpret the law with regard to Cartwright Act claims...." *Id.*, p. 1.

[30] *Spectrum Sports, Inc. v. McQuillan* (1993) 506 U.S. 447, 456.

[31] Memorandum 2024-15, pp. 4-5.

[32] Memorandum 2024-15, p. 3.

[33] Memorandum 2024-15, p. 4.

[34] Memorandum 2024-15, pp. 6-7.

[35] Memoranda 2024-15, pp. 6-7; 2024-34, p. 12-13.

[36] Memorandum 2024-15, p. 6, referring to *Brooke Group v. Brown & Williamson Tobacco* (1993) 509 U.S. 209.

economy.[37] Among other issues, current federal case law was not designed to address companies who offer their products for free.[38] The goal of antitrust law is to protect robust market competition in all markets,[39] and Supreme Court rulings like the one described above have made effectuating that purpose more difficult.

Public Comments Urging Antitrust Reform and Cautioning Against Antitrust Reform

Throughout the Antitrust Law Study process the Commission received numerous public comments that range from urging the Commission to draft legislation reforming California Antitrust law to comments questioning the need for any reform.[40]

Comments urging reform generally assert that it is essential to rein in the market power of many dominant companies not only in our digital markets, but in our many other market sectors including food, agriculture, gasoline, health care, labor and entertainment and to address the barriers that thwart new entry and business opportunities for many.[41] Labor organizations generally agreed that antitrust law has ignored and failed labor while allowing employers to increase their market power and secure advantages denied them by the labor laws.[42]

Comments arguing for no reform or very limited reform often referred to economic uncertainties that could result from any change in the law.[43] One commenter objected that "there has been no empirical or analytical analysis showing that California consumers or businesses are suffering from reduced competition, higher prices or lessened innovation because of gaps in California law."[44] Commenters also argue that changes in the law produce uncertainty for the business community that could in turn chill innovation.[45]

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37 2022 Cal. Stat. res. Ch. 147 (ACR 95, Cunningham & Wicks).

38 Memorandum 2024-15, p. 6, referring to *Brooke Group v. Brown & Williamson Tobacco* (1993) 509 U.S. 209.

39 Memorandum 2024-33, p. 7.

40 See Antitrust Law Study webpage, Index of Public Comments.

41 Memorandum 2024-46; see also the First, Second, and Third Supplements thereto.

42 Memorandum 2024-46; see also the First, Second, and Third Supplements thereto.

43 See e.g. Memorandum 2025-30 EX 12, EX 102.

44 See e.g. Memorandum 2025-30, EX 12. Other commentators expressed similar views; see e.g. Memorandum 2025-30, EX 102-104; Second Supplement to Memorandum 2024-13, EX 34; First Supplement to Memorandum 2024-13, EX 47; First Supplement to Memorandum 2025-11, EX 12-13, 35; Second Supplement to Memorandum 2024-46, EX 19.

45 See e.g. Memorandum 2025-30, EX 12. Other commentators expressed similar views; see e.g. Memorandum 2025-30, EX 102-104; Second Supplement to Memorandum 2024-13, EX 34; First Supplement to Memorandum 2024-13, EX 47; First Supplement to Memorandum 2025-11, EX 12-13, 35; Second Supplement to Memorandum 2024-46, EX 19.

Need for a SFC Provision in California Law

Congress has not made any substantive changes to the Sherman Act since it was enacted in 1890. California adopted the Cartwright Act in 1907, and despite the fact that case law has determined that it does not apply to SFC, the Act has not been amended to add an explicit SFC provision. The vertical integration[46] of some of California's largest industries,[47] as well as the sheer scale of certain digital platforms[48] present unique competitive challenges not foreseen by the original antitrust law drafters. While successful challenges by the government against market malfeasants do occur under the current legal framework,[49] these successes are rare and require considerable resources to surmount the hurdles favoring the status quo.[50] Indeed, representatives in the federal government[51] and states including New York,[52] New Jersey,[53] Minnesota,[54] and Pennsylvania[55] have recently attempted to augment their antitrust laws to address modern circumstances.

The Commission was persuaded by arguments, which echo majorities in the academic and enforcement communities,[56] that California should adopt legislation reaching SFC.[57]

Another motivating factor for developing a state SFC antitrust law is to allow California courts to adjudicate California antitrust matters. Currently, because California does not have its own SFC laws, any SFC claim is typically alleged under federal antitrust law and must be brought in federal court. At a minimum, adopting a state law would allow such matters to be brought under state law, even if the claims are litigated in federal court,.[58]

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[46] The Mergers and Acquisitions Working Group defines a vertical merger as "one between a downstream firm which produces some final good and an upstream firm which supplies some input necessary to the production of the downstream good. A PC manufacturer might merge with a chip manufacturer." Memorandum 2024–25, p. 7.

[47] See, e.g., Memorandum 2024-14, pp. 10-12, 20, 36.

[48] See Memorandum 2024-26, pp. 2-3.

[49] See e.g., *U.S. v. Microsoft* (D.C. Cir. 2001) 253 F.3d 34; *United States et al. v. Google* (D.D.C. Sept. 2, 2025) No. 1:2020cv03010, ---F.Supp.3d ---, 2025 WL 2523010.

[50] See Memorandum 2024-33, pp. 5-6, in which the Consumer Welfare Working Group states "There is a broad consensus among scholars that these presumptions have eroded the capacity of the antitrust enterprise to protect competition." See also Seventh Supplement to Memorandum 2024-24, EX. 2, in which Professor John M. Newman writes "In litigation, defendants can out-spend enforcers by orders of magnitude."

[51] See, e.g. Sen. No. 225, 117th Cong., 1st Sess. (2021).

[52] See, e.g. S6748B (Gianaris, 2023).

[53] See, e.g. S3778 (Singleton, 2023).

[54] See, e.g. HF 1563 (Greenman, 2023).

[55] See, e.g. HB 2012 (Pisciottano, 2023).

[56] See e.g., Memorandum 2024-15 and Seventh Supplement to Memorandum 2024-24, EX 7.

[57] Minutes of Commission Meeting on January 23, 2025, pp. 3-4.

[58] As indicated in California Lawyers Association, *California Antitrust and Unfair Competition Law*, Section 17.01 (2023 LexisNexis), the federal Class Action Fairness Act of 2005, Pub. L. 109.2, requires most consumer class actions brought under the Cartwright Act to be heard in federal court. Also, if the state antitrust claim is coupled with a federal claim, it must be filed in federal court.

The Commission then had to decide how to draft a state SFC law. Most other states with a SFC provision mirror federal law,[59] but multiple Working Groups cautioned against this.[60] By simply mirroring federal law, California would effectively import the decades of federal jurisprudence that has diluted the Sherman Act Section 2's original scope and strength.[61] Accordingly, many Working Groups recommended, and the Commission agreed, that California should adopt a SFC provision that distinguishes itself from federal law and those decisions that unduly hinder the competitive marketplace.[62]

The Commission, however, decided against adopting completely new antitrust language.[63] Many stakeholders argued that a new, untested antitrust framework could be risky and invite uncertainty, potentially chilling innovation and business growth.[64] Further, new antitrust provisions without federal precedent might also pose a significant challenge to state courts, which would be required to essentially build a new body of antitrust jurisprudence. As a result, the Commission settled on a hybrid approach that selectively draws on federal statutory and case law to ground the new California standard while reflecting California's values and enforcement priorities by tailoring guidelines, definitions, and presumptions to California's specific concerns.

Technology Companies and Firms with Substantial Market Power.

ACR 95 also asked the Commission to decide "[w]hether the law should be revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices."[65] This question required an analysis of the current law's ability to rein in the negative competitive effects of major technology firms' conduct while preserving its benefits.

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59 Memorandum 2025-21, p. 3-4.

60 See e.g., Memoranda 2024–35, pp. 16, 21; 2024-15, pp. 1-2, 13. Other states with SFC provisions closely mirror the Sherman Act and/or contain harmonization provisions that require conformance with federal case law. See Memorandum 2025-21, EX A-2-3.

61 Memorandum 2024-15, p. 13.

62 Memoranda 2024-15, pp. 6-7, 13; 2024-33, p. 8; 2024-26, pp. 7-8.

63 Minutes of Commission Meeting on June 26, 2025, p. 5.

64 See, e.g., Memorandum 2025-30, pp. 12-13.

65 2022 Cal. Stat. res. ch. 147 (ACR 95, Cunningham & Wicks).

The Technology Platform Working Group report,[66] Congressional investigations and reports[67] and many public comments[68] detailed the unprecedented footprint of several digital platform companies, many of which are headquartered or have a substantial presence in California. These stakeholders shared concerns that certain practices by dominant companies such as self-preferencing,[69] discriminatory access,[70] exclusionary contracting,[71] restraints on data portability,[72] tying,[73] and killer acquisitions[74] may escape liability under Section 2's restrictive judicial interpretations.[75] The Commission was persuaded that current law is insufficient to curb abuses among technology firms, but the law's failures are not unique to technology.[76] The Commission concluded that exclusionary practices by dominant companies in every industry have the capacity to harm competition, so any new law should not single out individual sectors but apply to all.[77]

The Commission also considered whether to create an adjusted SFC framework for companies holding significant market power. Both proposed reforms noted in ACR 95,[78] the New York State Twenty-First Century Antitrust Act[79] and the Competition and Law Enforcement Reform Act,[80] contain "abuse of dominance" (AOD) provisions that make it unlawful for a dominant entity to abuse that position to its competitive advantage. This concept is based upon a European Union (EU) law that prohibits "any abuse by one or more undertakings of a dominant position within the internal market or on a substantial part of it…."[81] Such a provision has

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66 Memorandum 2024-26, p. 2; Technology Platforms Working Group Presentation transcript, June 20, 2024, p. 3.

67 These issues are discussed in the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets*, Majority Staff Report and Recommendations October 2020, Pt. I, pp. 391–98, and Pt. II, pp. 395-97 and Congressional Research Services, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, pp. 11, 22, 58.

68 See e.g., First Supplement to Memorandum 2024-32, EX 13; Seventh Supplement to Memorandum 2024-24, EX 7.

69 This generally refers to a company preferring its own products over those of competitors.

70 This generally refers to a company excluding potential competitors from access to their platforms. See Memorandum 2024-26, p. 2.

71 This generally refers to a company entering into exclusive contracts with customers or suppliers.

72 This generally refers to a company prohibiting, or making it quite difficult, for a customer to move their information between platforms.

73 Tying refers to the practice of requiring the purchase of a second item to purchase the first.

74 This refers to the practice of a company buying a competitor to prevent competition.

75 See Memoranda 2024-15, pp. 6-7, 14; 2024-33, pp. 6-7; 2024-26, pp. 7-8.

76 See e.g., Memorandum 2024-14, which discusses concentration in certain California markets.

77 Minutes of Commission Meeting on January 23, 2005, p. 4.

78 2022 Cal. Stat. res. ch. 147 (ACR 95, Cunningham & Wicks).

79 S933 (Gianaris, 2021).

80 Sen. No. 225, 117th Cong., 1st Sess. (2021).

81 *Treaty on the Functioning of the European Union*, Document 12008E102. The EU Court of Justice defines a dominant position as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers." European Parliament, Fact Sheets on the European Union, *Competition Policy*.

long been a fixture of European and Canadian antitrust laws, which rest within very different legal, political, and enforcement frameworks from the United States.[82]

The Commission received numerous public comments arguing against adopting an abuse of dominance provision in California law.[83] The Commission ultimately decided against crafting separate laws for dominant companies, expressing concern about the vagaries and arbitrary nature of establishing thresholds for substantial market power and use of differing standards of conduct and was wary of failed efforts in the United States to adopt this approach.[84]

BACKGROUND ON TENTATIVE RECOMMENDATION

PURPOSE STATEMENT

Many statutes, particularly those establishing a new legal framework,[85] begin with a statement of legislative findings and declarations to explain the purpose of enacting the law. These statements are not always codified in statute,[86] but are still relied on to interpret the statute.[87] The Cartwright Act, within which the Commission's recommendation would be placed, presently has no such directive.

Although the Commission also drafts Comments that explain the nature of each proposed statutory revision,[88] these Comments are not available in all publicly accessible codes[89] and do not carry the same weight as codified law.[90] Nor would a member of the public necessarily know how to research the bill underlying the code section to find uncodified law. For these reasons, the Commission recommends including language in the Business and Professions Code that establishes the

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82 See Memorandum 2024-26, p. 8.

83 See e.g. Memorandum 2025-43, pp. 3-5; First Supplement to Memorandum 2025-43, pp. 3-5; First Supplement to Memorandum 2025- 31, EX 2.

84 Video of Commission Meeting on September 18, 2025, e.g., 47:45 – 53:05.

85 See e.g., the Digital Equity Bill of Rights, Civ. Code §§ 3120 - 3123; the California Whistleblower Protection Act, Gov't Code §§ 8547 – 8547.15.

86 See e.g., 2025 Cal. Stat. ch. 782 (SB 720, Ashby).

87 Office of Administrative Law, *California Law and the APA*, p. 1.4.

88 California Law Revision Commission, *Handbook of Practices and Procedures* § 25, Definitions.

89 For example, the Office of Legislative Counsel's Legislative Information website provides public access to all of California codes, but it does not include relevant case law or Commission comments.

90 Commission Comments are, however, given substantial weight by courts. See *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770, 288 P.3d 1237, 149 Cal.Rptr.3d 614 ("Comments of a commission that proposed a statute [referring to Commission] are entitled to substantial weight in construing the statute, especially when, as here, the Legislature adopted the statute without change."); *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1137, n. 20 (Commission's official comments deemed to express Legislature's intent); *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1132 (official comments of California Law Revision Commission are declarative of intent not only of drafters of code but also of legislators who subsequently enacted it).

Legislature's intent in revising California's antitrust laws and provides guidance for the new laws' interpretation.[91]

The Commission recommends this purpose statement for the proposed legislation:[92]

Bus. & Prof. Code § 16730 (added) Purpose Statement

SEC. ___. Section 16730 is added to the Business and Professions Code, to read:

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

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

(c) The California Supreme Court has determined that the Cartwright Act is "broader in range and deeper in reach" than the federal Sherman Act;[93] courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors "maximizing effective deterrence of antitrust violations;"[94] and that the Cartwright Act is not modeled on the Sherman Act.[95] Further, California courts have recognized that the Cartwright Act departs from the Sherman Act in many respects, including, but not limited to, inclusion of indirect purchaser recovery,[96] use of a proximate cause test for Cartwright Act standing,[97] recognition of broader harms and per se conduct,[98] lower

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[91] The Commission also believed it was not necessary to preface the purpose statement with the phrase, "the Legislature finds and declares," because it is redundant, should the Legislature enact this recommendation as law.

[92] The footnotes in the proposed legislation below are presented for explanatory purposes in this narrative portion of the Staff Draft Final Recommendation. Footnotes are not included in proposed legislation.

[93] *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 920.

[94] *Clayworth v Pfizer, Inc.* (2010) 49 Cal.4th 758.

[95] See Memorandum 2024-15, p. 8, n. 16, in which the SFC Working Group stated:

> As the California Supreme Court confirmed in the later case of *Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1195 (2013), ("[i]nterpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal anti-trust statutes but instead on statutes enacted by California's sister states around the turn of the 20th Century.").

[96] Bus. & Prof. Code § 16750.

[97] Antitrust standing under the Cartwright Act requires a plaintiff show that an antitrust violation was the proximate cause of its injuries. See *Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723; Memorandum 2025-35, p. 10.

[98] Bus. & Prof. Code §§ 16720, 16727, 16729, 16750(a), 16600.1. Memorandum 2024-35, pp.13-14.

actionable market shares,[99] structured rule of reason analysis,[100] and differing burdens of proof.[101]

(d) Federal case law on the subject of this article is not binding on California courts, but courts may consider federal case law as persuasive authority to the extent they find it consistent with California law, including Section 16730.

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

Subdivision (a) reiterates the fundamental goal of California's antitrust law, which is the promotion and protection of free and fair competition.[102] This subdivision also integrates portions of a California Supreme Court decision that describes the Cartwright Act as premised on the idea that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[103]

Subdivision (b) reiterates the law's dedication to workers' rights, also mentioned in subdivision (a), and as affirmed by the inclusion of "monopsony" in the statute containing the operative language.[104]

Subdivision (c) emphasizes the differences between the Cartwright Act and the Sherman Act. Although one of the goals in establishing a state SFC law is to allow state courts to adjudicate these cases, a case including a Cartwright Act claim may still be heard in federal court in some circumstances. For example, a case may be litigated in federal courts if it also includes a federal antitrust claim, is a class action, or is removable on diversity grounds.[105] Throughout the Antitrust Law study, the

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99 *Fisherman's Wharf Bay Cruise v. Superior Ct*. (2003) 114 Cal.App.4th 309, 326. In this case addressing exclusive dealing, among other things under the Cartwright Act, the court held that a 20% market foreclosure was enough to pursue a cause of action against a competitor.

100 Memorandum 2024-35, p. 6; *In re Cipro Cases I & II*, (2015) 61 Cal.4th 116, 147-148.

101 *In re Cipro Cases I & II*, (2015) 61 Cal.4th 116, 153-154.

102 *See Clayworth v. Pfizer, Inc*. (2010) 49 Cal.4th 758, 783.

103 *In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 136.

104 Proposed Bus. & Prof. Code §16730; see also Memoranda 2024-14, pp. 4-6; Bus. & Prof. Code §§ 16600 – 16600.5 relating to California's broad prohibition on noncompete agreements.

105 See, See California Lawyers Association, *California Antitrust and Unfair Competition Law*, Section 17.01 (2023 LexisNexis); Second Supplement to Memorandum 2024-13, EX 6and Memorandum 2024-35, p. 3 in which the Enforcement and Exemptions Working Group stated:

> Private litigation has been the principal means of Cartwright Act enforcement for many decades, encouraged (intentionally) by Cartwright's provisions for treble damages and recovery of attorney's fees. Since passage of the federal Class Action Fairness Act of 2005, [Pub. L. 109.2] most consumer class actions to enforce Cartwright have been heard in federal court. This has had several

Commission heard from the Working Groups and multiple practitioners that federal courts frequently and incorrectly conflated the Cartwright Act with the Sherman Act.[106] This subdivision is designed to address those circumstances by making it clear the state and federal antitrust laws are distinct in multiple ways.

Subdivision (d) clarifies that courts do not have to follow federal case law when interpreting California antitrust statutes, but they may consider federal case law persuasive to the extent it is consistent with California's laws and aligned with the Cartwright Act's purpose.

Subdivision (e) aligns California with themes in the 2023 Federal Trade Commission and Department of Justice Merger Guidelines.[107] Of note, the 2023 Guidelines "rely more on the theme of 'lessening competition' than on the language in the 1982, 1992, and 2010 Guidelines, which emphasized market power and its exercise."[108]

SINGLE FIRM CONDUCT OPERATIVE PROVISION

The Commission evaluated and considered three options to address SFC within the Cartwright Act. The first option used language similar to the Sherman Act,[109] but the Commission rejected this over concerns that tracking federal law too closely would risk implicitly endorsing its entire body of problematic jurisprudence.[110] The third option, which was rejected by the Commission, drew from the SFC Working Group's report,[111] which proposed language defining unlawful SFC in relation to its harm to trading partners, balanced against the benefits of the conduct. While attractive as a fresh alternative, this option received only support from its authors, with other commentators noting the risks inherent in pursuing a novel regulatory framework.[112]

The Commission instead supported the second option presented:

> unfortunate side effects. One such effect, because the claims often appear alongside Sherman Act claims, has been a tendency of federal judges to conflate Cartwright claims with federal ones, presuming that they are the same for all practical purposes even when they are not.

[106] See e.g. Memorandum 2024-35, p. 3, in which the Enforcement and Exemptions Working Group stated:

> One such effect, because the claims often appear alongside Sherman Act claims, has been a tendency of federal judges to conflate Cartwright claims with federal ones, presuming that they are the same for all practical purposes even when they are not.

[107] 2023 Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission (December 18, 2023).

[108] Memorandum 2024-25, p. 3.

[109] Memorandum 2025-21, p. 2.

[110] Video of Commission Meeting on September 18, 2025, e.g., 1:56:40 – 1:57:55; see also Memoranda 2025-41, pp. 7-8; 2025-30, pp. 5-6; 2025-21, p. 3; 2024-15, p. 15.

[111] Memorandum 2024-15, p. 16.

[112] Memorandum 2025-30, pp. 10-13. The SFC Working Group submitted a public comment urging the Commission to adopt the third option. *Id.*, EX 110-111.

Bus. & Prof. Code § 16731 (added) Single Firm Conduct

SEC. ___. Section 16731 is added to the Business and Professions Code, to read:

(a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events:

(1) In restraint of trade; or,

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

(b) As used in this section, "restraint of trade" shall include, but not be limited to, any actions, measures, or acts included or cognizable under Section 16720, whether directed, caused, or performed by one or more persons.

(c) Anticompetitive effects in one market from the challenged conduct may not be offset by purported benefits in a separate market; and the harm to a person or persons from the challenged conduct may not be offset by purported benefits to another person or persons.

Subdivision (a) describes the effects that make certain conduct illegal and clarifies that the law applies to conduct carried out both directly and indirectly.

Paragraph (1) of Subdivision (a) uses the phrase "restraint of trade" which is used both in the Cartwright Act[113] and in the federal Sherman Act Section 1[114] and is intended to capture the full range of anticompetitive conduct by a single firm that may not fall within the currently restricted scope of federal or state law for multiple actors.[115] Some commentators asserted that the term "restraint of trade" could not be placed in a single firm context because it relates to multi-firm conduct.[116] However, the Commission did not find this argument compelling, as the "restraint of trade" language is intended to refer to a negative effect on competition[117] and the United States Supreme Court affirmed that restraints of trade can be performed by

113 Bus. & Prof. Code § 16720 (outlawing trusts that "create or carry out restrictions in trade or commerce"): Bus. & Prof. Code § 16721.5 establishes additional circumstances constituting an unlawful trust and unlawful restraint of trade.

114 15 U.S.C. § 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal…."

115 *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 917-18.

116 See Memoranda 2025-41, p. 41; 2024-34, p. 8 citing *Ben-E-Lect v. Anthem Blue Cross Life & Health Ins. Co*. (2020) 51 Cal. App. 5th 867, 872, as modified on denial of reh'g (July 22, 2020) ("The Cartwright Act prohibits all combinations created for or carrying out unreasonable restrictions in trade or commerce.") and *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2020) 55 Cal.App.5th 381, 398–399, ("The distinction between per se and rule of reason analysis stems from the fact that the Cartwright Act, like its federal counterpart the Sherman Act, prohibits not all agreements restraining trade, but rather agreements that unreasonably restrain trade.").

117 See e.g., *Am. Needle, Inc. v. Nat'l Football League* (2010) 560 U.S. 183, 186 ("The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade.").

single firm actors as well as multiple companies.[118] Further, some argued that "restraint of trade" was too vague.[119] The Commission concluded, however, that while "restraint of trade" is on its face broad and general, both the federal and California courts have substantial experience adjudicating this term.[120]

Paragraph (2) of subdivision (a) uses language similar to Sherman Act Section 2[121] and adds "monopsony" and "to maintain monopoly or monopsony" to distinguish state law, highlight its application to all buyer-side transactions, including those in the context of employers and labor,[122] and prohibit the anticompetitive maintenance of monopoly power.[123] This structure, combining "restraint of trade" with Sherman Act Section 2 language, also borrows from other states that have both a SFC provision banning restraints of trade and a ban on monopoly conduct.[124]

Subdivision (b) clarifies that "restraints of trade" under this section includes but is not limited to any of the unlawful acts proscribed in the Cartwright Act, whether done by one person or multiple persons, directly or indirectly.[125]

Subdivision (c) was not originally considered by the Commission,[126] but rather was suggested by multiple stakeholders[127] who argued that despite it being existing law,[128] courts sometimes permit an anticompetitive effect in one market to be offset

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[118] *Copperweld Corp*. v. *Indep. Tube Corp.* (1984) 467 U.S. 752, 775. ("[A]n unreasonable restraint of trade may be affected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints affected by a contract, combination, or conspiracy—it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability.") *Am. Needle, Inc. v. Nat'l Football League* (2010) 560 U.S. 183, 186.

[119] Memorandum 2025-30, pp. 7-8.

[120] Memorandum 2025-41, pp. 9-10. "Restraint of trade" means "unreasonable" restraint of trade as recognized by the California Supreme Court in *In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 136.

[121] 15 U.S.C. § 2 states in part, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…."

[122] The inclusion of "monopsonize," although commonly understood as encompassed within the broader term "monopolize," is intended to help address the historical underenforcement of buyer-side monopolies that impact labor, among others. See Memoranda 2024-14, pp. 4-6; 2024-25, p. 17.

[123] See e.g. *UFCW Local 1776 & Participating Employers Health and Welfare Fund v. Takeda Pharmaceutical Co. LTD*. (2nd Cir. 2021) 11 F.4th118, 137; *Bloyer v. St. Clair County of Illinois* (S.D.Ill. 2016) 179 F.Supp.3d 843, 859-50.

[124] See e.g., Haw. Rev. Stat. Ann §§ 480-4, 480-9 and Idaho Code §§ 48-104, 48-105.

[125] *Copperweld Corp. v. Indep. Tube Corp.* (1984) 467 U.S. 752, 775 "([A]n unreasonable restraint of trade may be affected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms.").

[126] Memoranda 2025-21, 2025-30.

[127] Memorandum 2025-41, EX 9.

[128] Cross-market efficiencies are prohibited in mergers, see *United States v. Philadelphia National Bank* (1963) 374 U.S. 321, but courts have sometimes permitted it in SFC cases. See e.g., *Epic Games, Inc. v. Apple, Inc.* (2023) 67 F.4th 946, 989 (U.S. Supreme Court "precedent on cross-market balancing is unclear."); *NCAA v. Alston* (2021) 594 U.S. 69, 87 (declining to consider argument by amici that "review

by a pro-competitive benefit in another (also known as cross-market efficiencies) in SFC cases. The Commission included this provision to emphasize to the judiciary that anticompetitive effects may only be offset by benefits in the same market and to the same persons originally affected by the anticompetitive conduct.

JUDICIAL GUIDANCE

As noted above, California courts are not bound to federal antitrust case law, though the purpose statement notes they may use it as guidance to the extent the federal case law aligns with California state law. The Commission found certain federal precedents particularly restrictive, which could limit the effectiveness of state antitrust enforcement.[129] Accordingly, the Commission chose to include in this statute a nonexclusive list of elements from various federal antitrust law cases that do not need to be proved to establish liability under California antitrust law.[130] This list also includes restatements of existing law, reminding the courts that various types of evidence can substantiate an antitrust allegation, and that defining a relevant market is unnecessary when there is direct evidence of market effects or market power.

Bus. & Prof. Code § 16732 (added) Judicial Guidance

SEC. ___. Section 16732 is added to the Business and Professions Code, to read:

> Although the following nonexclusive list may constitute evidence of a violation of Section 16731, California law does not require a finding of any of the following to establish liability:
>
> (a) The unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct.
>
> (b) The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons.
>
> (c) The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or service required under federal antitrust law.
>
> (d) The defendant's conduct makes no economic sense apart from its tendency to harm competition.

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should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury," when the parties had agreed in the trial court that cross-market balancing was appropriate). While the courts have refused to engage in cross-market balancing in cases of per se violations, *United States v. Topco Assocs., Inc.* (1972) 405 U.S. 596, 609-10 ("Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules."), one court considered with little discussion whether procompetitive benefits in one market justified anticompetitive conduct in a related one. See *NCAA v. Bd. of Regents of Univ. of Okla*. (1984) 468 U.S. 85, 104-108 (considering a procompetitive rationale regarding the college football tickets market when assessing anticompetitive conduct in the market for college football television).

[129] See e.g., Memoranda 2024-15, pp. 6-7; 2024-33, pp. 6-7; 2024-26, pp. 7-8.

[130] Memoranda 2024-15, pp.17-18; subdivisions (a)-(g) are similar to those listed in Sen. No. 130 119th Cong. 1st Sess. (2025), Section 26A.

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

(f) In cases where a defendant's business is a multi-sided platform, the defendant's conduct presents harm to competition on more than one side of the multi-sided platform, or the harm to competition on one side of the multi-sided platform outweighs any benefits to competition on any other side(s) of the multi-sided platform.

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

(h) The rivals whose ability to compete has been reduced or harmed are as efficient, or nearly as efficient, as the defendants.

(i) A single firm or person has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power.

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

This section is intended to provide guidance to courts when interpreting proposed Business and Professions Code Section 16731 and includes in statute a nonexclusive list of elements from various federal antitrust law cases that do not need to be proved to establish liability under those sections. Most of these subdivisions reflect prior federal rulings outlining various criteria that must be met before a court determines a person has violated federal antitrust laws. Often, courts have interpreted these criteria as prerequisites for liability when instead they could be read as possible, but not mandatory, indicators of anticompetitive conduct. By advising judicial officers that they are not required to make a finding of these elements to determine fault under California antitrust law, California is setting wider boundaries than federal case law to find unlawful conduct.

Subdivision (a) ("The unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct") addresses the ruling in *Verizon Communications v. Law Offices of Curtis V. Trinko (Trinko)*, a refusal to deal case.[131] *Trinko* was brought by telephone customers against a carrier who alleged that the carrier's failure to provide connection services violated the Sherman Act. In its opinion denying relief, the Court noted that *Trinko's* fact pattern did not match those of a prior case, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp. (Aspen Skiing)*.[132] *Aspen Skiing* was an action by a ski resort owner against a neighboring ski resort which had stopped participating in a multi-resort ski lift pass. In *Aspen Skiing*, the court found an

[131] *Verizon Communications v. Law Offices of Curtis V. Trinko* (2004) 540 U.S. 398.

[132] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (1985) 472 U.S. 585.

antitrust violation because, among other elements, the defendant had previously participated in the multi-resort pass.[133]

Subdivisions (b) and (d) address the holding in *Aspen Skiing*. In addition to its previous participation, the defendant refused to provide lift tickets to the plaintiff when the tickets were commercially available to others[134] (subdivision (b): "The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons"), and the defendant's refusal to continue to participate in the multi-resort pass was not based on a reasonable business justification[135] (subdivision (d): "The defendant's conduct makes no economic sense apart from its tendency to harm competition"). *Trinko* and its progeny have, in many instances, elevated the distinguishing facts of *Aspen* to mandatory proof requirements, restricting the universe of actionable refusal-to-deal claims.[136]

However, refusals to deal in today's economy can be anticompetitive for reasons beyond *Aspen Skiing's* fact pattern.[137] While *Aspen* and *Trinko* provide guidance when refusals to deal may be anticompetitive, they do not have to be read as establishing a mandatory list of conditions. Indicators of anticompetitive intent will vary depending on the circumstances, and rigid rules requiring specific fact patterns can unduly restrict enforcement.[138] Further, requiring a prior course of dealing or

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[133] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (1985) 472 U.S. 585. pp. 604-611.

[134] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (1985) 472 U.S. 585 pp. 607-608.

[135] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (1985) 472 U.S. 585 pp. 608-611.

[136] *Verizon Communications v. Law Offices of Curtis V. Trinko* (2004) 540 U.S. 398, 408–411; *New York v. Facebook, Inc.* (D.D.C. 2021) 549 F.Supp.3d 6, 24-31, aff'd sub nom. *New York v. Meta Platforms, Inc.* (D.C. Cir. 2023) 66 F.4th 288, 305; Memoranda 2024-15, p. 7; see also 2024-26, pp. 7-8, referencing the Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary of the House of Representatives, Part I, *Investigation of Competition in Digital Markets*, July 2022, p. 336:

> The Subcommittee's investigation uncovered several instances in which a dominant platform used the threat of delisting or refusing service to a third party as leverage to extract greater value or more data or to secure an advantage in a distinct market. Because the dominant platforms do not face meaningful competition in their primary markets, their threat to refuse business with a third party is the equivalent of depriving a market participant of an essential input. This denial of access in one market can undermine competition across adjacent markets, undermining the ability of market participants to compete on the merits.
>
> …To clarify the law, Congress should consider overriding judicial decisions that have treated unfavorably essential facilities- and refusal to deal-based theories of harm. [citing *Trinko*.]

[137] Memorandum 2024-15, p. 7.

[138] *Steward Health Care System, LLC. v. Blue Cross & Blue Shield of Rhode Island* (D.R.I. 2018) 311 F.Supp.3d 468, 485:

> *Aspen Skiing* and *Trinko*, properly read, provide useful guidance as to whether Blue Cross's conduct amounted to a refusal to deal motivated by anticompetitive animus. While the indicators of anticompetitive animus here vary somewhat from what the Supreme Court identified in *Aspen Skiing* and *Trinko*, those differences are reflective of the very different marketplaces at issue (healthcare and health insurance as opposed to ski resorts and regulated telecommunications.) Potentially anticompetitive behavior by market participants is bound to manifest itself differently in different markets.

discriminatory treatment as necessary elements of liability leaves a large body of potential rivals and victims of anticompetitive refusals with no remedy.[139]

While the "no economic sense" requirement in section (d) may seem benign, in application, it can also insulate company's anticompetitive refusals to deal and exclusionary conduct from liability. While lack of economic justification may be useful as evidence of anticompetitive purpose or effect, requiring it as a necessary element of liability creates multiple problems.[140] First, there are many other kinds of evidence that can be used to show anticompetitive purpose. Conduct can be purposely anticompetitive without an immediate economic impact on the defendant. For instance, a "no economic sense" test doesn't work in cases where a monopolist offers products or services for free, which has or has little or no marginal cost to the monopolist. Additionally, this standard requires a court to distinguish "legitimate" profits from "profits made by eliminating competition," a potentially difficult and costly task. Finally, there may be multiple motivations for the conduct, requiring additional guidance to balance conflicting reasons.[141]

Subdivisions (c) and (g) address the ruling in *Brooke Group v. Brown & Williamson Tobacco*.[142] In this case, the plaintiff argued that the defendant introduced a rival brand of generic cigarettes and sold them below the defendant's cost, harming the plaintiff's sales. The court held that the plaintiff must show that the defendant's prices were below cost in order to prove predatory pricing (subdivision (c): "The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or service required under federal antitrust law") and the defendant has a reasonable probability of recouping its losses once its competitors are driven from the market (subdivision (g): "In a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue").

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[139] *Steward Health Care System, LLC v. Blue Cross & Blue Shield of Rhode Island* (D.R.I. 2014) 997 F.Supp.2d 142, 160:

> To permit the defendant in an unlawful exclusion case to hide behind the presumptive disfavoring of non-market participants would subject plaintiffs in such cases to an insurmountable Catch-22. Were courts to observe a blanket prohibition on claims brought by those excluded from the market by alleged anticompetitive conduct, those firms responsible for the exclusion might never be held accountable.

[140] Congressional Research Service, *Antitrust Reform and Big Tech Firms* (Nov. 21, 2023), p. 7; *Viamedia, Inc. v. Comcast Corp*. (7th Cir. 2020) 951 F.3d 429, 461-462; see also Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard* (2006) 73 Antitrust L.J. 311, 319-320, 355-57.

[141] The practical existence of multiple reasons for conduct runs contrary to case law that recognizes damaging competition as the only possible motivation. See *Federal Trade Commission v. Qualcomm Inc.* (2020) 969 F.3d 974, 993 which says that "a company engages in prohibited, anticompetitive conduct when…the only conceivable rational or purpose is 'to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition'…."

[142] *Brooke Group v. Brown & Williamson Tobacco* (1993) 509 U.S. 209.

However, the below-cost and recoupment requirements have proven difficult to satisfy, and it is rare for a predatory pricing case to succeed under federal law.[143] These federal judicial restrictions on predatory pricing claims reflect outdated thinking that pricing predation was irrational and competition would enter the market during the recoupment period.[144] Moreover, these requirements make little sense when many digital products are offered for free or with very low marginal costs, as the requirements immunize virtually all prices from predation claims.[145] These requirements also fail to recognize that prices set above defendant's costs can be anticompetitive, too.[146]

The directive that California courts need not follow these federal precedents aligns with existing state law, which expressly rejects federal standards of assessing costs and rejects any need to show recoupment.[147]

Subdivision (e) ("the conduct's risk of harming competition or actual harm must be proven with quantitative evidence") is a reminder that antitrust harm or the risk of harm can be proven by quantitative *or* qualitative evidence. California law, like much of federal law, recognizes that damages can be shown with a reasonable probability of a causal connection between the challenged conduct and loss, and that damages can be proven with probable and inferential proof.[148]

Subdivision (f) ("In cases where a defendant's business is a multi-sided platform, that the defendant's conduct presents harm to competition on more than one side of the multi-sided platform, or that the harm to competition on one side of the multi-sided platform outweighs any benefits to competition on any other side(s) of the multi-sided platform") is a response to the ruling in *Ohio v. American Express*.[149] This case held that American Express did not violate antitrust laws by prohibiting merchants from discouraging the use of American Express cards in favor of methods of payment with lower transaction fees. In reaching this conclusion, the United

143 First Supplement to Memorandum 2024-32, p. 1, n.4, referencing Lina Khan, *Amazon's Antitrust Paradox* (2017) 126 Yale L.J. 710, 730.

144 Congressional Research Service, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, p. 8, n.73 ("Economists have identified a variety of circumstances in which predation can, in theory, be a rational business strategy—for example, where entry entails large fixed costs, a dominant firm develops a predatory reputation, capital markets are imperfect, or predation can deny rivals minimum efficient scale.").

145 Memoranda 2024-15, p. 6 ("…the continued usefulness of the federal predatory pricing rule is questionable when we observe that a rule created thirty years ago, when the digital economy was in its infancy, is poorly suited to products and services with very low or zero marginal costs, as it immunizes virtually all prices from predation claims for such products."); 2024-26, pp. 7-8 ("Advocates of this approach [not passing legislation to specifically target technology companies] may also assert that existing antitrust law is sufficient, so long as certain modern federal antitrust decisions (such as *Brooke Group, Trinko,* and the like) are reversed through legislative action. For example, the House Antitrust Subcommittee recommended legislatively overriding ... *Brooke Group* and *Weyerhauser* (to the extent those cases hold that proving predatory pricing or buying requires 'proof of recoupment') ....")

146 Memorandum 2024-15, p. 6; *ZF Meritor, LLC v. Eaton Corp* (3rd Cir. 2012) 696 F.3d 254, 274-275.

147 California Unfair Practices Act, Bus. & Prof. Code § 17043. See also *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 445; Memorandum 2024-15, p. 12.

148 See *Suburban Mobile Homes, Inc. v. Amfac Communities, Inc*. (1950) 101 Cal.App.3d 532, 545.

149 *Ohio v. American Express* (2018) 585 U.S. 529.

States Supreme Court determined that a credit card network platform is a single market with a merchant services side and a consumer cardholder side (a multi-sided platform), and both sides must be analyzed for anticompetitive effects sufficient to establish a violation. This created a confusing precedent as to the type and amount of evidence needed to show harm in cases involving two sided platforms. This case also used assumptions about the interconnectedness of the two sides that may not translate to market realities in other circumstances, and could allow firms to escape antitrust liability for causing harm on one side of a platform and masking it with benefits on the other side.[150]

Subdivision (h) ("The rivals whose ability to compete has been reduced or harmed are as efficient, or nearly as efficient, as the defendants") addresses *Ortho Diagnostic Sys., Inc. v. Abbott Labs, Inc.*[151] which involved rival drug testing firms. In its ruling, the court determined that the plaintiff must allege and prove that it was at least as efficient a producer of the competitive product as the defendant, but that the defendant's pricing made it unprofitable for the plaintiff to continue to produce. This was the court's attempt to ensure its analysis was truly about competitive practices and that the pricing was not due to poor systems control.[152]

However, requiring the plaintiff to be as efficient as the defendant as a precondition to liability in an exclusionary conduct claim has been criticized on multiple grounds, including that it favors dominant firms and requires burdensome and complex litigation about the parties' relative efficiencies. Most importantly, such a requirement denies antitrust protection for harm to plaintiffs without the scale or efficiency of the defendant.[153]

Subdivision (i) ("A single firm or person has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power") highlights the differences between state and federal law regarding market share and market power. While there is no federal consensus as to market shares that create antitrust concerns, the Federal Trade Commission notes, "Courts look at the firm's market share, but typically do not find monopoly power if the firm (or a group of firms acting in concert) has less than 50 percent of the sales of a particular product or service within a certain geographic area."[154] In contrast, in

[150] *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation* (E.D.N.Y. 2024) 714 F.Supp.3d 65, 85 ("... *Amex* offers little guidance to lower courts in terms of what evidence (or how much) must be shown to demonstrate the existence of a triable question of fact as to harm to a two-sided transaction market."); *Epic Games, Inc. v. Apple Inc.* (9th Cir. 2023), 67 F.4th 946, 985 ("*Amex* does not require a plaintiff to [show] harm to participants on both sides of the market."); fundamental antitrust law precludes justifying harmful restraints in one market with justifications from outside the harmed market. *United States v. Topco Assocs. Inc.* (1972) 405 U.S. 596, 609-610; *Law v. NCAA* (D.Kan. 1995) 902 F.Supp. 1394, 1405-1406.

[151] *Ortho Diagnostic Sys., Inc. v. Abbott Labs, Inc.* (SDNY 1996) 920 F.Supp. 455.

[152] *Ortho Diagnostic Sys., Inc. v. Abbott Labs, Inc.* (S.D.N.Y. 1996) 920 F.Supp. 455, pp. 466-467.

[153] Memorandum 2024-15, p. 17; Congressional Research Service, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, p. 7.

[154] Federal Trade Commission, Guide to Antitrust Laws, Single Firm Conduct, *Monopolization Defined*.

Fisherman's Wharf Bay Cruise v. Superior Ct.,[155] a California case addressing, among other things, exclusive dealing under the Cartwright Act, the court held that a 20% market share foreclosure was enough to pursue an action against anticompetitive practices.

Subdivision (j) ("A definition of 'relevant market' where there is direct evidence of market effects or power") restates existing case law,[156] because some cases get derailed by questions of relevant market when harm is already evident.[157] Since the purpose of the inquiries into market definition and market share is to determine whether an arrangement has the *potential* for genuine adverse effects on competition, proof of *actual* detrimental effects can obviate the need for that inquiry.

CONCLUSION

Based on the foregoing review and analysis, the Commission recommends that California law should include a SFC provision that is tailored to reflect California's values and enforcement priorities and is not bound to federal antitrust case law. The Commission concluded that codifying language that establishes the Legislature's intent in revising California's antitrust laws and provides guidance for their interpretation would ensure a durable framework for this new body of law. Finally, the Commission found certain federal precedents particularly restrictive, which could limit the effectiveness and enforcement of state law if followed by state or federal courts. Accordingly, it chose to include in statute a nonexclusive list of elements from various federal antitrust law cases that do not need to be proved to establish liability under California antitrust law.

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[155] *Fisherman's Wharf Bay Cruise v. Superior Ct*. (2003) 114 Cal.App.4th 309, 339. In a Cartwright Act case, the court held that a 20% market foreclosure was enough to pursue a cause of action against a competitor.

[156] Memorandum 2024-35, pp. 6-7; *FTC v. Ind. Federation of Dentists* (1986) 476 U.S. 447, 460-61; *In re Loestrin 24 Fe Antitrust Litigation* (2019) 433 F.Supp.3d 274, 299; *In re Nexium III* (D.Mass. 2013) 968 F.Supp.2d 367, 388 n.19.

[157] See e.g., *Ohio v. American Express* (2018) 585 U.S. 529 in which the Supreme Court ruled in favor of the defendants based on the government's failure to properly define the relevant market, despite the district court finding direct evidence of significant anticompetitive effects.

PROPOSED LEGISLATION

Bus. & Prof. Code § 16730 (added) Purpose Statement

SEC. ___. Section 16730 is added to the Business and Professions Code, to read:

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

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

(c) The California Supreme Court has determined that the Cartwright Act is "broader in range and deeper in reach" than the federal Sherman Act; courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors "maximizing" effective deterrence of antitrust violations; and that the Cartwright Act is not modeled on the Sherman Act. Further, California courts have recognized that the Cartwright Act departs from the Sherman Act in many respects, including, but not limited to, inclusion of indirect purchaser recovery, use of a proximate cause test for Cartwright Act standing, recognition of broader harms and per se conduct, lower actionable market shares, structured rule of reason analysis, and differing burdens of proof.

(d) Federal case law on the subject of this article is not binding on California courts, but courts may consider federal case law as persuasive authority to the extent they find it consistent with California law including Section 16730.

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

Comment. Subdivision (a) expresses the fundamental goal of California's antitrust law, which is the promotion and protection of free and fair competition. *Clayworth v. Pfizer, Inc*. (2010) 49 Cal.4th 758, 783. ("From its inception, the Cartwright Act has always been focused on the punishment of violators for the larger purpose of promoting free competition."). This subdivision also references *In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 136, which describes the Cartwright Act as premised on the idea that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

Subdivision (b) reiterates the law's dedication to worker's rights. (See e.g., Bus. & Prof. Code §§ 16600 – 16600.5 relating to California's broad prohibition on noncompete agreements.)

Subdivision (c) emphasizes the differences between the Cartwright Act and the Sherman Act as established in California case law and statutes: The California Supreme Court has determined that the Cartwright Act is "broader in range and deeper in reach" than the federal Sherman Act; *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 920; courts shall liberally interpret California's antitrust laws to best promote free and fair competition and be mindful that California favors 'maximizing' effective deterrence of antitrust violations; *Clayworth v Pfizer, Inc.* (2010) 49 Cal.4th 758, 783 ("As the Cartwright Act's primary concern is with the elimination of restraints of trade and impairments of the free market, we can and should select the damages rule most consistent with that focus … double and treble damages may overcompensate injured plaintiffs, but they do so in order to maximize deterrence."); that the Cartwright Act is not modeled on the Sherman Act. *Aryeh v. Canon Business Sols., Inc.* (2013) 55 Cal.4th 1185, 1195 ("Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was not modeled on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century."); inclusion of indirect purchaser recovery (Bus. & Prof. § 16720, 16750(a)); use of a proximate cause test for Cartwright Act standing. *Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723 ("The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries."); recognition of broader harms and per se conduct (Bus. & Prof. Code §§ 16720, 16750(a), 16600.1); lower actionable market shares. *Fisherman's Wharf Bay Cruise v. Superior Ct.* (2003) 114 Cal.App.4th 309, 326 (This case addresses, among other things, exclusive dealing under the Cartwright Act, holding that a 20% market foreclosure was enough to pursue a cause of action against a competitor.); structured rule of reason analysis *In re Cipro Cases I & II,* (2015) 61 Cal.4th 116, 162 ("By ferreting out anticompetitive agreements that limit generic market entry and sustain costly monopolies, a structured rule of reason serves those goals and poses no obstacle to congressional objectives."); and differing burdens of proof *In re Cipro Cases I & II* (2015) 61 Cal.4th 116 (This case discusses approaches to weighing the burdens of proof that differ from federal case law).

Subdivision (d) clarifies that courts do not have to follow federal case law when interpreting California antitrust statutes, but they may consider federal case law persuasive to the extent it is found to be consistent with California's laws, including the Cartwright Act's purpose statement.

Subdivision (e) is intended to align California with the 2023 Federal Trade Commission and Department of Justice Merger Guidelines in recognizing that unilateral action and multiparty actions, horizontal and vertical relationships, and various forms of corporate entities can interfere with free and fair competition.

Bus. & Prof. Code § 16731 (added) Single Firm Conduct

SEC. ___. Section 16731 is added to the Business and Professions Code, to read:

16731. (a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events:

(1) In restraint of trade; or

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

(b) As used in this section, "restraint of trade" shall include, but not be limited to, any actions, measures, or acts included or cognizable under Section 16720, whether directed, caused, or performed by one or more persons.

(c) Anticompetitive effects in one market from the challenged conduct may not be offset by purported benefits in a separate market; and the harm to a person or persons from the challenged conduct may not be offset by purported benefits to another person or persons.

Comment. Subdivision (a) describes the effects that make certain conduct by single persons illegal and clarifies that the law applies to conduct carried out both directly and indirectly.

Subdivision (a)(1) uses the phrase "restraint of trade" which is used in both the Cartwright Act (Bus. & Prof. Code § 16721.5) and in the Sherman Act (15 U.S.C. § 1) and is intended to capture the full range of anticompetitive conduct by a single person, consistent with the Cartwright Act's general framework. *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 917-18. "Restraint of trade" means "unreasonable" restraint of trade as recognized by the California Supreme Court. *In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 136.

Subdivision (a)(2) uses language similar to Section 2 of the Sherman Act (15 U.S.C. § 2) and adds "monopsony" and "to maintain monopoly or monopsony" to distinguish state law, highlight its application to all buyer-side transactions, and prohibit the anticompetitive maintenance of monopoly power.

Subdivision (b) clarifies that "restraints of trade" under this section includes, but is not limited to, any of the unlawful acts proscribed in the Cartwright Act, whether done by one person or multiple persons, directly or indirectly. *Copperweld Corp. v. Indep. Tube Corp.* (1984) 467 U.S. 752, 775 ("an unreasonable restraint of trade may be affected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms.").

Subdivision (c) clarifies that anticompetitive effects may only be offset by benefits in the same market and to the same persons originally affected by the anticompetitive conduct

Bus. & Prof. Code § 16732 (added) Judicial Guidance

SEC. ___. Section 16732 is added to the Business and Professions Code, to read:

16732. Although the following nonexclusive list may constitute evidence of a violation of Section16731, California law does not require a finding of any of the following to establish liability:

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

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

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

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

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

(f) In cases where a defendant's business is a multi-sided platform, the defendant's conduct presents harm to competition on more than one side of the multi-sided platform, or the harm to competition on one side of the multi-sided platform outweighs any benefits to competition on any other side(s) of the multi-sided platform.

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

(h) The rivals whose ability to compete has been reduced or harmed are as efficient, or nearly as efficient, as the defendants.

(i) A single firm or person has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power.

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

Comment. This section is intended to provide guidance to courts when interpreting Business and Professions Code Section 16731 and includes in statute a nonexclusive list of elements from various federal antitrust law cases that do not need to be proved to establish liability under those sections.

Subdivision (a) addresses the ruling in *Verizon Communications v. Law Offices of Curtis V. Trinko* (2004) 540 U.S. 398, a refusal to deal case. In its opinion denying relief, the Court noted that *Trinko's* fact pattern did not match those of a prior case, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (1985) 472 U.S. 585 *(Aspen Skiing).* In *Aspen Skiing*, the court found an antitrust violation because, among other elements, the defendant had previously participated in the multi-resort pass. *Id.,* p. 604.

Subdivisions (b) and (d) address *Aspen Skiing*. In addition to its previous participation, the defendant refused to provide lift tickets to the plaintiff when the tickets were commercially available to others. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (1985) 472 U.S. 585, 607–608. Subdivision (b) draws from *Aspen Skiing, Id.,* pp. 608-611 ("The defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons"), and that the defendant's refusal to continue to participate in the multi-resort pass was not based on a reasonable business justification references subdivision (d) ("The defendant's conduct makes no economic sense apart from its tendency to harm competition"). *Trinko* and its progeny have, in many instances, elevated the distinguishing facts of *Aspen Skiing* to mandatory proof requirements, restricting the universe of actionable refusal-to-deal claims.

Subdivision (d) allows, but does not require, a plaintiff to prove lack of economic justification for a defendant's conduct because there may be multiple motivations for the conduct. Further, conduct can be purposely anticompetitive without an immediate economic impact on the defendant, and requiring a court to distinguish between "legitimate" profits from "profits made by eliminating competition," is a potentially difficult and costly task.

Subdivisions (c) and (g) address the ruling in *Brooke Group v. Brown & Williamson Tobacco* (1993) 509 U.S. 209. Subdivision (c) addresses the holding in that case that the plaintiff must show that the defendant's prices were below cost in order to prove predatory pricing ("The defendant's price for a product or service was below any measure of the costs to the defendant for providing the product or service required under federal antitrust law"). *Id.* p. 223. Subdivision (g) also addresses the requirement from the case that the plaintiff prove "In a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue." *Id*., p. 224. These federal judicial restrictions on predatory pricing claims reflect outmoded precepts that pricing predation was irrational and competition would enter the market during the recoupment period. See Congressional Research Service, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, p. 8. Moreover, these requirements make little sense when many digital products are offered for free or with very low marginal costs, as the requirements immunize virtually all prices from predation claims. Further, these requirements fail to recognize that prices set above defendant's costs can be anticompetitive, too. *ZF Meritor, LLC v. Eaton Corp* (3rd Cir. 2012) 696 F.3d 254, 274-275. The directive that California courts need not follow these federal precedents aligns with existing state law, which expressly rejects federal standards of assessing costs and rejects any need to show recoupment. (Bus. & Prof. Code § 17403; *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 445).

Subdivision (e) recognizes that antitrust harm or the risk of harm can be proven by quantitative or qualitative evidence. California law, like much of federal law, acknowledges that damages can be shown with a reasonable probability of a causal connection between the challenged conduct and loss, and that damages can be proven with probable and inferential proof. *Suburban Mobile Homes, Inc. v. Amfac Communities, Inc*. (1980) 101 CalApp.3d 532.

Subdivision (f) addresses the ruling in *Ohio v. American Express Ohio v. American Express* (2018) 585 U.S. 529. This ruling created a confusing precedent as to the type and amount of evidence needed to show harm in cases involving two sided platforms assumed interconnectedness between the two sides, which may not translate in other circumstances, and could allow firms to escape antitrust liability for causing harm on one side of a platform and masking it with benefits on the other side.

Subdivision (h) addresses *Ortho Diagnostic Sys., Inc. v. Abbott Labs, Inc.* (SDNY 1996) 920 F. Supp. 455, which involved rival drug testing firms. In its ruling, the court determined that the plaintiff must allege and prove that it was at least as efficient a producer of the competitive product as the defendant, but that the defendant's pricing made it unprofitable for the plaintiff to continue to produce. This was the court's attempt to ensure its analysis was truly about competitive practices and that the pricing was not due to poor systems control. However, requiring the plaintiff to be as efficient as the defendant as a precondition to liability in an exclusionary conduct claim has been criticized on multiple grounds, including that it favors dominant firms and requires burdensome and complex litigation about the parties' relative efficiencies. Most importantly, such a requirement denies antitrust protection for harm to plaintiffs without the scale or efficiency of the defendant. See Congressional Research Service, *Antitrust Reform and Big Tech Firms*, Nov. 21, 2023, p. 7.

Subdivision (i) highlights the differences between state and federal law regarding market share and market power. While there is no federal consensus as to market shares that create antitrust concerns, the Federal Trade Commission notes, "Courts look at the firm's market share, but typically do not find monopoly power if the firm (or a group of firms acting in concert) has less than 50 percent of the sales of a particular product or service within a certain geographic area." (Federal Trade Commission, *Guide to Antitrust Laws, Single Firm Conduct, Monopolization Defined*.) In contrast, in *Fisherman's Wharf Bay Cruise v. Superior Ct*. (2003) 114 Cal.App.4th 309, 326, a California case addressing, among other things, exclusive dealing under the Cartwright Act, the court held that a 20% market share foreclosure was enough to pursue an action against monopolist practices.

Subdivision (j) restates existing case law that proof of actual detrimental effects can obviate the need for inquiries into market definition and market power. *FTC v. Ind. Federation of Dentists* (1986) 476 U.S. 447, 460-61; *Diaz Aviation Corp. v. Airport Aviation Services, Inc.* (1st Cir. 2013) 716 F.3d 256, 265; *In re Loestrin 24 Fe Antitrust Litigation* (2019) 433 F.Supp.3d 274, 299; *In re Nexium III* (D.Mass. 2013) 968 F.Supp.2d 367, 388 n.19.)

January 5, 2026

The Honorable Richard Simpson, Chair
California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, California 95814
sreilly@clrc.ca.gov

Re: U.S. Chamber of Commerce Comment Regarding Single Firm Conduct

Dear Chair Simpson and Members of the Commission,

On behalf of the U.S. Chamber of Commerce and our members, including many who are based in California, have employees based in California, or otherwise conduct business in California, we appreciate the opportunity to provide comments on the CLRC Staff's Draft Tentative Recommendation regarding single firm conduct. While we appreciate the CLRC's transparency and support robust antitrust enforcement as a means to protect competition, we write to flag several concerns: (1) despite years of hearings, the CLRC has failed to identify any potentially anticompetitive conduct that cannot be challenged under state and/or federal law; (2) by untethering California's antitrust law from federal law, the state would damage California's business climate and harm its workers and consumers by becoming a national outlier; and (3) by endorsing the most recent version of the federal merger guidelines, California would ossify its laws and forego the benefits of new antitrust learning.

First, the evidence belies any need for California to revise its antitrust laws in significant ways. A state should revise its antitrust laws only if the evidence shows that the marketplace is producing poor results for consumers and that existing laws and enforcement tools cannot resolve those problems. None of these conditions exist in California. For example, the evidence shows that the U.S. economy is flush with competition and that there is no so-called "overconcentration" problem, either in the U.S. or in California.

In any event, to the extent that any competitive problems may exist, California's Attorney General and private citizens have multiple avenues to seek appropriate redress, both through California's existing state laws and through their ability to bring suit under federal law. On this critical point, the Staff makes several demonstrably false and misleading statements.

The Staff asserts that there is “widespread recognition of the increasing inadequacy of state and federal antitrust laws to assure free and fair competition.” This is flatly wrong. Neither Congress nor any other state in the Union have amended their antitrust laws in significant ways. In recent years, Congress and several other states have extensively considered their antitrust laws, yet belying the Staff’s assertion, none of them enacted meaningful substantive changes.

Similarly, the Staff asserts that “current federal case law was not designed to address companies who offer their products for free.” Again, this statement is demonstrably misleading. In the first place, zero-price products have existed for more than a century, such as broadcast radio, which adds no additional cost in reaching each additional consumer. Even newspapers and magazines’ costs for printing each additional copy are low, especially compared to the cost of producing the content. More importantly, federal antitrust law, and the existing laws of California and all other states, protect both price and nonprice competition, including competition based on quality, variety, and other nonprice factors. Indeed, California’s economy has thrived under the existing antitrust laws, spurring growth and innovation all while protecting businesses and consumers from anticompetitive conduct.

Second, by untethering California’s antitrust law from federal law, the state would damage California’s business climate and harm its consumers by becoming a national outlier. For decades, the federal government, all 50 states, and U.S. courts have adopted the fact-based and economically grounded consumer welfare standard as the touchstone of antitrust law. This standard has proven an effective tool in applying the antitrust laws. It rejects the standards applied prior to the mid-1970s that were based on vague, subjective political and policy goals that second guessed the market and ignored consumer benefits.

No state has broken from the principles enshrined in federal law. Although some states have debated aggressive proposals, such as “abuse of dominance,” no state legislature has broken from the nation’s bipartisan consensus that antitrust law protects consumers, rather than particular competitors. By untethering California’s law from federal law, and the law of every other state, the Recommendation would turn California into a national outlier.

Moreover, the adoption of any novel antitrust proposal could seriously damage California’s business climate. A state’s legal and regulatory climate influences a company’s investment and location decisions. If California adopts a novel bill that exposes companies to undefined but potentially costly antitrust risks, the state could scare away businesses that might want to invest in California’s startups and new businesses, to the detriment of California’s workers and consumers.

Indeed, the Recommendation typifies a broad flaw that is especially problematic for California: insufficient concern for how overly aggressive antitrust enforcement today can deter innovation and entrepreneurship in the future. For instance, forcing one company to deal with competitors or other market actors, even in the absence of harm to competition from a refusal to deal, disincentivizes other companies from entering lines of business that would impose such duties. This creates a real, actual harm to competition and entrepreneurship for the sake of avoiding an uncertain or hypothetical harm.

Third, by endorsing the most recent version of the federal merger guidelines, California would ossify its laws and forego the benefits of new antitrust learning. The Recommendation's reasoning is internally inconsistent. On one hand, the Recommendation asserts that "the antitrust laws have not kept up with modern developments," yet on the other hand, the Recommendation proposes to enshrine the current version of the Merger Guidelines as adopted by the Federal Trade Commission and U.S. Department of Justice in 2023. By setting this document in stone, California would deny its enforcers and consumers the benefits of new economic learning and case law that may result in amendments to the Merger Guidelines down the road. The antitrust agencies periodically update those Guidelines, and California, like every other state, should "keep up with modern developments."

Moreover, on the merits, the current Merger Guidelines may themselves already be out of date. As the Chamber has explained, the current Guidelines seek to rewrite decades of antitrust policy by declaring structural presumptions against mergers that increase market concentration and by downplaying the possibility of merger efficiencies. They rely on outdated cases and economic ideas while ignoring recent court decisions that reject the agencies' theories. They also give the agencies tremendous discretion to pick winners and losers, dictate market structures, and play to favored constituencies. To date, it appears that no court has cited the guidelines for any of its more aggressive principles. If this pattern continues, California will have enshrined a set of guidelines that have been largely ignored by the courts, a result that would benefit no one.

For these reasons, the U.S. Chamber urges the CLRC to reject the Recommendation Regarding Single Firm Conduct. Instead, we urge California to maintain its current legal framework, to enforce existing laws vigorously, and to maintain the forty-year national and interstate bipartisan antitrust consensus, one that has produced unprecedented growth and innovation for California and its consumers.

Sincerely,

Sean Heather
Senior Vice President
International Regulatory Affairs & Antitrust
U.S. Chamber of Commerce

Y COMBINATOR
335 Pioneer Way, Mountain View, CA 94041

January 5, 2026

California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

Re: Comments on Tentative Recommendation #B-750 – Antitrust Law: Single Firm Conduct

Dear Commissioners:

Y Combinator ("YC") submits these comments in strong support of Tentative Recommendation #B-750, *Antitrust Law: Single Firm Conduct*. YC is a startup accelerator based in California that has, over the past two decades, helped launch more than 5,000 technology startups.[1] Our President and CEO Garry Tan recently testified in the U.S. Senate on behalf of "little tech"—the startups and entrepreneurs whose innovations are consistently undermined by the dominance of large incumbents.[2] YC's Head of Public Policy, Luther Lowe, writes to commend the Commission's proposal to outlaw single-firm anticompetitive conduct and to offer the unique perspective of the startup community.

We believe this reform is crucial to ensure open, competitive markets in California. YC's institutional mission is to spawn innovation and new businesses, a goal that depends on robust antitrust enforcement to prevent dominant firms from foreclosing opportunities for nascent competitors. In our experience, current law too often fails to prevent exclusionary abuses by entrenched companies, allowing startups to serve as "canaries in the coal mine"—the first to be harmed by anticompetitive conduct that ultimately harms consumers and the economy. We applaud the Commission's Tentative Recommendation and urge its adoption into law.[3]

Y Combinator's Perspective on Startup Competition

YC's role in California's innovation economy. Founded in 2005, Y Combinator pioneered the modern startup accelerator model and has since funded thousands of companies now collectively valued in the hundreds of billions of dollars. Many of our alumni—such as Airbnb, Stripe, Reddit, and Instacart—have become industry leaders. This track record gives YC a broad view of the startup ecosystem and the competitive challenges new companies face.

We see firsthand how startups are often the first to detect and suffer from incipient anticompetitive conduct. When an entrenched firm engages in exclusionary or predatory tactics, it is young companies on the frontier of innovation that feel the effects before such behavior makes headlines or attracts government scrutiny. As Mr. Tan told Congress, "unchecked concentration of power in big tech has severely limited innovation," creating a landscape where incumbents "pull up the ladder" behind them and startups struggle to reach consumers.[4] In short, what's good for startups is good for competition, and vice versa. California's startup community is thus an early warning system for antitrust problems—and it is sounding the alarm that stronger single-firm conduct rules are urgently needed.

"Canaries in the coal mine": examples of startup harm. YC companies have encountered a range of exclusionary practices by dominant platforms. These experiences illustrate why reform is needed and why a focus on competition beyond just price effects is critical.

- **Self-Preferencing:** Even when an incumbent lacks a 50% market share, its gatekeeper position can enable severe discrimination against rivals. For instance, internal communications revealed that Apple manually boosted its own "Files" app above Dropbox in App Store search results, causing Dropbox's app not even to appear on the first page when users searched "Dropbox."[5] Apple claims this was a mistake, but only corrected it after a partner's CEO complained. This kind of platform self-preferencing—a dominant firm favoring its own downstream service—can sabotage even well-established startups.

- **API and Access Discrimination:** YC portfolio companies have been thwarted by dominant firms denying them access to essential inputs. In one case, a YC startup developing cutting-edge fraud detection technology (capable of identifying deepfake phone scams) was refused critical API access by a dominant platform, forcing the startup to abandon its original product.[6] Without the ability to interoperate with the incumbent's system, the startup could not bring its innovation to market. As Mr. Tan recounted, "even the brightest entrepreneurs cannot secure funding, and innovative solutions never reach the public" when key interfaces are closed off. Such refusals to deal prevent new services from ever reaching consumers—a loss of innovation and choice that traditional price-centric analyses would miss entirely.

- **Gatekeeping and Lack of Interoperability:** Dominant platforms often leverage control over ecosystems to exclude nascent competitors. YC startup Beeper offers a vivid example. Beeper created an interoperable messaging client aiming to let users unify conversations across iMessage, WhatsApp, and other services. This promised to "break down the green vs. blue bubble divide" in messaging and give consumers more choice.[7] But Apple's closed iMessage system effectively shut Beeper out: by refusing to allow interoperability or access to iMessage for third-party apps, Apple foreclosed a startup's innovative product. The harm here is two-fold—consumers lost a novel solution that could have improved their messaging experience, and the startup's business was stifled by the platform's gatekeeping.

  This occurred despite Apple's iOS not being a literal monopoly in global smartphone share. It demonstrates that exclusionary conduct by a firm with substantial market power—even if not an absolute monopoly—can seriously undermine competition. California's courts have long recognized this principle. In *Fisherman's Wharf Bay Cruise v. Superior Court*, a 20% market foreclosure was held sufficient to state an exclusive-dealing claim under the Cartwright Act.[8] In practice, YC companies have faced exclusion long before an incumbent grows to 50% share, which is why bright-line market share tests should not be the sole trigger for antitrust concern.

• **"Kill Zones" and Foreclosed Investment:** Beyond individual incidents, we observe broader "kill zones" around certain dominant firms. These are areas in which startups and their investors avoid competing, for fear that the entrenched firm will instantly copy, crush, or cut off any upstart in its domain. For example, Google's dominance in search and search advertising has deterred venture investment in search-related startups for over a decade.[9] In an amicus brief in *U.S. v. Google*, YC explained that Google's power created a "kill zone" that "stunted the U.S. startup ecosystem"—venture firms (including YC itself) hesitated to fund new search or AI companies because Google could quickly quash them. The result, as YC wrote, is an innovation landscape "artificially stunted and stagnant" in areas around the monopolist.

This chilling effect on entrepreneurial activity is real and substantial, yet would not register in a traditional price/output analysis. It underscores why California's reform wisely emphasizes protecting competition itself, not just immediate price levels. When dominant incumbents can surround themselves with "no-fly zones" that scare off new entrants, the long-term damage to innovation is profound.

In summary, YC's community has experienced the harms of single-firm dominance across many forms—self-preferential treatment, denial of interoperability or access, exclusionary design choices, and the deterrence of investment in disfavored areas. These harms often do not depend on the dominant firm having a formal monopoly share, but rather on its strategic position and leverage. The Commission's Tentative Recommendation addresses these realities by moving away from rigid market share presumptions and toward a holistic protection of the competitive process. We strongly support this approach on behalf of California's startups.

Support for Proposed § 16729: Single-Firm Conduct Operative Provision

Banning monopolization and monopsonization outright. YC enthusiastically supports the creation of a new Section 16729 in the Business and Professions Code, which will "outlaw anticompetitive conduct by single companies."[3] In particular, proposed § 16729(a) clearly provides that it is unlawful for a single firm to either restrain trade or to monopolize/monopsonize (or attempt to do so).[10] This operative language smartly captures both types of single-actor offenses: (1) unilateral conduct that constitutes a "restraint of trade" (for example, exclusive dealing, tying, or other exclusionary acts that previously might only be reachable via the Cartwright Act when done by multiple actors), and (2) monopolization/monopsonization, including attempts.

By explicitly prohibiting single-firm restraints of trade, the law closes a major gap. Under current California law, many anticompetitive tactics by a solo firm (short of outright monopolization) fall through the cracks—the Cartwright Act primarily addresses concerted conduct, and federal Sherman Act § 2 is not directly part of state law. New § 16729 would ensure that any exclusionary or predatory conduct by a single firm with the requisite intent or effect on competition is actionable, without having to artificially plead a conspiracy. This brings California in line with the majority of states that already outlaw monopolistic practices by single actors. It also builds on the legacy of *United States v. Microsoft Corp.*, where California played a leading role in enforcing federal § 2 against a tech giant—now California will have its own statute to directly tackle such issues.

Including monopsony—protecting competition for workers and suppliers. We particularly commend the inclusion of "monopsonize" alongside monopolize in § 16729(a)(2). This makes clear that dominant buyer power is equally within the law's scope. As the Commission notes, the inclusion of monopsony is intended "to help address the historical underenforcement of buyer-side monopolies that impact labor, among others."[11] In today's economy, monopsony power can be as harmful as monopoly power. Tech industry employees, contractors, content creators, and app developers all depend on fair competition in labor or input markets.

When a single firm dominates hiring in a specialized field, it can depress wages or mobility (for instance, through non-compete agreements or "no poach" collusion—practices California has rightly moved to abolish).[12] Likewise, if a platform is the only buyer of a certain digital good or service, it can impose coercive terms on small suppliers. By expressly prohibiting acts to monopsonize, California will give enforcers and courts a mandate to pursue abuses in labor markets and other buyer-side contexts.

No "cross-market" justifications for anticompetitive conduct. YC also strongly supports the proposed rule in § 16729(c) barring defendants from escaping liability by pointing to pro-competitive benefits in a separate market. The Tentative Recommendation wisely adds language to "emphasize to the judiciary that anticompetitive effects may only be offset by benefits in the same market and to the same persons originally affected by the conduct."[13] In other words, a monopolist cannot defend harming competition in one market by arguing it helps consumers in some other market. This principle is crucial to prevent "cross-market efficiencies" from undermining enforcement.

Such a defense has no legitimate place in single-firm conduct cases—as the U.S. Supreme Court observed long ago in *Philadelphia National Bank*, antitrust law does not permit destroying competition in one market for supposed gains in another.[14] Unfortunately, recent cases have muddled this issue. In the *Epic Games v. Apple* litigation, the Ninth Circuit noted that Supreme Court precedent on cross-market balancing is "unclear," even as it struggled with Apple's argument that restrictions harming app developers were justified by an allegedly better app ecosystem for iPhone users.[15] California's proposal would foreclose such arguments.

Support for § 16730: Legislative Purpose Statement

The Tentative Recommendation's proposed Section 16730 sets forth guiding principles and legislative intent. YC strongly supports this purpose statement, which reaffirms that California's antitrust policy is broader and more pro-competitive than federal law in key respects. This section will send an important signal to courts and businesses about the goals of the new statute, anchoring it in California's distinct antitrust tradition and aligning it with modern enforcement thinking.

California's antitrust laws are "broader in range and deeper in reach" than federal law. The purpose statement rightly emphasizes that California antitrust law has never been a mere carbon copy of federal law. In *Cianci v. Superior Court*, the California Supreme Court noted that the Cartwright Act is "broader in range and deeper in reach" than the Sherman Act.[16] Proposed § 16730 explicitly recognizes this fundamental principle. It reminds courts that while federal precedents may be consulted for their persuasive value, California law is an independent body of law reflecting our state's own values and legislative choices.

As the draft purpose language notes, federal antitrust decisions are "at most instructive, not conclusive" in interpreting the Cartwright Act (quoting *Aryeh v. Canon Business Solutions*), and the Cartwright Act was not modeled on the Sherman Act.[17] This is not an abstract point—it has practical consequences. For example, California allows indirect purchaser recovery (since 1978), whereas federal law (under *Illinois Brick*) does not; California focuses on maximizing deterrence (embracing robust remedies like treble damages), whereas federal law has sometimes tilted toward minimizing over-enforcement. The *Clayworth v. Pfizer* decision epitomized California's outlook: even if multiple damages mean some plaintiffs are overcompensated, "they do so in order to maximize deterrence" of antitrust violations.[18]

Alignment with modern antitrust understanding. The purpose statement also smartly aligns California's law with the evolving consensus in antitrust enforcement that competition is a multifaceted concept. Specifically, § 16730 cites the 2023 DOJ/FTC Merger Guidelines for certain themes.[19] As the Commission notes, the 2023 Guidelines "rely more on the theme of 'lessening competition' than on [prior] language … which emphasized market power and its exercise." In other words, the new federal guidelines shift focus away from purely structural metrics and price/output effects and toward the core question: does a transaction (or conduct) lessen competition? This includes looking at innovation, quality, choice, resiliency, and other indicia of competitive health.

By echoing this theme, California's purpose statement embraces a broad view of competitive harm. It confirms that the goal of our law is "the promotion and protection of free and fair competition." This wording is important. It does not limit "competition" to low consumer prices or short-term efficiency; it encompasses the full range of benefits a competitive market yields, including innovation, variety, and opportunity for new entrants. Indeed, the legislative mandate to the Commission (ACR 95 of 2022) explicitly asked whether antitrust law should account for "competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether monopolies act to raise prices."[20] The Tentative Recommendation answers with a resounding yes.

Support for § 16731: Guidance to Courts (Rejecting Harmful Precedents)

Perhaps most crucially, YC supports the proposed Section 16731, which provides interpretive guidance to courts applying the new law. This section explicitly instructs that certain restrictive federal precedents "do not have to be read as establishing mandatory requirements" under California law.[21] In effect, § 16731 serves as a "legislative override" of several judge-made rules that have severely curtailed effective Section 2 enforcement at the federal level. We believe this guidance is essential.

• **Verizon v. Trinko** (2004)—Refusals to Deal: *Trinko* is widely viewed as the high-water mark of judicial hostility to refusal-to-deal claims. The Supreme Court in *Trinko* not only refused to impose liability on a monopolist telecom for denying interconnection to a rival, but went out of its way to express skepticism about Section 2 duty-to-deal claims generally. Lower courts since *Trinko* have treated it as practically immunizing unilateral refusals to deal, unless a plaintiff can meet the very specific fact pattern of the earlier *Aspen Skiing* case.[22]

Proposed § 16731(f) rightly instructs that California will not follow *Trinko* down this path. Instead, it emphasizes that *Aspen Skiing*'s facts are examples, not prerequisites, of an unlawful refusal to deal. The statutory guidance notes that "refusals to deal in today's economy can be anticompetitive for reasons beyond *Aspen Skiing*'s fact pattern," and that while *Aspen* and *Trinko* provide some guidance, courts should not treat them as a checklist of mandatory elements. This is a huge win for startups: it means gatekeeper platforms can be held accountable if they wield their control to exclude new entrants.

• **Brooke Group** (1993)—Predatory Pricing and Recoupment: In *Brooke Group v. Brown & Williamson*, the Supreme Court set an onerous two-prong test for predatory pricing: a plaintiff must prove (1) the monopolist's prices were below an appropriate measure of cost, and (2) the monopolist had a dangerous probability of recouping its losses later by charging above-competitive prices.[23] These tests have made predatory pricing claims exceedingly difficult to win—virtually no predatory pricing case has succeeded in federal court in the decades since *Brooke Group*.

Even more troubling, these requirements are ill-suited to digital markets. As the Commission observes, rules devised 30 years ago, in an era when the digital economy was nascent, "make little sense when many digital products are offered for free or with very low marginal costs."[24] California's new law deliberately rejects the most restrictive aspects of *Brooke*

Group. Proposed § 16731(c) and (g) remove any absolute requirement that plaintiffs prove below-cost pricing and likelihood of recoupment in every case. In fact, the guidance explicitly states that California "rejects any need to show recoupment."[25]

• **Ohio v. American Express** (2018)—Two-Sided Market Rule: In the *AmEx* case, the Supreme Court imposed a stringent rule for markets deemed "two-sided transaction platforms." It held that in such markets, a court must consider both sides of the platform together when defining the market and assessing competitive effects. This decision has been widely criticized for potentially allowing a dominant intermediary to justify anticompetitive restrictions by pointing to happy users on another side of the platform.[26]

California's § 16731 directly addresses this. Subdivision (f) of § 16731 essentially rejects the *AmEx* rule by clarifying that courts need not engage in such cross-side balancing in our law. The implication is that California courts can find a restraint unreasonable based on harm to a distinct group (e.g., developers), without requiring proof of net harm across all user groups of a platform. We support this position.

• **Direct Evidence and Market Definition:** We also endorse § 16731's guidance that courts should not let cases "get derailed by questions of relevant market when harm is already evident."[27] The proposal codifies that "proof of actual detrimental effects can obviate the need for [market definition] inquiry." This aligns with well-accepted antitrust principle (from *FTC v. Indiana Federation of Dentists* and others) that direct evidence of harm to competition is often the best evidence, and a rigid market delineation is secondary.

YC's Additional Perspective: Defining Dominant Gatekeepers vs. Others

While we fully support the Tentative Recommendation's content, YC would like to offer one additional consideration for future refinement of California's competition law: establishing clear thresholds to distinguish truly dominant platforms from smaller firms. We refer to this as a "thresholding" concern—ensuring that the new law's enforcement is appropriately focused on the biggest gatekeepers, without unintentionally burdening modestly sized companies that lack substantial market power.

Rationale for bright-line thresholds. The proposed law wisely targets single firms with substantial market power engaging in anticompetitive conduct. In practice, the kinds of exclusionary abuses we are concerned with (self-preferencing, exclusionary API policies, predatory pricing, etc.) are primarily a problem when done by dominant, gatekeeping firms—those with the ability to control key platforms or choke points in the market. By contrast, similar conduct by a much smaller firm (even if objectionable in principle) is less likely to cause durable harm to competition.

Proposed criteria. YC suggests that global scale and financial heft are useful metrics. For example, a platform serving 700 million or more users worldwide (roughly 1/10 of the global population) clearly has an unparalleled reach and likely a gatekeeper role in its domain. Likewise, a firm with a market capitalization exceeding $1 trillion is by definition one of the most valuable and powerful companies on Earth. We mention these numbers not as hard rules to adopt immediately, but to spark consideration that quantitative thresholds could play a role in future enforcement.

This concept is not novel. The European Union's Digital Markets Act (DMA) explicitly designates "gatekeepers" using criteria like number of users and revenue.[28] Once designated, those gatekeepers must comply with pro-competition obligations (such as ensuring interoperability and refraining from self-preferencing). The intent is to promote innovation by enabling smaller firms to compete on and against the platforms of the giants. As YC noted in a letter to U.S. policymakers, Europe's DMA "promotes innovation by American companies" by curbing gatekeeper abuses, and the U.S. should consider similar measures.[29]

Additional Suggestions for Future Reforms

The Tentative Recommendation admirably addresses core aspects of single-firm conduct. Looking ahead, YC agrees with the Commission's note that there may be other specific anticompetitive tactics worth explicit attention. We briefly highlight a few:

- **Tying and Bundling:** Dominant tech firms often leverage one monopoly to bolster another nascent product, by tying them together. The House Antitrust Report documented how the major platforms integrate across business lines and use tactics like tying products to lock in users and insulate themselves from competition.[30] California might consider specific provisions against "self-preferencing" in platform rules. Making it explicitly unlawful for a dominant firm to materially favor its own products or services over competitors that rely on its platform could save litigation time and protect startups from being unfairly relegated.

- **Most-Favored-Nation (MFN) Clauses and Exclusive Dealing:** MFNs (a contractual guarantee that a supplier will not give a better price or terms to anyone else) and related exclusivity provisions can be anticompetitive when imposed by a firm with market power. The House Report flagged the issue of platforms abusing superior bargaining power to impose onerous contract terms.[31] YC suggests California could explicitly scrutinize MFNs and de facto exclusivity requirements used by dominant firms.

- **Interoperability and Data Portability:** One of the most pro-competition steps regulators can take in digital markets is to require dominant platforms to be more open—allowing competitors to interconnect and users to switch with less friction. The House report recommended facilitating data interoperability and portability to lower entry barriers.[32]

California could explore ways to enshrine interoperability or data-portability obligations for dominant platforms.

Responses to Opposition Arguments

In supporting this Tentative Recommendation, YC has also heard the various concerns raised by opponents of antitrust reform. We address a few of the main arguments and explain why, in our view, California's proposal is pro-innovation, provides clarity, and complements federal law—rather than the reverse.

"Will stronger antitrust enforcement chill innovation?" Some incumbent tech companies argue that aggressive antitrust laws punish success and deter companies from investing in new products. We find this argument deeply misguided. It is monopoly power that chills innovation—not antitrust enforcement. Time and again, we have seen dominant firms slacken their innovative efforts once competition is under control, and conversely, breakthroughs emerge when markets are open and contested.

Mr. Tan observed in his testimony that Siri, despite serving over a billion users, stagnated in quality because Apple's closed ecosystem prevented integration of cutting-edge AI—"Consumers get transformative technology years later than they otherwise could because entrenched monopolies consistently pull up the ladder behind them."[33] This is a perfect example where more competition (through interoperability or third-party integration) would have led to a better outcome, but monopoly control led to complacency.

Meanwhile, startups at the edge of innovation struggle to gain traction. The status quo of unchecked dominance is far more threatening to innovation: as noted, entire "kill zones" form where investors won't fund new entrants. YC told the court in the Google case that "Google has chilled" firms like YC from funding certain startups—causing a decade of stagnation in search and AI around Google's moat.[9] We therefore reject the notion that holding dominant firms accountable will stifle innovation. On the contrary, our experience at YC is that entrepreneurs flourish when markets are fair and open.

"Does this law create uncertainty for businesses?" The intent of B-750 is to provide clearer statutory guidance in place of the murky case law that exists now. Far from creating uncertainty, the law should reduce it by spelling out what conduct is prohibited and what legal standards apply. Under today's regime, much single-firm conduct sits in a gray area—businesses only know that under federal law the bar for liability is extremely high, effectively giving a blank check for borderline practices. That may be certainty for monopolists, but it's cold comfort for everyone else, including startups who face those practices. The new law lays down concrete rules.

"Will California's law conflict with or duplicate federal efforts?" We view California's initiative as complementary to federal antitrust enforcement, not conflicting. There is no preemption issue—states are allowed to have stricter antitrust provisions than federal law (the *California v. ARC America* case confirms states can provide remedies beyond federal limitations).[34] Historically, state antitrust laws like the Cartwright Act have often worked in tandem with federal law, filling gaps and providing additional deterrence.

Conclusion

Y Combinator applauds the California Law Revision Commission for its thorough study and bold Tentative Recommendation on single-firm conduct. We believe the proposed §§ 16729–16731 hit the mark in addressing gaps in current law and ensuring that California's pro-competition policy is clear and effective. For YC and the thousands of startups in our network, these reforms are not abstract—they will tangibly improve the business environment by keeping markets open and meritocratic. A startup should succeed because it builds a better product or service, not be doomed because an entrenched incumbent can unlawfully block its access or favor its own clone. By enacting Tentative Recommendation B-750, California will take a giant step toward that ideal of fair competition.

We reiterate our strong support for this Recommendation. We urge the Commission to finalize it and the Legislature to swiftly adopt it. California has the opportunity to lead the nation once again in updating antitrust law for the modern economy—an economy born and bred in large part in our state's startup garages and laboratories. YC is grateful for the chance to contribute our perspective in this process. We are available to provide any additional information, data, or testimony that would be helpful to the Commission or lawmakers as this recommendation advances.

Thank you for your thoughtful work on this issue and for considering our comments. We believe the implementation of these proposals will foster a healthier tech ecosystem where innovation can flourish. Please do not hesitate to reach out if we can be of further assistance.

Sincerely,

Luther Lowe
Head of Public Policy
Y Combinator, LLC

ENDNOTES

[1] Testimony of Garry Tan, President and CEO of Y Combinator, Before Senate Committee on Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, Hearing on "Big Fixes for Big Tech," April 1, 2025.

[2] Id.

[3] California Law Revision Commission, Tentative Recommendation: Antitrust Law: Single Firm Conduct (Dec. 2025), proposed § 16729.

[4] Tan Testimony, supra note 1.

[5] Sean Hollister, Apple admits it ranked its Files app ahead of competitor Dropbox, The Verge (June 11, 2021).

[6] Tan Testimony, supra note 1.

[7] Id.; see also Sarah Perez, Beeper says it's done trying to bring iMessage to Android after month-long 'cat and mouse' game with Apple, TechCrunch (Dec. 21, 2023).

[8] Fisherman's Wharf Bay Cruise Corp. v. Superior Court, 114 Cal. App. 4th 309, 336 (2003).

[9] Charles Rollet, Y Combinator says Google is a 'monopolist' that has 'stunted' the startup ecosystem, TechCrunch (May 13, 2025); Amicus Brief of Y Combinator, United States v. Google LLC, Case No. 1:20-cv-03010 (D.D.C. May 9, 2025).

[10] Tentative Recommendation, supra note 3, proposed § 16729(a).

[11] Id.

[12] See Cal. Bus. & Prof. Code § 16600; S.B. 699 (2023).

[13] Tentative Recommendation, supra note 3, proposed § 16729(c).

[14] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 370 (1963).

[15] Epic Games, Inc. v. Apple Inc., 67 F.4th 946 (9th Cir. 2023).

[16] Cianci v. Superior Court, 40 Cal. 3d 903, 920 (1985).

[17] Aryeh v. Canon Business Solutions, Inc., 55 Cal. 4th 1185, 1195 (2013).

[18] Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 784 (2010).

[19] U.S. Dep't of Justice & Federal Trade Commission, Merger Guidelines (2023).

[20] ACR 95 (2022).

[21] Tentative Recommendation, supra note 3, proposed § 16731.

[22] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[23] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[24] Tentative Recommendation, supra note 3, commentary on predatory pricing.

[25] Id.

[26] Ohio v. American Express Co., 138 S. Ct. 2274 (2018).

[27] Tentative Recommendation, supra note 3, commentary on market definition.

[28] Regulation (EU) 2022/1925 (Digital Markets Act).

[29] Questions for the Record, Garry Tan Responses, Senate Judiciary Committee Hearing on "Big Fixes for Big Tech," April 7, 2025.

[30] H.R. Rep. No. 116-XX, Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations (Oct. 2020).

[31] Id.

[32] Id.

[33] Tan Testimony, supra note 1.

[34] California v. ARC America Corp., 490 U.S. 93 (1989).

AMERICAN BAR ASSOCIATION
Antitrust Law Section

321 North Clark Street
Chicago, IL 60654-7598
antitrust@americanbar.org
www.ambar.org/antitrust

January 8, 2025

TO: sreilly@clrc.ca.gov

SUBJECT: Section Comment on the Draft Tentative Recommendation on Single Firm Conduct of the California Law Revision Commission

Dear Sir/Madam:

On behalf of the American Bar Association Antitrust Law Section, we appreciate the opportunity to submit these comments on the Tentative Recommendation on single firm conduct published by the California Law Revision Commission on December 12, 2025.

The views expressed herein are being presented on behalf of the Section of Antitrust Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

Renata Hesse
Chair, Antitrust Law Section

COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION ON THE DRAFT TENTATIVE RECOMMENDATION ON SINGLE FIRM CONDUCT OF THE CALIFORNIA LAW REVISION COMMISSION

January 6, 2026

The views expressed herein are being presented on behalf of the Section of Antitrust Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The American Bar Association Antitrust Law Section (the Section) welcomes the opportunity to submit these comments on the Tentative Recommendation on single firm conduct[1] published by the California Law Revision Commission (the Commission) on December 12, 2025. These Comments reflect the Section's experience and expertise with the application of antitrust laws in a wide range of jurisdictions and related international best practices. They are offered to assist the Commission as it considers potential legislation addressing single firm conduct.

The Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection, and data privacy as well as related aspects of economics. Section members, numbering over 11,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, and federal and state government agencies, as well as judges, professors, and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. For 30 years, the Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[2]

I. Introduction

The Commission proposes to amend the Cartwright Act[3] by adding Sections 16729–16731 to the Business and Professional Code, thereby creating new prohibitions against single-firm conduct. In support of the proposal, the Commission expressed concern about whether existing state and federal antitrust laws "assure free and fair competition,"[4] including whether Section 2 of the Sherman Act[5] (Section 2) and related case precedent sufficiently address conduct by companies

1 Cal. Law Revision Comm'n, Tentative Recommendation (Dec. 12, 2025), https://clrc.ca.gov/pub/Misc-Report/TR-B750.pdf [hereinafter Tentative Recommendation].

2 *See Antitrust Comments, Reports & Amicus Briefs*, AM. BAR ASS'N, ANTITRUST L. SECTION, http://ambar.org/atcomments.

3 Cal. Bus. & Prof. Code §§ 16700-16770.

4 Tentative Recommendation, *supra* note 1, at 5.

5 15 U.S.C. § 2.

that "offer their products for free."[6] The Commission declined to adopt "completely new antitrust language," recognizing that "a new, untested antitrust framework could be risky and invite uncertainty, potentially chilling innovation and business growth."[7] The Commission further acknowledged that antitrust provisions without federal precedent could pose a substantial challenge for California state courts, which would be required to develop "an entirely new body of antitrust jurisprudence."[8] Ultimately, the Tentative Recommendation endorses a "hybrid approach that selectively draws on federal statutory and case law to ground the new California standard."[9] The Section offers the following feedback to further the goals of promoting certainty, predictability, and reducing the likelihood of chilling conduct that may be neutral or pro-competitive.

Without taking a position on whether California should expand the scope of existing prohibitions on anticompetitive single-firm conduct, the Section recommends that the Commission incorporate in any recommendation limiting principles to assist businesses and courts in distinguishing between lawful and unlawful single firm conduct.

II. The Tentative Recommendation on Single Firm Conduct Would Benefit from Clear Limiting Principles

Proposed Section 16729(a) would make it unlawful for any person "to act, cause, take or direct measures, actions, or events" in "restraint of trade." The comment for proposed Section 16729(a) broadly describes "restraint of trade" in reference to the Cartwright Act and the Sherman Act as a "full range of anticompetitive conduct by a single person."[10] The legality of the restraint turns on whether it is "reasonable" as recognized by the California Supreme Court. Applying the reasonableness standard to all single firm conduct, without further direction, as to how to distinguish permissible competition from anticompetitive misconduct raises several concerns as explained below. As the U.S. Supreme Court recognized,

> It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization.[11]

6 Tentative Recommendation, *supra* note 1, at 6.
7 *Id.* at 8.
8 *Id.*
9 *Id.*
10 *Id.* at 23.
11 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767–68 (1984) (footnotes omitted).

Proposed Section 16731 lists 10 non-exclusive factors derived from federal antitrust cases that "may constitute evidence of a violation" but are not necessary to establish liability under the statute. The accompanying commentary rejects several conduct prerequisites—such as the "no economic sense" [12] test for refusals to deal and the below-cost/likelihood of recoupment requirement for predatory pricing claims[13]—that U.S. courts have used to limit Section 2 liability. Section 16731 helps clarify Section 16729 by identifying ways in which Section 16729 could challenge conduct not reached by Section 2 of the Sherman Act, but without providing further clarity on how to distinguish anticompetitive from procompetitive behavior beyond the application of a broad and general prohibition on conduct "in restraint of trade." Section 16729, as currently drafted, provides that a restraint of trade "shall include . . . any actions, measures, or acts included or cognizable under Section 16720" and Section 16720 includes actions to "limit or reduce the production, or increase the price of merchandise or of any commodity," or to "prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity." Absent more robust limiting principles, the current language could expose a firm to litigation for conduct that reduces production or increases price in response to changes in consumer demand or other market conditions, even where that conduct is not anticompetitive.

The absence of adequate limiting principles will present substantial challenges for enforcers and the judiciary, particularly generalist judges, particularly when applying the new statute to cases of first impression. It will also increase the risk of unintended or inconsistent legal outcomes. If the Commission has concluded that existing Section 2 limiting principles are overly restrictive, the Section respectfully suggests recalibrating the thresholds rather than abandoning them altogether.

III. Conclusion

Given California's critical role in global commerce and technological innovation, the Tentative Recommendation, if enacted, could be influential in establishing a new model for regulating single firm conduct by other U.S. states, as well as other jurisdictions outside of the United States, with significant implications for competition in the U.S. and global economies. Therefore, the Section urges the Commission to clarify the boundaries between competition on the merits and single firm misconduct and articulate more robust limiting principles for the benefit of businesses as well as the agencies and courts tasked with enforcement.

The Section would be pleased to respond to any further inquiries regarding these Comments.

12 Tentative Recommendation, *supra* note 1, at 18.

13 *Id.* at 19.

January 9, 2026

The Honorable Xochitl Carrion
Chair, California Law Revision Commission
295 L Street, Suite 275
Sacramento, CA 95814

Re: Antitrust Law – Staff Draft Tentative Recommendation Recommendation on Single Firm Conduct (Memorandum 2025-52)

Dear Chair Carrion and Members of the Commission:

On behalf of the Chamber of Progress, a center-left tech industry association supporting inclusive innovation, I respectfully urge the Commission to reconsider its tentative recommendation on single-firm conduct and remove Section 16729 subdivision (c)'s late-prohibition on considering cross-market effects.

Section 16729 subdivision (c) will worsen the risk of narrow, artificial market definition and economically unrealistic outcomes

The concept, absent from prior CLRC drafts, emerged post-September 2025 meeting. It was a response to public criticism of the remedy decision in the DOJ's search monopoly case against Google, specifically faulting the court for considering the negative impacts of remedies in related markets (like browsers and search results syndication) when evaluating remedies for "general search engines."

Departing from the Commission's norm, subdivision (c) is not a careful, long-studied reform. It is a last-minute reaction to a high-profile case, and adds to the expanding list of federal precedent, old and now very new ones, that this recommendation encourages California courts to discount.

Subdivision (c) misunderstands how modern markets operate, especially digital ones that are prone to "made for litigation" market definitions. In the Google search case, the relevant market was "general search engines," but some of the most aggressive proposed remedies would have decimated competition in browser markets and in syndicated search results markets, harming consumers and rivals alike. The **court appropriately refused to adopt those remedies in part because the collateral damage could not be reasonably considered an outcome that was good for competition.**

CHAMBER OF PROGRESS

Similar dynamics exist across industries. A case about “e-commerce platforms” will likely implicate logistics providers, payment processors, and shipping networks that depend on integrated services. A case about app distribution will raise real questions about device competition and mobile security. Digital and nascent markets are deeply interconnected by design and in practice.

In all of those scenarios, courts need the freedom to look at **reality**: if a proposed antitrust remedy or outcome will cause serious consumer harm or wipe out competition in inextricably related and complementary markets, judges should be permitted to take that into account. However, subdivision ©, as written, would bar them from doing so.

The judicial guidance provisions are structurally one-sided

Section 16731 provides that California law “does not require a finding” of numerous elements that often serve as guardrails in single-firm cases, including: no requirement of quantitative proof of harm or risk of harm; no requirement to show recoupment in predatory pricing cases; no requirement to show below-cost pricing under federal measures; no requirement that harmed rivals are as efficient; and no requirement to define a relevant market even where there is direct evidence of market effects or power.

These concepts exist because unilateral-conduct antitrust is unusually vulnerable to cases that punish procompetitive behavior such as discounting, product improvement, vertical integration, or hard bargaining. Codifying that these screens are not required will predictably increase made-for-litigation theories and suits brought by less efficient competitors seeking to leverage litigation costs into business concessions.

For these reasons, we respectfully urge the Commission to reconsider the tentative recommendation. At a minimum, the Commission should avoid codifying one-sided “nonrequirements” as statutory text and should adopt clearer, disciplined limiting principles that preserve the ability to separate exclusionary conduct from vigorous competition on the merits. As drafted, the Recommendation would expand liability while increasing uncertainty, likely chilling investment, integration, and innovation in dynamic markets central to California’s economy. We appreciate the Commission’s work and the opportunity to comment on this important process.

Sincerely,

Vidushi Dyall,
Director of Legal Analysis

January 12, 2026

Richard Simpson, Chairperson
and Honorable Commissioners
California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, California 95814

Re: Antitrust Law – Study B-750 – Comment on Behalf of the California Chamber of Commerce

Dear Chairperson Simpson and Commissioners:

Over the last two years, the California Chamber of Commerce – on behalf of its 14,000 members – has repeatedly expressed concerns with the Commission's proposals for a new California single-firm conduct law. Nevertheless, the Commission is now poised to formally adopt Staff's December 2025 Tentative Recommendation ("Recommendation") endorsing a single-firm conduct provision for submission to the Legislature. In addition to the structural problems with the process leading up to the Recommendation, the Recommendation is not narrowly tailored to rein in defined anticompetitive conduct, but instead is so novel, undefined and broad that it may chill and impinge competition at every level of the California economy.

As noted in virtually all our public comments and reiterated in our testimony, the Commission has not been presented with meaningful evidence that there is a need for California to create its own single-firm conduct law. Put another way, there is no study or analysis suggesting that California consumers and businesses are suffering from reduced competition, higher prices, inferior products and services or lessened innovation because California does not have its own single-firm conduct provision. Instead, the Commission has based its decision to move forward with the Recommendation solely on the personal views and opinions of a handful of lawyers, economists and academics, most of whom are frequently aligned with the plaintiffs' side of antitrust litigation. While these views and opinions should be considered by the Commission, they should not drive the Commission because they are not evidence that California's existing antitrust laws are failing. Antitrust policy making is most likely to benefit competition and consumers when it is based on a demonstrated need and sound economic analysis. This work simply has not been done.

Likewise, the Commission has not evaluated – or apparently even considered – the effects and costs of the Recommendation. Antitrust policy making has tradeoffs: Regulation can deter anticompetitive conduct, but it can also chill competition and innovation due to uncertainty or poorly-designed laws. Stifling pro-competitive conduct can harm consumers and the overall economy in the same manner as anticompetitive conduct, meaning there is no reasonable basis to ignore the chilling effects of new regulation. That is why it is imperative to utilize a cost-benefit analysis to determine whether the Recommendation is – on balance – likely to improve economic performance and efficiency at a cost that State and its citizens are willing to bear. This work also has not been done.

In terms of substance, the text of the Recommendation fails to give courts and businesses clear guidance on what is unlawful and what is not. The Recommendation outlaws monopolization, but it also prohibits single-firm "restraints of trade." As we have explained several times, short of monopolization, no court or statute has ever defined what a single-firm restraint of trade is, and the Recommendation makes no effort to do so. Restraints of trade have always been evaluated in terms of two or more firms agreeing to take certain actions, such as competitors agreeing on the prices they will charge, the markets they will supply or the customers they will serve. But the law explaining what kind of multi-firm restraints of trade are unlawful is of no assistance in assessing whether a single-firm restraint of trade is unlawful because single firms have always been permitted to make unilateral decisions on strategies like the prices they will charge, the markets they will supply and the customers they will serve. The shear novelty of the Recommendation's "restraint of trade" language will cause great uncertainty, will increase costs, will increase litigation and is likely to result in conflicting results in the courts.

Put another way, the Recommendation outlaws conduct that the Commission has not defined. For this reason, the Commission's own Single Firm Conduct Working Group opposes the Recommendation warning that it ***"gives the courts no useful guidance on how to distinguish restraints that promote competition from those that suppress or even destroy competition."***[1] There has been no explanation why the Commission has just ignored this advice from its own Single Firm Conduct Working Group and moved on with the Recommendation.

More concerning is the fact that the Recommendation may outlaw common business practices that are generally viewed by courts and economists as pro-competitive and good for consumers. For instance, under current California and federal law, competitors seek to undercut their rivals by slashing prices to consumers. They introduce innovative products aimed at driving outdated and inefficient competitors into ruin. They give discounts and other benefits to resellers seeking to invest in, and promote, their products to the exclusion of their competitors. They give rebates and rewards to loyal customers choosing to forego purchases from competing businesses. And they pick and choose the firms they will and will not do business with in order to best position their products. But these kinds of standard, unilateral business decisions may be cast as unlawful, single-firm "restraints of trade" by businesses that have lost the competitive race and enterprising plaintiffs' lawyers.

[1] Memorandum 2025-30 at 110.

All these concerns are compounded by the Recommendation's statement of "Judicial Guidance" instructing courts that a laundry list of federal antitrust standards that are designed to distinguish between lawful competition and unlawful restraints of trade are not required under California law. For example, the Judicial Guidance does away with the economic and legal principles that assist courts in distinguishing between unlawful predatory pricing and lawful price cutting, calling into question business's ability to make their own price-setting decisions. The Judicial Guidance also nullifies the general rule that a competitor has no duty to assist its rivals and a monopolist only has to do so in unique situations, potentially creating a California standard under which competitors are compelled to assist one another, rather than compete with one another. The Judicial Guidance likewise disavows the notion that, in two-sided markets, courts should evaluate the competitive effects on both sides of a transaction, thereby ignoring the fact that consumers are frequently on one side of dual-sided markets and often benefit from conduct that may harm competitors on the other side of the market and flipping on its head the "consumer welfare standard" that has guided courts and policy for decades. Expressly disavowing these decisions must be seen for what it is: A plaintiffs' lawyer's wish list that will not only increase litigation and costs, but leaves California courts with little guidance on how to deal with these complex issues.

And in that the Judicial Guidance is an intentional divergence from established federal law, an analysis of the effects of the Recommendation is even more important. While certain commenters dislike specific federal precedents, jettisoning these precedents can affect the performance of individual markets in California and the overall California economy. For instance, while the goal for removing the requirement that prices be below cost in a predatory pricing claim may be to facilitate challenges to conduct in certain digital markets where marginal costs are low or even zero, the law would apply to all markets, and a predatory pricing claim under the proposed law could involve above-cost pricing in a "typical" market. These kinds of claims have the potential of deterring businesses from charging low but above-cost prices. Antitrust law should promote, not inhibit, price cutting. Even if well-intentioned, attempts to strengthen antitrust enforcement by removing guardrails that focus on anticompetitive conduct can have unintended, harmful economic consequences.

In conclusion, CalChamber recognizes that the Commission's antitrust study has been a monumental undertaking. As we have noted, drawing a line between aggressive competition and anticompetitive conduct is terribly difficult. But a line must be drawn. All efficient markets have well-defined guardrails of what is legal competition and what may be anticompetitive, making it easier, less expensive, and less risky to do business. The Recommendation simply does not comply with these standards.

Sincerely,

Eric P. Enson

Eric P. Enson

January 12, 2026

California Law Revision Commission
925 L Street, Suite 275
Sacramento, CA, 95814

Re: Concerns Regarding the Commission's Proposed Single-Firm Conduct Recommendation

Dear Chair and Honorable Commissioners of the California Law Revision Commission,

California Life Sciences (CLS), which represents over 1,300 pharmaceutical, biotechnology, medical technology, and academic research institutions and companies across California, continues to express our collective concerns with the Commission's single firm conduct recommendation as written in Memo 2025-52.

Specifically, we believe the addition of Sections 16729, 16730, and 16731 to the Business and Professions Code will create significant legal uncertainty and risk unintended consequences for research and development, biomanufacturing, supply-chain stability, and the collaborative partnerships that underpin scientific innovation and public health.

As drafted, the Commission's recommendation would substantially expand single-firm antitrust liability, disrupting California's second largest sector, which consistently delivers lifesaving treatments to patients, drives significant economic value to the state, and thousands of high-quality jobs for Californians.

Our concerns are elaborated below with additional details and examples.

The Proposal Expands "Restraint of Trade" to Unilateral Conduct Without Meaningful Limiting Principles

As written, the addition of Section 16729(a)(1) and (b) would prohibit any unilateral "actions… in restraint of trade," incorporating concepts from existing Business and Professions Code Section 16720 which have historically only applied to concerted conduct into single-firm behavior. Because the statute provides no limiting definition of "restraint of trade" in this context, the provision is materially broader than federal Sherman Act Section 2 and existing California antitrust law. This broadness risks capturing a wide range of ordinary, procompetitive business conduct that benefits consumers while incentivizing frivolous litigation.

Life sciences example:
Biopharmaceutical companies routinely enter exclusive development, licensing, or supply agreements with small platform-technology firms or academic laboratories to finance clinical

trials and regulatory approval. These agreements necessarily foreclose alternative relationships, but they are essential to bringing novel therapies to patients. Under the proposed standard, plaintiffs could challenge such collaborations as unlawful unilateral restraints without establishing market definition, market power, intent, or actual anticompetitive effects.

Section 16731 Eliminates Core Analytical Guardrails Traditionally Used to Distinguish Competition on the Merits from Exclusionary Conduct

As drafted, Section 16731 states that courts need not find any of a nonexclusive list of evidentiary factors including market share thresholds, market definition, below-cost pricing, recoupment, economic rationality, or quantitative proof of competitive harm to establish liability. In practice, this would remove many of the core guardrails courts rely on to separate aggressive but lawful competition from anticompetitive conduct.

Biomanufacturing scale example:
Large-scale biologics manufacturing requires significant upfront investment and long-term capacity planning. Scale efficiencies often result in lower unit costs and differentiated pricing. Under the proposal, a plaintiff could challenge routine pricing or contracting practices without demonstrating market power, defining a relevant market, or showing below-cost pricing, turning ordinary economies of scale into potential antitrust exposure.

Multi-sided research platforms:
Many life sciences tools such as sequencing services, cloud-based laboratory platforms, and reagent marketplaces operate as multi-sided platforms that subsidize one side to expand scientific access. Section 16731(f) explicitly states that plaintiffs need not show harm across multiple sides of a platform or weigh cross-platform benefits. This framework would deter platform operators from offering discounted or subsidized access to early-stage researchers, academic labs, or patient-focused studies.

The Proposal Prohibits Courts from Considering Procompetitive Benefits Across Interconnected Markets

Section 16729(c) of the recommendation would prevent courts from looking at the full economic picture. Judges could not consider benefits that arise in one market when evaluating alleged harms in a different but related market, nor could they weigh harms to one group against benefits to another. As a result, transactions that produce overall benefits could still be condemned based on a narrow and incomplete analysis. This could be especially damaging in the life sciences sector where innovation routinely depends on coordinated conduct across R&D, clinical trials, manufacturing, and distribution markets to bring a final treatment to market.

Clinical trial network example:

A firm may limit participation in a proprietary clinical trial network to ensure consistent protocols, data integrity, and regulatory compliance. While such limits may constrain competition in certain trial services, they generate downstream benefits including faster regulatory approval, more reliable data, and improved patient outcomes. Section 16729(c) would prohibit courts from considering these benefits, even where they are integral to innovation and public health.

The Purpose Statement Encourages Expansive and Unpredictable Liability

As written, Section 16730 directs courts to "liberally interpret" the statute, to "maximize" deterrence, and to treat federal antitrust precedent as nonbinding. When combined with the elimination of traditional evidentiary requirements, this guidance invites expansive and unpredictable interpretations of single-firm liability.

Life sciences investment depends on legal predictability in intellectual-property licensing, scale-up partnerships, and long-term supply agreements. Increased uncertainty around antitrust exposure will raise transaction costs, discourage investment, and make California a less attractive location for new laboratories, manufacturing facilities, and research collaborations.

The Proposal Would Encourage Opportunistic Litigation and Chill Collaboration

Overall, by eliminating thresholds, cost tests, and evidentiary safeguards, the recommendation would make single-firm claims comparatively easy to bring and costly to defend even for startups and research-driven companies with limited resources. Ordinary and necessary conduct could become the basis for litigation risk, including:

- Exclusive IP licensing, essential for commercializing university-developed research
- Volume-based reagent or input pricing, reflecting legitimate cost efficiencies
- Selective scale-up partnerships, where platform technologies partner with a single manufacturer, plaintiffs could allege exclusionary conduct despite clear pro-innovation rationales
- Strategic portfolio decisions, including discontinuing products or reallocating resources, potentially framed as altering a prior course of dealing

California has built the world's leading life sciences innovation ecosystem by intentionally fostering collaboration, sustained investment, and scientific risk-taking. We respectfully urge the Commission to reconsider or substantially narrow the proposed single-firm conduct recommendation in Memo 2025-52 to preserve the collaborative, capital-intensive environment that enables life sciences companies to translate discovery into treatments for patients.

As biotechnology companies continually assess global investment opportunities, California's antitrust regulatory framework has historically been predictable and aligned with federal law encouraging companies to invest and grow in the state. That framework has traditionally

CALIFORNIA LIFE SCIENCES

recognized the value of high-quality research and the economic benefits that follow when innovation leads to local manufacturing, job creation, and tax revenue. This approach has kept California at the epicenter of the life sciences industry launching and sustaining thousands of companies, employing millions of Californians, and driving innovations that save lives and dramatically improve quality of life. The unprecedented single-firm conduct recommendation proposed in Memo 2025-52 would disrupt this successful paradigm, imposing new risks and costs that could push life sciences companies to pursue more predictable and stable regulatory environments outside of California.

We appreciate the Commission’s consideration of these comments and welcome the opportunity to engage further on these important issues.

Sincerely,

Sam Chung
Vice President, State Government Relations
California Life Sciences

700 K Street NW Suite 600
Washington, DC 20001

COMMENTS OF ITIF

Before the

California Law Revision Commission

California, United States

In the Matter of: Tentative Recommendation December 12, 2025 Antitrust Law: Single Firm Conduct	))))))))	Public Comment

January 12, 2026

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INTRODUCTION

On December 12, 2025, the California Law Revision Commission (the Commission) released its much anticipated Tentative Recommendation on Single Firm Conduct to the California Legislature (the Recommendation).[1] The Recommendation offers proposed amendments to the Cartwright Act, California's antitrust law, to include new liability for single firm conduct offenses. The Recommendation follows a multiyear review by the Commission, which included eight working groups that studied various aspects of antitrust law, including single firm conduct, with reports presented to the Commission in 2024.[2] In connection with this process, the Commission received numerous detailed comments from stakeholders, many of which raised concerns about the potential effects of the proposed changes to California's antitrust regime.[3] In January of last year, the Commission began drafting proposed language to amend the Cartwright Act to cover single firm conduct, culminating in its Recommendation.

The Information Technology and Innovation Foundation (ITIF) is a nonprofit, nonpartisan research and educational institute that has been repeatedly recognized as the world's leading think tank for science and technology policy.[4] While ITIF commends the Commission for its extensive review of California's antitrust laws, the Recommendation would, in several key respects, harm and upend the *status quo*. In particular, the Recommendation's inclusion of a unilateral restraint of trade offense, treatment of efficiencies, *de facto* abandonment of the consumer welfare standard, and deviation from the federal legal rules for evaluating a variety of single firm practices risk creating an unadministrable enforcement regime that chills consumer welfare and innovation.

[1] State of California, California Law Revision Commission, Tentative Recommendation, Antitrust Law: Single Firm Conduct (Dec. 2025), https://clrc.ca.gov/pub/Misc-Report/TR-B750.pdf [hereinafter Recommendation].

[2] *See, e.g.*, Single-Firm Conduct Working Group, California Law Review Commission Study of Antitrust Law, Aaron Edlin, Doug Melamed, Sam Miller, Fiona Scott Morton and Carl Shapiro (Jan. 25, 2024), https://www.clrc.ca.gov/pub/2024/MM24-15.pdf.

[3] *See, e.g.*, Joseph V. Coniglio, Comments for the California Law Revision Commission Study of Antitrust Law Regarding Consumer Welfare Standard, Concerted Action, and Other Issues, ITIF (Aug. 26, 2024); https://www2.itif.org/2024-california-consumer-welfare-concerted-action.pdf; Joseph V. Coniglio, Comments for the California Law Review Commission Study of Antitrust Law Regarding Innovation and Mergers, ITIF (June 20, 2024), https://www2.itif.org/2024-california-law-review.pdf; Joseph V. Coniglio and Trelysa Long, Comments for the California Law Review Commission Study of Antitrust Law Regarding Single-Firm Conduct and Concentration, ITIF (May 2, 2024), https://www2.itif.org/2024-california-single-firm-conduct.pdf.

[4] James G. McGann, 2020 Global Go To Think Tank Index Report, Univ. of Pa. (2021), https://repository.upenn.edu/think_tanks/18/.

PROPOSED SECTION 16729

ITIF offers no objection to the Recommendation's proposal in Section 16729(a)(2) for the inclusion of single firm conduct offenses that prohibit the undue acquisition and maintenance of, or the attempt or conspiracy to obtain, monopoly or monopsony power in a market, which are already prohibited under Section 2 of the Sherman Act. Indeed, while the Sherman Act does not expressly prohibit monopsony behavior by its terms, the Supreme Court has been clear that "the theoretical connection between monopoly and monopsony suggests that similar legal standards should apply to both sorts of claims."[5] The economics supports this "mirror-image" treatment between monopoly and monopsony: Like monopoly, exclusionary practices that maintain monopsony power will harm consumers, such as through reduced output.

The Recommendation's creation in Section 16729(a)(1) of a separate "restraint of trade" offense is a different story. As the Recommendation explains, while there is no prohibition under the Sherman Act of single firm conduct untethered to monopoly power or the attempt to acquire it, this new offense is "intended to capture the full range of anticompetitive conduct by a single firm."[6] To be sure, firms with market power that lack monopoly power, or the specific intent and dangerous probability of achieving it, can engage in unilateral behavior that harms competition, including invitations to collude and other unilateral facilitating practices.[7] However, as ITIF has previously explained, there are reasons why a broad ban on unilateral conduct that merely creates or maintains market power is undesirable.[8] First, administrative costs will substantially increase given that in many modern markets "almost every business enjoys some degree of market power," such that a broad swath of firms could be subject to the single firm conduct regime.[9] Moreover, whereas monopoly power is consistent with true market failure, market power may spur dynamic competition and innovation.[10]

Finally, the proposed language in §16729(c) similarly deviates from Section 2 of the Sherman Act by expressly and categorically precluding consideration of out-of-market efficiencies. Specifically, whereas federal law discounts these efficiencies under Section 7 of the Clayton Act, the Supreme Court has not clarified whether a similar rule applies to Section 2 of the Sherman Act, and has even arguably considered the merits of out-of-market efficiencies in the Section 1 context.[11] Moreover, the ban of out-of-market efficiencies in §16729(c) is particularly problematic in light of the accompanying language in Section 16731(f) that rebukes the Supreme Court's rule in *Ohio v. Am. Express* that courts should take into account anticompetitive effects on the platform as a whole, rather than focusing on just one side of the market, in order to avoid chilling behavior that is, on balance, procompetitive simply because it may harm one side of the market.[12]

[5] Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co., 549 U.S. 312 (2007); *see also* United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945) (allegations of a dominant firm engaged in predatory overbuying).

[6] Recommendation at 11.

[7] E.I. du Pont de Nemours & Co. v. Fed. Trade Comm'n, 729 F.2d 128 (2d Cir. 1984).

[8] Joseph V. Coniglio and Trelysa Long, Comments for the California Law Review Commission Study of Antitrust Law Regarding Single-Firm Conduct and Concentration, ITIF (May 2, 2024), https://www2.itif.org/2024-california-single-firm-conduct.pdf.

[9] FTC v. Meta Platforms, Inc., __ F.Supp.3d __, 2025 WL 3458822 (D.D.C. Nov. 18, 2025).

[10] This follows from the "inverted-U" relationship that often obtains between market structure and innovation. See, e.g., Philippe Aghion et al., *Competition and Innovation: An Inverted-U Relationship*, 120 Q. J. ECON. 701 (2005).

[11] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2147 (2021).

[12] Ohio v. American Express Co., 138 S. Ct. 2274 (2018).

PROPOSED SECTION 16730

The draft language in Section 16730 appears to present a purposive framework that troublingly departs from the consumer welfare orientation that has long animated the Sherman Act.[13] In particular, the purpose of the Cartwright Act is articulated in Sections 16730(a) and (c) as the promotion and protection of "free and fair competition," which not only reflects a more European approach to antitrust enforcement, but also imports its significant ambiguity with respect to the meaning of "fairness."[14] Indeed, this more European and structural understanding of competition is both inapposite to the dynamic, Schumpeterian competition that typifies so many contemporary markets, but has also likely contributed to the technology-driven productivity gap between the United States and Europe that has emerged over the past several decades.[15] Moreover, the proposed language would fundamentally politicize the purpose of unilateral conduct enforcement by sanctioning the pursuit of political ends, such as the "preservation of our democratic, political, and social institutions"—a troubling ghost of antitrust's past.[16] Doing so would further open the door to an unadministrable enforcement regime whereby courts consider political concerns when evaluating the legality of single firm conduct, and ultimately stifle procompetitive behavior on the grounds that it results in some purported offsetting adverse political consequences.

The express inclusion of worker welfare in Section 16730 raises similar concerns about administrability and the risk of false positives. Whereas the Sherman Act is designed to protect consumer welfare in a product market, worker interests reflect producer welfare in a labor market, and there are various practices that may harm the former while benefiting the latter. That is, although single firm conduct that maintains monopsony power in a labor market is rightly seen as anticompetitive, there are many cases in which single firm conduct that increases buyer power in a labor market could have proconsumer effects, such as reduced prices and increased output. As such, Section 16730's statement that these amendments are designed to promote worker and consumer welfare is a recipe to force courts to make difficult tradeoffs between worker and consumer welfare that will come at the expense of administrability and conduct that benefits consumers.

Moreover, while deterrence is an important goal of antitrust policy, a single firm conduct regime geared toward "maximizing" effective deterrence can result in harmful unintended consequences when implemented without consideration of other legitimate objectives. Excessive remedies can result in overdeterrence, harming consumers through false positives, and anticompetitive single firm conduct is almost exclusively a civil offense, in which context the Supreme Court has made clear that "[c]ourts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive."[17] For this reason, while it is legitimate for remedies to serve a deterrent—and in some cases punitive—purpose, such as through treble damages, this must not be the singular or even preferred approach to remedy anticompetitive single firm conduct.

[13] Reiter v. Sonotone Corp. et al., 442 U.S. 330, 343 (1979).

[14] *See, e.g.*, EU, Summaries of EU legislation, Competition ("European competition policy is intended to ensure free and fair competition in the European Union."), https://eur-lex.europa.eu/EN/legal-content/glossary/competition.html.

[15] Joseph V. Coniglio and Lilla Nóra Kiss, The Draghi Report: Right Problem, Half-Right Solutions for Competition Policy, ITIF (Oct. 2024), https://itif.org/publications/2024/10/02/draghi-report-right-problem-half-right-solutionscompetition-policy/.

[16] Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958).

[17] United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

PROPOSED SECTION 16731

In view of the nature of U.S. antitrust law as a "common law statute," ITIF has concerns with Section 16731's statutory exclusion of certain tests as necessary conditions for liability under any circumstances, rather than allowing courts to make these determinations over time through a common law process.[18] To be sure, this concern applies less to the evidentiary provisions that are stipulated, specifically 16731(e)'s statement that quantitative evidence of harm should not be required, as well as 16731(j)'s proposal that a plaintiff need not make out an indirect case of monopoly power when sufficient direct evidence exists—both of which are sensible and consistent with federal practice. Moreover, the ability of plaintiffs to prove monopoly power through direct evidence itself implies the condition in Section 16731(i) that plaintiffs are not required to show that a defendant has a sufficiently high market share. However, for purposes of indirect proof, a market share threshold should not be statutorily barred so as to allow courts to utilize structural presumptions surrounding when a firm does and does not possess monopoly power that facilitate great administrability.

Notwithstanding the foregoing, Section 16731 would problematically require courts to apply fundamentally different standards for evaluating unilateral conduct under the Cartwright Act and the Sherman Act. For example, Section 16731(d) effectively forecloses courts from applying a "no economic sense" test to evaluate single firm behavior, which, as Herbert Hovenkamp has explained, is a sound approach for assessing conduct like predatory innovation.[19] As the Ninth Circuit has explained, "[t]o weigh the benefits of an improved product design against the resulting injuries to competitors is not just unwise, it is unadministrable."[20] A similar approach is reflected in the Recommendation's categorical rejection of an equally efficient competitor standard in 16731(h), which ignores that the Ninth Circuit has reasonably found such analysis appropriate in analyzing bundled discounts by asking whether they were priced below the seller's marginal cost.[21]

These concerns are further exacerbated by Section 16731's disavowal of several key rules that are critical to assessing the competitive merits of important types of single firm conduct. To be sure, while there is no single test used for evaluating all exclusionary practices, the core questions are always whether the conduct harms the competitive process and consumers. With respect to predatory pricing and volume discounts, the price-cost and recoupment prongs that the Recommendation respectively discards in 16731(c) and (g) are critical to these assessments, as "the below-cost pricing requirement ensures that the pricing harms competitors, the recoupment requirement ensures that the low prices also harm competition—that is, consumers—and prevents antitrust law from condemning the very conduct it is supposed to encourage."[22] Without these respective requirements, courts risk condemning pricing that is both competition on the merits by virtue of not excluding equally efficient competitors, as well as benefits—not harms—consumers with lower prices.

[18] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007).

[19] *See* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 332 (2001).

[20] Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP, 592 F.3d 991, 1000 (9th Cir. 2010).

[21] Cascade Health Solutions v. PeaceHealth, 502 F.3d 895 (9th Cir. 2007).

[22] Timothy J. Muris and Joseph V. Coniglio, *What* Brooke Group *Joined Let None Put Asunder: The Need for the Price-Cost and Recoupment Prongs in Analyzing Digital Predation*, THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 35 (2020).

A similar logic applies to the standards for evaluating refusals to deal: For a refusal to deal to be anticompetitive, it must not reflect competition on the merits and must be likely to result in consumer harm.[23] To that end, as is the case under the Sherman Act, given that "[i]n the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal," some criterion is required for determining whether a refusal to deal reflects competition on the merits.[24] As the Supreme Court explained, for refusals to deal to be unlawful, there must be some showing of profit sacrifice or a "willingness to forsake short-term profits," or else courts risk the perverse result of requiring firms to deal with counterparties even if doing so is unprofitable.[25] This is the function served by both the prior course of dealing test in Section 16731(a) and the discrimination analysis in Section 16731(b), each of which provides a generally administrable framework to conduct this analysis. Without these, or some other way to measure profit sacrifice, the Recommendation risks having courts assess the merits of refusals to deal through an assessment of whether the consumer benefits of the refusal outweigh the harms—turning antitrust enforcement into *de facto* regulation by giving judges "*carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."[26]

RECOMMENDATIONS

For these reasons, ITIF has concerns with the Recommendation and respectfully offers the following:

- **Unilateral Coduct Liability Should Attach to Monopoly Power**: While ITIF does not object in principle to the Recommendation's proposal for the introduction of a state single firm conduct regime in California, the creation of a unilateral restraint of trade offense untethered to actual or attempted monopoly (or monopsony) power is a dangerous expansion of antitrust law that raises serious administrability and error cost concerns.
- **Antitrust Is Not About Fairness or Politics**: Antitrust is designed to protect competition and consumers, and allowing courts to take into account notions of fairness and political goals will only exacerbate concerns about inadequate administrability and chill procompetitive conduct.
- **Competition on the Merits Should be Lawful**: By banning the use of a prior course of dealing requirement, a price-cost test, the no economic sense test, and the equally efficient competitor standard, the Recommendation both opens the door to courts condemning broad swaths of behavior that reflect competition on the merits and risks creating an administrability and legitimacy crisis in which courts are routinely required to act like regulators and weigh the costs and benefits of unilateral business decisions.

[23] Aspen Skiing Co. v. Aspen Highlands Skiing Corp, 472 U.S. 585, 605 (1985) (noting that "it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory. It is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers").

[24] United States v. Colgate Co., 250 U.S. 300, 307 (1919).

[25] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004).

[26] *Id.* at 415-16.

CONCLUSION

While it is true that state antitrust regimes may go beyond the scope of federal antitrust law, that does not justify the radical departure from the Sherman Act contemplated by the Recommendation in terms of the principles, standards, and rules that should define sound antitrust enforcement at all levels of government. In particular, by creating single firm conduct liability for firms untethered to monopoly (or monopsony) power, sanctioning fairness and political objectives as part of the purpose of antitrust enforcement, and banning courts from applying a variety of tests that ensure only conduct that harms the competitive process is condemned, the Recommendation risks creating a highly unadministrable antitrust enforcement system in California that would significantly stifle procompetitive behavior that benefits consumers.

Thank you for your consideration.

Joseph Van Coniglio, CA Bar No. 315045
Senior Counsel and Director, Schumpeter Project on Competition Policy
Information Technology and Innovation Foundation

Connected Commerce Council (3C)
1701 Rhode Island Avenue NW
Washington, DC 20036

January 12, 2026

To: California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

RE: Antitrust Law: Study B-750

Dear Executive Director Reilly and Members of the California Law Revision Commission:

On behalf of the Connected Commerce Council (3C) — a nonprofit organization dedicated to ensuring small businesses have access to the digital tools they need to thrive in today's economy — I urge the California Law Review Commission (CLRC) to reconsider its tentative recommended changes to California law with regard to "single firm conduct." The changes outlined in the Commission's proposal will likely hurt California's 4.3 million[1] small businesses.

The Commission's recommendations include applying the Cartwright Act[2], a statute clearly intended to address collusive conduct by two or more entities, to the activities of a single firm. Particularly problematic is the Commission's proposed definition of restraint of trade, which it says "shall include, but not be limited to, any actions, measures, or acts **included or cognizable under Section 16720**, whether directed, caused, or performed by one or more persons."

The Commission's recommendation attempts to fit a round peg into a square hole, equating single-firm conduct to practices outlawed when undertaken by multiple firms. Section 16720 of the Business and Professions Code includes the following prohibited behavior:

(a) To create or carry out restrictions in trade or commerce.
(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.
(c) To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce or any commodity.

[1] Connected Commerce Council, 2025 Small Business Profile, California
https://advocacy.sba.gov/wp-content/uploads/2025/06/California_2025-State-Profile.pdf
[2] California Code, Business and Professions Code - BPC § 16720
https://codes.findlaw.com/ca/business-and-professions-code/bpc-sect-16720/

This approach contrasts sharply with Section 2 of the Sherman Antitrust Act[3], and similar laws adopted by the vast majority of states, which restrict single-firm conduct only in so much as it creates a monopoly or the monopolization of trade. Section 2 states, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof..."

The proposed changes to the Cartwright Act go far beyond restricting monopolistic behavior, and would essentially make many standard business practices illegal. There is a reason Cartwright deals specifically with collusion; there's a difference between an entity acting on its own to decide to raise prices and an entity acting in collusion with others to raise prices.

Importantly, the integrated capabilities of leading technology companies help foster competition, reduce prices, and promote innovation. Small businesses use[4] leading technology companies' high-value, low-cost digital tools to find customers and compete; in California, 85%[5] of small businesses say digital tools play a critical role in their growth. The proposed changes to California law will lead to a degradation of these valuable, integrated products and services.

These tools empower small businesses to succeed. But the Commission's proposal could make the integrations that make these tools so valuable as an unfair restraint of trade, requiring platforms to allow competitors access to these integrated products or services.

The proposed changes would mean thousands of small California businesses would risk losing access to affordable, world-class services that help them reach and serve customers throughout the state and across the country. Instead, inferior products would have to be given the same access to provide their competing services on digital services. That, in turn, means California small businesses will be forced to use less effective tools, which will ultimately cost them significant time and money.

3C appreciates the Commission's goals of ensuring fair competition. However, we believe the Commission has failed to realize how America's leading digital platforms enable small businesses to compete with firms many times their size, and fails to understand how blanket application of a law designed to prevent collusion between firms will criminalize standard business practices, particularly the integration of tools and services by digital platforms that has benefited millions of small businesses. There are better ways to address actual anti-competitive practices that harm consumers and small businesses, as many other states and the federal

[3] 15 U.S. Code § 2 - Monopolizing trade a felony; penalty https://www.law.cornell.edu/uscode/text/15/2

[4] Connected Commerce Council, Digital Tools Continue To Unlock Opportunities For U.S. Small Businesses https://connectedcouncil.org/wp-content/uploads/2022/02/Digital-Tools-Continue-To-Unlock-Opportunities-For-U.S.-Small-Businesses-FINAL.pdf

[5] Connected Commerce Council, Small Business Big Growth https://connectedcouncil.org/smallbizbiggrowth/

government have done. Only through carefully considered, narrowly targeted legislation can California truly lead on this issue in a way that will not harm small businesses.

Single-firm conduct legislation may be intended to curb the power of big companies, but it's likely to prove most disempowering to California small businesses that leverage their larger partners' strengths to grow, compete, and succeed in today's digital economy. Accordingly, 3C urges the Commission to reconsider its recommendation that the California legislature pursue these changes.

Sincerely,
Rob Retzlaff
Executive Director
Connected Commerce Council

RE: Antitrust Law: Study B-750

Dear Executive Director Reilly and Members of the California Law Revision Commission:

I am writing today to request that the CLRC reconsider its tentative recommendations to California lawmakers regarding "single firm conduct" legislation. Such legislation may be well-intended, but I believe it will make it harder for millions[1] of California small businesses — including mine — to leverage the digital tools we need to grow, compete with bigger businesses, and succeed in today's economy.

Eight years ago, my wife and I started a company making table games that bring friends and family together to talk, laugh, and connect. We struggled to get our games sold for over a year, but by using a variety of available technology products and services, we've been able to sell over two million games.

Large companies' high-value, low-cost integrated services help keep small California businesses like mine thriving.[2] Tools that integrate analytics and data, pricing, and fulfillment options, help us compete on a level playing field with giant game-makers like Hasbro and Mattel. Similarly, integrated advertising and analytics tools — which help us understand things like which ads are most effective and how people arrive at our website — allow thousands of small California businesses like ours to connect with customers and make smart, cost-effective marketing and business decisions.

Research shows that 85%[3] of California small businesses regard digital tools as critical to their growth. But because many of these tools are offered by leading companies as suites of integrated services, the single firm dominance legislation could be used to break the tools apart. If that happened, my small California business, along with thousands of others, would lose access to world-class services that help us reach and serve customers worldwide. We'd have to patch together a new system of disconnected tools — costing us time and money, and likely resulting in higher prices and worse service for customers.

I am concerned that the CLRC's recommendations would make it harder for our digital partners to integrate these tools. Breaking apart these products will degrade California's business environment from incredibly challenging[4] to nearly impossible for entrepreneurs like me. As a

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[1] Connected Commerce Council, 2025 Small Business Profile, California https://advocacy.sba.gov/wp-content/uploads/2025/06/California_2025-State-Profile.pdf

[2] Connected Commerce Council, Digital Tools Continue To Unlock Opportunities For U.S. Small Businesses https://connectedcouncil.org/wp-content/uploads/2022/02/Digital-Tools-Continue-To-Unlock-Opportunities-For-U.S.-Small-Businesses-FINAL.pdf,

[3] Connected Commerce Council, Small Business Big Growth google.com/url?q=https://connectedcouncil.org/smallbizbiggrowth/&sa=D&source=docs&ust=1763754599871661&usg=AOvVaw2AD6al9WDXHzOq6zSwDxca

[4] Buss, Dale, Chief Executive, Best & Worst States for Business 2024 Survey Finds Unsettled CEOs Ready To Roam https://chiefexecutive.net/best-worst-states-survey-shows-unsettled-ceos-are-ready-to-roam/

lifelong Californian and proud small-business owner, I urge the CLRC not to advance proposals that would unintentionally limit the tools that help us compete and grow.

Respectfully,

Alfred Mai
CEO, ASM Games
San Francisco

Daniel Francis
NYU School of Law
Vanderbilt Hall, 40 Washington Square South
New York, NY 10012

January 12, 2026

California Law Revision Commission
c/o Legislative Counsel of California
925 L St., Ste. 275
Sacramento, CA 95814

BY EMAIL c/o Sharon Reilly (sreilly@clrc.ca.gov)

Comments on Tentative Recommendation: Antitrust Law: Single Firm Conduct

To the California Law Revision Commission:

I write to provide comments on the Tentative Recommendation entitled "Antitrust Law: Single Firm Conduct," dated December 2025, issued in connection with Study B-750 (Antitrust Law). These comments are very brief, and based primarily on a review of the Tentative Recommendation itself (including because I am currently on parental leave with a new baby!) but I will gladly expand on the comments, or engage further with the Commission, if desired.

My name is Daniel Francis. I am a law professor at NYU School of Law, where I teach and write about antitrust and regulation. I previously served at the U.S. Federal Trade Commission in a series of roles in the Bureau of Competition (Senior Counsel to the Director, Associate Director for Digital Markets, and Deputy Director). My work at the FTC focused in large part on monopolization, mergers, and tech markets. Previously I worked in private practice for around ten and a half years, specializing in antitrust. I write as a scholar of federal antitrust with a long-standing interest in monopolization, not as an expert on state antitrust law or California law.

I do not work for or represent private clients of any kind, and have not done so since I began government service in 2018. My research is funded only by NYU School of Law; my wife is an antitrust attorney in private practice.

I hope some of these comments are helpful. Please do not hesitate to contact me if I can be of assistance on this or any other matter.

Daniel Francis

COMMENTS ON THE TENTATIVE RECOMMENDATION ON SINGLE-FIRM CONDUCT

DANIEL FRANCIS

Executive Summary

As I read it, the Tentative Recommendation is an effort to accomplish two objectives: *first*, to introduce an antitrust rule for unilateral conduct into California state law; and, *second*, to specify some features of that law in order to differentiate it from federal monopolization law. I generally support the first objective. But while I do not object to the second—and while I actively support some of the proposed clarifications—I do not support most of the proposed differences indicated by the Tentative Recommendation. Most importantly, I think a number of them will be actively harmful in their current form.

First, to reiterate: I support the Commission's effort to introduce a monopolization offense into state law, and to do so without creating separate rules for uncertain sets of "technology" businesses or "dominant" firms. In candor, I think the benefits of creating a state monopolization offense are likely to be modest, given the general applicability of federal monopolization law, but the mere creation of a state-law monopolization offense may bring some benefit and is unlikely to cause harm.

Second, while I support some of the proposed efforts to specify features of the proposed California law of unilateral conduct (*e.g.*, the clarification that proof of a relevant market is not necessary in the presence of direct evidence of harm), I have serious concerns about much of the substance of the Tentative Recommendation. For example:

- I would not create a new offense of "unilateral restraint of trade." It is not at all clear what such a provision would cover—I think the Tentative Recommendation is entirely mistaken when it says that the meaning will be reasonably clear to courts and businesses—and it threatens to swallow the new monopolization offense.
- I would not create a new stand-alone offense of "maintenance of monopoly" as such, without limiting the offense to *harmful* means of monopoly maintenance. Just like the acquisition of a new monopoly, the maintenance of an existing one may result *either* from harmful conduct *or from beneficial conduct* (*e.g.*, product improvement or cost reduction). Banning or deterring beneficial conduct that maintains a monopoly—as the current proposal facially does—would be a catastrophically anti-consumer act. Moreover, as the harmful maintenance of monopoly is embraced by the concept of "monopolization," as that term is understood in antitrust, there is no need at all for a separate provision of this kind.
- I would not include a prohibition against inter-*personal* effects balancing. Whatever one's views about cross-*market* effects balancing, a rule against inter-personal effects balancing

within a single market would be absurdly demanding. If taken seriously, it would give persons in unique circumstances, or with esoteric preferences, a complete veto over practices and transactions that would generate significant overall benefits for consumers, workers, or others. I am not aware of any mainstream scholarly advocacy for, or defense of, such a "no person harmed" standard—a measure that recalls the notoriously demanding Pareto standard—for antitrust liability or indeed any other policy purpose, and it would be a serious mistake for California to adopt one.

- I would not include a number of the proposed items of "judicial guidance," particularly those items that would eliminate basic doctrinal rules or tools for analyzing familiar categories of conduct (*e.g.*, pricing and refusal to deal) without offering a superior and reasonably clear framework to replace them. These practices raise tricky problems of monopolization doctrine that cannot be solved by simply sweeping away existing doctrine and hoping that California courts—grappling with such practices and with monopolization law for the first time—will spontaneously come up with a better rule to fill the resulting void. Doing so seems certain to result in terrible confusion for courts and litigants, and unlikely to yield rules that optimally serve consumers.

The concerns described above will be exacerbated by the fact that, if California enacts a specially pro-plaintiff unilateral-conduct law, plaintiffs will flock to use it. The result, in turn, will be that California state-court judges—with no personal or institutional experience of the adjudication of monopolization cases—will be forced to create new doctrine on the fly, in a large number of high-stakes cases, in the most complex area of antitrust theory and doctrine. That strikes me as a recipe for real trouble—and, at a minimum, for costly, prolonged, and harmful uncertainty.

Instead, I propose a simple amendment to the Cartwright Act stating that it is unlawful to monopolize or monopsonize, or to attempt or conspire to monopolize or monopsonize. At most, I would include clarifying language drawn from the proposed Section 16731(e) (quantitative evidence), (h) (equally efficient competitor), and (j) (relevant market / direct effects).

I acknowledge that it is easier to criticize, as I do in part here, than it is to affirmatively formulate proposed language. I offer the following comments in a respectful and appreciative vein, and I appreciate the opportunity to participate in the Commission's process.

The comments are divided into "General Comments," which relate to the scope and structure of the proposed statutory reform, and "Specific Comments," which relate to the details and language of the proposed statutory reform.

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General Comments

General Comment 1. I support the addition of a prohibition on monopolizing, monopsonizing, or attempting or conspiring to monopolize or monopolize, because it will incorporate a familiar and important antitrust tool into California state law.

The absence of a unilateral-conduct rule from California state antitrust law has long been an anomaly in American antitrust federalism, and that absence may matter in cases where federal antitrust law is unavailable. Adding a unilateral conduct prohibition would align California's antitrust system with that of other states and the federal government, and provide a familiar and valuable tool to respond to harmful private conduct.

However, despite the appeal of convergence with the practice of other states, the Tentative Recommendation does not explain with any specificity why the gap in California state antitrust law is actually harmful: that is, why the ability to litigate under federal antitrust law in federal court is not a satisfactory alternative, setting aside for a moment the case for a different substantive rule of law for unilateral conduct (*e.g.*, the idea that federal law is substantively too permissive). Perhaps the most obvious source of concern is the federal *Illinois Brick* doctrine, which denies antitrust standing to those who purchase indirectly from an antitrust wrongdoer.[1] The California legislature appears to have rejected that doctrine, and as a result state law may be a uniquely important tool for such indirect purchasers.[2] This is a genuine, if small, zone within which the extension of state law might really matter.

General Comment 2. I urge the Commission to recognize the critical difference between monopoly power on the one hand and harm to consumers and workers on the other, and to treat harm—not power—as the problem.

The report attached to the Tentative Recommendation (the "Single-Firm Conduct Working Group California Law Review Commission Study of Antitrust Law" dated January 25, 2024) ("Working Group Report") articulates a general view that the existence of monopoly power implies consumer harm: "[T]he public is harmed when a single firm has such tight control over the supply of some product or service that customers have few if any good alternatives to that firm's offerings[.]"[3]

I recognize that this view is immensely appealing and widely held, but I think it is mistaken. The existence of market or monopoly power—by which I mean the ability to charge a price in excess of an appropriate measure of cost—is *not* a reliable signal that consumers or workers or others have been or are being harmed compared to an appropriate counterfactual. For example, suppose that a

[1] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[2] Cal. Bus. & Prof. Code 16750(a) ("[A Cartwright Act] action may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, *regardless of whether such injured person dealt directly or indirectly with the defendant.*") (emphasis added).

[3] Working Group Report, 2.

business develops a new product or substantially improves an existing one. The new or improved product is so good that there are, at the relevant time, "few if any good alternatives to it." The result is certainly that monopoly power (or substantial market power, which means the same thing) has been created. But all relevant persons are overwhelmingly better off, not worse off, as a result of the relevant conduct. They have been benefited, not harmed; the conduct should be encouraged, not banned.

The Commission should be strictly focused on practices that harm consumers or workers overall, and should not fall into the trap of treating power, as such, as a problem.

General Comment 3. I do not agree that the Commission's objective should be to recapture an "original scope and strength" of Section 2 of the Sherman Act because I do not believe such an "original" interpretation ever existed. Instead, I think the Commission should aim to protect consumers and workers from economic harms.

The Tentative Recommendation suggests that "decades of federal jurisprudence" have "diluted the Sherman Act Section 2's original scope and strength."[4] As I read it, this seems to suggest that Section 2 of the Sherman Act "original[ly]" had a clear and appealing meaning, and that the federal courts have betrayed it by "dilut[ing]" that meaning. The tacit point seems to be that the Commission's objective is, or should be, to recapture that vigorous "original" meaning.

This kind of thing is often said, particularly in the context of criticisms of the current (certainly conservative, often pro-defendant) federal judiciary. But I do not think it is correct—and not only because in an array of recent Section 2 cases, including against Big Tech firms, plaintiffs have been doing pretty well.[5]

I think the history of Section 2 of the Sherman Act is complex and messy, marked by enduring confusion about what exactly the statute prohibits and what it permits, and I do not think there was ever an earlier time when it had a meaning that was both clear and appealing. Moreover, the most prominent cases from more recent decades that represent a wholly or largely discarded view of Section 2—cases like *Alcoa*, *Otter Tail*, *Berkey Photo*, perhaps *Aspen Skiing* too—are generally difficult or impossible to reconcile with a clear and pro-consumer set of rules. (At the very least, I have never seen such a reconciliation, and the Tentative Recommendation does not offer one.)

It *is* true, though, that plaintiffs probably used to win Section 2 cases, and antitrust cases generally, more often than they do today. But maximizing wins for plaintiff businesses *as such* is not a

[4] Tentative Recommendation, 8.

[5] *See*, *e.g.*, In re Google Play Store Antitrust Litigation, 147 F.4th 917 (9th Cir. 2025); Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC, 111 F.4th 337 (4th Cir. 2024); United States v. Google LLC, 778 F. Supp. 3d 797 (E.D. Va. 2025); United States v. Apple, Inc., 2025 WL 1829127 (D.N.J. June 30, 2025); United States v. Google LLC, 747 F. Supp. 3d 1 (D.D.C. 2024). I do not think that anything in the Tentative Recommendation would have affected the outcome in FTC v. Meta Platforms, Inc., 2025 WL 3458822 (D.D.C. Dec. 2, 2025).

particularly plausible goal (a "plaintiffs always win" rule would not be optimal!). Why prefer one set of businesses over another simply because of the side of the *v.* on which they happen to fall in the context of a particular dispute?

Instead, rather than attempting to capture a purportedly "lost" golden version of monopolization law, I think the Commission's objective should be simple and timeless: to protect consumers and workers from economic harms. This includes the harms that result when beneficial practices and transactions are prohibited or deterred. This is a narrower objective than simply maximizing plaintiff wins, and it does not depend on an effort to recapture a purported earlier version of the law.

General Comment 4. I agree with the decision not to create a separate rule for "technology companies," because there is no good reason for a separate set of rules.

I support the decision not to create a separate rule for technology companies. For one thing, it is not obvious what should count as a "technology company" given the increasing digitization of many forms of commercial activity. Moreover, I am not aware of any reason to think that the best antitrust rules for governing "tech businesses" are not also the best rules for other businesses, assuming that the goal—protecting consumers and workers from economic harms—remains the same.

General Comment 5. I agree with the decision not to create a separate rule for "dominant" businesses, including an abuse-of-dominance rule, because there is no good reason for a separate set of rules.

I support the decision not to create a separate rule for "dominant" businesses. Antitrust already uses the concept of "market power" to capture businesses with substantial pricing power, and it uses the concept of "monopoly power" to capture businesses with, in turn, an unusually significant quantity of market power. Defining and identifying these forms of power is hard enough. It is not at all obvious why it would be desirable to create a third, probably intermediate, category of "dominant" businesses, or why distinctive rules should apply to businesses in such a third category.

A European-style "abuse of dominance" rule would be particularly harmful and undesirable. Article 102 of the Treaty on the Functioning of the European Union includes a prohibition on *exploitation* of monopoly power, including excessive pricing, and is dramatically broader than U.S. monopolization law. Article 102 has even recently been interpreted to require a business to undertake new investments specifically in order to meet the demands of rivals.[6] All this is profoundly foreign to U.S. unilateral-conduct law, which has historically focused only on harmful exclusion, not mere exploitation, of monopoly power.

[6] Case C-233/23, Alphabet Inc. v. Autorità Garante della Concorrenza e del Mercato, ECLI:EU:C:2025:110.

Specific Comments

Specific Comment 1. I would clarify and simplify the proposed monopolization offense.

As noted above, I support the introduction of a prohibition on monopolizing, monopsonizing, or attempting or conspiring to do either. Harmful exclusionary practices are very properly a core concern of antitrust at both federal and state level.[7] I would therefore draft the relevant provision to read:

> It is unlawful to monopolize or monopsonize, to attempt to monopolize or monopsonize, or to combine or conspire with another person to monopolize or monopsonize.

I would not make it unlawful to "act, cause, take or direct measures, actions, or events" to this end, at least absent a clearer explanation of what this language is supposed to capture beyond the core prohibition. The language is an odd deviation from standard regulatory order, and, as I read it, it works an expansion of entirely uncertain scope. The core prohibition already captures attempts to monopolize and monopsonize: so what exactly is the point of this expanded language?

Specific Comment 2. I strongly oppose the proposed prohibition on simply "maintaining a monopoly or monopsony," because it would bar beneficial conduct as well as harmful conduct.

I think the proposed prohibition on "maintain[ing] a monopoly or monopsony" is a serious mistake, because it is not limited to harmful conduct. Just like the acquisition of a new monopoly, the maintenance of an existing monopoly may result from beneficial actions which should not be punished or deterred. But the proposed language condemns maintenance-of-monopoly itself, regardless of whether the means are harmful or beneficial. For example, the proposed language appears to prohibit an existing monopolist from taking actions like price reductions, quality improvements, or cost reductions: these and similar practices certainly "maintain" monopoly. As a result, by deterring and punishing such practices, the proposed provision will seriously harm consumers. It should be removed.

The Tentative Recommendation states that this language is intended to "prohibit the anticompetitive maintenance of monopoly power."[8] But that is just not what the proposed language says. The proposed language prohibits the maintenance of monopoly power as such. Among other things, I note that this prohibition is framed as an *alternative* and separate form of violation to monopolization, rather than a form or subset of monopolization. As a result, the fact that *monopolization* is broadly understood to require harmful or otherwise undesirable conduct therefore does not help to limit this prohibition.

[7] *See generally*, *e.g.*, Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 Antitrust L.J. 527 (2013); Thomas G. Krattenmaker; Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986); *see also* Daniel Francis, *Making Sense of Monopolization*, 84 Antitrust L.J. 779 (2022).
[8] Tentative Recommendation, 12.

Moreover, there is no need for a separate prohibition on harmful monopoly maintenance, so long as monopolization is prohibited: the legal concept of monopolization already includes harmful maintenance of an existing monopoly, as decades of case law confirm.[9]

I do not think this is a particularly close case on which reasonable minds can differ. My best guess is that it is a drafting error.

Specific Comment 3. I strongly oppose the proposed prohibition on inter-personal effects balancing, because it would create an impossibly demanding analytical standard.

Setting aside for a moment the question of inter-*market* balancing, I do not think a sensible antitrust law could possibly prohibit inter-*personal* effects balancing within a single market.

Antitrust analysis often requires a court to determine whether or not a particular practice or transaction is harmful: that is, whether its harms exceed its benefits. The standard frame for that analysis is usually the "relevant market," with the main controversy being whether out of market benefits are cognizable.[10]

The proposed language in the Tentative Recommendation implies that if a small subset of persons within a market—or, at the limit, *even one person*—happens to disprefer the effects of a practice or transaction, then that practice or transaction is unlawful. That is an absurdly demanding standard. For example, suppose that a business enters into a procompetitive collaboration with a trading partner or competitor, with the result that virtually all consumers and workers receive significant net benefits. Under the proposed rule, if even one person dispreferred the results—even though all the other similarly situated persons were significantly benefited—then the practice would be illegal. Such a rule would prohibit a vast amount of beneficial conduct, and therefore cause much harm.

For example, suppose that a hospital entered into an exclusive partnership with an anesthesiology supplier in exchange for lower prices, with the result that anesthesiology prices fell for all patients. If a single patient happened, idiosyncratically, to prefer or require a specific third-party anesthesiologist that was now unable to provide services at the hospital, that single patient's resulting welfare harm could not, under the proposed approach, be justified by the overwhelming benefits to other patients. The practice would therefore appear to be illegal. This would be an exceedingly silly outcome, and a remarkably harmful one.

In sum, a rule against inter-personal effects balancing would turn antitrust into a ridiculously demanding straitjacket for commercial arrangements of all kinds, and would work significant harm

[9] *See*, *e.g.*, Lorain Journal Co. v. United States, 342 U.S. 143 (1951); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc).
[10] *See generally*, *e.g.*, Daniel Francis & Christopher Jon Sprigman, ANTITRUST: PRINCIPLES, CASES, AND MATERIALS (3d ed. 2025) 174.

overall. I am not aware of any serious mainstream academic defense of a "no person harmed" standard for antitrust, let alone one that has commanded significant support.[11]

Specific Comment 4. I oppose the proposed prohibition on inter-market effects balancing, because it would lead to the prohibition of practices that are beneficial overall.

I recognize that reasonable minds may differ about the wisdom of an explicit prohibition against inter-*market* effects balancing. My own view is that such a prohibition is undesirable. Antitrust should be in the business of prohibiting and deterring only conduct that is harmful overall. As Louis Kaplow among others has forcefully explained, the reallocation of resources from one use to another, higher value use is part of the central normative case for a market economy. It does not seem very sensible, for example, to have a rule that prohibits a hospital from buying a car parking lot to build a new hospital wing on the land simply because the result will be to slightly increase car parking prices, while treating the enormous benefits to hospital patients as irrelevant because they are "out of market."[12] As Professor Kaplow explains in a forthcoming article in the *Antitrust Law Journal*:

> **[M]any asset acquisitions, especially the most consequential ones, remove or redirect resources so as to reduce those available in some sectors.** When a semiconductor firm (whether or not a monopolist) buys buildings on contiguous parcels in order to tear them down to make way for its new chip fabrication facility, the acquired assets are no longer available to the sectors where they were formerly deployed. A new hospital built on a former parking lot may enable remaining parking lots to raise parking prices. One can readily imagine scenarios in which there is a material reduction in local competition, for example, when one of a few firms or operations in an area is purchased and extinguished to make way for something else. Even if a displaced firm ultimately transfers activities elsewhere, its original location may be left with less competition. And the chip fabrication plant will hardly take up the slack in those other sectors. The same holds true when the acquirer does not destroy the prior facilities but merely redeploys them to its own, higher-value use in serving some other sector. This is so even in mundane cases where a firm takes over a warehouse or occupies a significant portion of office space in some sufficiently distinct geography, displacing or driving up prices of such facilities for firms in other sectors at that same location. . . . **[P]reventing losses in any identifiable sector regardless of the benefits in others would put a halt to much economic activity, indeed, much of the most important activity.**[13]

As a result, I would drop the explicit prohibition on inter-market balancing.

[11] *Compare, e.g.*, Steven C. Salop, Daniel Francis, Lauren Sillman & Michaela Spero, *Rebuilding Platform Antitrust: Moving On from* Ohio v. American Express, 84 Antitrust L.J. 883, 914 (2022) (dismissing out of hand a no-person-harmed standard for antitrust analysis, on the ground that it would "effectively prohibit virtually any conduct within the scope of the rule, reflecting the well-known impracticality of the Pareto criterion in the real world"); *see also generally* Herbert Hovenkamp, FEDERAL ANTITRUST POLICY (6th ed. 2020) § 2.3c at 99 (discussing various analytical criteria for assessing allocative efficiency in antitrust analysis, and noting that "[t]he concept of Pareto-superiority is so rigorous that it would be satisfied by only the most trivial of social changes").

[12] *See* Louis Kaplow, *Out of Market, Out of Mind*, Antitrust L.J. (forthcoming; draft on file and available on request) (emphasis added).

[13] *Id.* at *18.

Specific Comment 5. I strongly oppose the proposed prohibition on unilateral restraint of trade, because it would create a new and undefined kind of antitrust rule with uncertain consequences.

The Tentative Recommendation includes a proposal to prohibit conduct by "one or more" persons in "restraint of trade," through the proposed Section 16729(a)(1).[14] This will likely be read as a significant expansion of existing unilateral-conduct law, of uncertain meaning and scope.

The Tentative Recommendation broadly indicates that the new prohibition will borrow the existing meaning of "restraint of trade" from Section 1 of the Sherman Act, presumably with the result that it will be illegal to do unilaterally what it is currently illegal to do jointly under Section 1.

But I think this is a significant mistake. Suppose, for example, that a single firm sets a uniform price (or otherwise agrees on a price schedule) across its branches or wholly-owned subsidiaries. Under current federal antitrust law the reason that this is not *per se* illegal price fixing is that there is no "agreement." (Indeed, that is the bottom line of the *Copperweld* decision specifically cited in the Tentative Recommendation, and of the successor *American Needle* decision that refined the relevant rule.[15]) Is the proposed language intended to eliminate any agreement requirement, and thus make that practice illegal? (Surely not?) And if not, what is the intended effect of a prohibition on unilateral restraint of trade, and how is it intended to differ from monopolization?

The Tentative Recommendation dismisses any concerns on the ground that the phrase "restraint of trade" connotes harm to competition.[16] But "harm to competition" does not have a consensus just-so meaning.[17] For example, suppose that one thinks that term means "overall harmful to consumers." Does it therefore follow that a defendant's unilateral refusal to share or sell at cost prices is illegal, on the ground that the unilateral decision causes consumer harm by reference to a counterfactual in which the defendant shares at cost? Or even the charging of an above-cost price, for the same reason?

Puzzlingly, the Tentative Recommendation cites the practice of Hawaii and Idaho as models for its proposed approach.[18] But the citations do not seem to support the Commission's proposal for a unilateral restraint of trade offense, or anything like it: quite the contrary. As I read the cited laws, neither Hawaii or Idaho has created a state-law offense of unilateral restraint of trade: rather, like federal law, those states ban *agreements* in restraint of trade and, separately, monopolization.[19]

In sum, the proposed prohibition on unilateral restraint of trade seems to be both undefined and duplicative, overlapping in an uncertain fashion with the new monopolization offense. I think the

[14] Tentative Recommendation, 10.
[15] American Needle, Inc. v. NFL, 560 U.S. 183 (2010); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
[16] Tentative Recommendation, 11.
[17] *See generally* Daniel Francis, *Antitrust Without Competition*, 74 Duke L.J. 353 (2024).
[18] Tentative Recommendation, 12 & n.100.
[19] *See* Haw. Rev. Stat. Ann. §§ 480-4, 480-9; Idaho Code §§ 48-104, 48-105.

Tentative Recommendation is entirely wrong to dismiss concerns about clarity and desirability of such a rule. I would remove the provision entirely. Antitrust scrutiny of unilateral practices under California law is surely best implemented through a state-law monopolization provision, *not* through a novel rule against "unilateral restraint of trade" that leaves California courts—as well as businesses and consumers—to figure out what such a rule is intended to capture, and how it is intended to differ from the prohibition on monopolization.

Specific Comment 6. I recommend editing the purpose statement to eliminate references to freedom of choice as an independent goal, the "maximization" of deterrence, and to "alignment" with the 2023 Merger Guidelines, because these propositions do not imply an antitrust framework that is focused on protecting consumers and workers from overall economic harms.

I would make some edits to the proposed statement of purpose in the proposed Section 16730.[20]

Worker freedom

First, I would modify the proposed phrase "anticompetitive business practices that impede workers' freedom to choose employment," in the proposed Section 16730(b). That is because, as written, it suggests that a practice may be objectionable on the sole ground that it limits "workers' freedom to choose employment."

I do appreciate that the word "anticompetitive" may be intended to guard against this outcome, but that word does not have a clear consensus meaning,[21] and the Tentative Recommendation does not define what it means by it. Worse still, some language in the Tentative Recommendation affirmatively distances the Commission's intended orientation from a consumer-harm standard.[22] If the Commission intends to limit illegality to practices that harm consumers overall, it should surely say so; if it does not, I am not sure what limiting work "anticompetitive" is intended to perform.

It would be very undesirable to make practices illegal simply because they limit worker freedom to choose employment. Among other things, any contract to perform labor services has such an effect, by committing a worker to provide services and imposing obligations that make it harder to simultaneously choose other employment. So does the introduction of application requirements for a job, by limiting the freedom of workers that do not meet the requirements. And so on.

As a result, I propose amending the proposed Section 16730(b) so that it reads: "Protecting competition includes protecting competition between businesses when they compete for workers." I believe that would accomplish the Commission's goals without raising the concerns above.

[20] Tentative Recommendation, 13–14.
[21] *See supra* note 17 and accompanying text.
[22] Tentative Recommendation, 15 (noting with approval that the 2023 Merger Guidelines "rely more on the theme of 'lessening competition' than on the language in the 1982, 1992, and 2010 Guidelines, which emphasized market power and its exercise"). It is not clear what this means, but it clearly disfavors a focus on market power harms.

Maximizing deterrence

Second, I do not think it is wise to state in the proposed Section 16730(c) that California "favors 'maximizing' effective deterrence of antitrust violations."[23] Maximizing deterrence implies the introduction of absurd penalties (*e.g.*, the death penalty) and the disregard of competing objectives like encouraging beneficial practices and investments, ensuring due process for litigants, avoiding false-positive impositions of liability, and so on. It is obvious that any plausible policy orientation requires some kind of balancing exercise: deterring unlawful conduct is important, but so too are other things.

To be sure, I share the sense of many writers that federal courts have in antitrust cases sometimes been too worried about the inaccurate imposition of liability, and not worried enough about the inaccurate failure to impose liability.[24] But I am not aware of any mainstream scholars who have argued that *maximizing* deterrence is a plausible or appealing policy goal.

I would simply drop this language. I am aware that it is a quotation from a California court decision. But it is one thing for a judicial decision to use some improvident or over-broad language; it is quite another to elevate it into state statute.

Obscure language regarding the 2023 Merger Guidelines

Third, and finally, I would remove the proposed Section 16730(e). The purpose and effect of the language is not at all clear—I am afraid I have literally no idea what it is intended to do or mean—and the explanatory language in the Tentative Recommendation does not help. I do not know what it means to "align[] California with themes" in the 2023 Merger Guidelines, as the Tentative Recommendation indicates by way of explanation, or what those Merger Guidelines—which apply to Section 7 of the Clayton Act and do not deal with monopolization law[25]—have to do with any aspect of the unilateral-conduct law proposed in the Tentative Recommendation.

I think it is a particular mistake to tie the proposed amendment of California law to a purported intention to "rely more on the theme of 'lessening competition' than on the language in the 1982, 1992, and 2010 Guidelines, which emphasized market power and its exercise."[26] This part of the Tentative Recommendation directly suggests that "harm to competition" is intended to mean something other than harm from the increase or maintenance of market power. This rather directly underscores the point made repeatedly above that harm to competition does not have a just-so meaning. If the Commission intends to take the view that, for the purposes of the proposed

[23] Tentative Recommendation, 13.

[24] *See* Jonathan B. Baker, *Taking the Error out of Error Cost Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L.J. 1 (2015); Andrew I. Gavil & Steven C. Salop, *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 U. Pa. L. Rev. 2107 (2020).

[25] *See* U.S. Dept. of Justice & FTC, 2023 MERGER GUIDELINES, 1–2.

[26] Tentative Recommendation, 15.

amendments, harm to competition should mean something other than overall (or consumer) harm from the increase or maintenance of market power, the proposed amendments should surely explain what alternative measure is intended. (I would caution against such an approach, including on the ground that the most persuasive and appealing version of the antitrust project is, as noted above, one that protects consumers and workers from economic harms.[27] If the Commission has a different view, it should at a bare minimum explain what that view is.)

Specific Comment 7. I strongly recommend against the inclusion of many of the "judicial guidance" propositions in Section 16731, particularly paragraphs (a), (b), (c), (d), (f), (g), and (i), because they will lead to judicial confusion and undesirable results.

I understand the desire to go beyond adding a unilateral-conduct law and to start "fixing" real or perceived problems with federal monopolization doctrine. I also share the sense that in at least some respects the judicial treatment of Section 2 of the Sherman Act has led to imperfect doctrine and poor results, including many that are unduly pro-defendant. And I substantively agree, or at least sympathize strongly, with some of the specific propositions in the proposed Section 16731.

But I recommend against including several of the guidance propositions. At best, these statements are stray and incomplete propositions that threaten significant confusion for courts, consumers, and businesses. At worst, in some cases they imply affirmatively harmful antitrust rules.

Valuable or unobjectionable guidance

I mildly support the guidance in proposed Section 16731(e) (emphasizing that quantitative evidence is unnecessary), (h) (emphasizing that targets need not be as efficient as the defendant, or nearly so, for liability to result), and (j) (emphasizing that no market need be defined in cases involving direct evidence of harm). I do not think they are likely to cause harm and in at least some cases they may do some good.

Predatory pricing

Paragraphs (c) and (g) affect claims for predatory pricing. Federal predatory pricing law imposes two key legal tests on a plaintiff: below-cost pricing by a defendant, and a sufficient likelihood of recoupment of lost profits.[28] But the proposed Section 16731(c) directs that there be no requirement to prove below-cost pricing, while the proposed Section 16731(g) eliminates any requirement to prove recoupment. In so doing, the Tentative Recommendation would eliminate both pillars of predatory-pricing doctrine. But it offers nothing in its place.

So what then is the legal rule intended to be? And what is a California court supposed to do in a predation case? Almost nothing would be more harmful than for antitrust doctrine to punish and

[27] *See* Francis, *Competition*, *supra* note 17, at 436–38 (proposing a "harm-centric" orientation for antitrust).
[28] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–23 (1993).

deter low prices as such, but that—along with a hefty dose of judicial confusion, and lengthy, expensive litigation—seems to be a very natural short-order consequence of the proposed amendments. It seems wantonly harmful to abolish core doctrinal rules without articulating an alternative framework that is at least as protective of consumers as what is being swept away.

The problem is made exceptionally acute by the suggestion in the Tentative Recommendation that the provision of ad-supported digital products and services at a zero price to users might constitute illegal predation.[29] That is a shocking suggestion to leave in the legislative history, in sweeping terms, for a plaintiff to cite and a court to read. Is the point really supposed to be that users must pay a fee for internet search, email, social networking, and so on, on pain of antitrust liability? Surely not. (And what about the many brick and mortar products supported by advertising rather than a fee?) If the revisions here are intended to create antitrust risk around this kind of thing—taking an antitrust sledgehammer to some common and pro-consumer features of the online economy—that outcome seems both profoundly mistaken and concealed from a casual reader of the legislation.

Refusal to deal

The guidance for refusal-to-deal cases would also eliminate existing standards without offering anything to replace them. The proposed language in the Tentative Recommendation would eliminate much of the doctrinal toolkit used by courts in such cases, including the termination of a previous profitable course of dealing (proposed Section 16731(a)) and the no-economic-sense test (proposed Section 16731(d)). I am not much of a fan of either test. But no affirmative guidance is given to replace these tools. So what does the Commission intend that a California court should do in a refusal-to-deal case? What obligations is a defendant supposed to infer if the statute is enacted?

The Tentative Recommendation might be understood to imply support for an intent-based standard for refusal to deal.[30] But, concretely, *what* test is intended? What is a court supposed to ask of a factual record? I strongly disfavor an intent-based standard, including because it would lead to divergent legal treatment of identical practices, and encourage inefficient gamesmanship by businesses. It would also violate the important general antitrust principle that liability depends on the effects of conduct, not on subjective occurrent thoughts of defendants.[31]

I recognize that the Commission clearly wants to broaden liability for refusals (my own view, for whatever it is worth, is that unconditional refusals are and should be *per se* legal, while conditional refusals should be scrutinized closely[32]), but the Commission avoids saying what the elements of

[29] Tentative Recommendation, 19.
[30] Tentative Recommendation, 17–18.
[31] *See*, *e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc) ("[I]n considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.").
[32] *See* Daniel Francis, *Monopolizing by Conditioning*, 124 Colum. L. Rev. 1917 (2024).

liability *are* intended to be. I do not think this is an appealing way to pursue law reform or to set California courts, businesses, or consumers up for success.

Harm in platform cases

I also caution against the proposed Section 16731(f). To be sure, *AmEx* is a poor decision (I have called it one of the Supreme Court's worst[33]), principally because the Court ignored clear evidence of net harm. (There is, alas, not much way to protect against such judicial practices.) But condemning a practice simply because it causes harm on one side of a platform business threatens seriously harmful—and anti-consumer—results. For example, suppose that a particular practice causes a small amount of harm to business customers on one side of a platform (*e.g.*, advertisers) but confers a much greater benefit, by any measure, upon consumers or workers on another side of the platform. Such a practice should surely be lawful. But a strict rule against cross-platform balancing would ensure that it was prohibited. As a result, I would not include this guidance.

Market power

The proposed Section 16731(i) is very odd, and the explanation in the Tentative Recommendation does not make much sense to me.[34] I think the underlying idea is to avoid the thoughtless or formalistic use of market share thresholds to test monopoly power, which is a sensible goal, but it does not seem to make much sense to deny any need to prove "any specific threshold of market power." The whole point of market and monopoly power is that they are thresholds, and they must of course be proved by a plaintiff.

Instead of the current text, I would simply say: "In any action under Section 16729, any assessment of monopoly or monopsony power shall be based on the totality of the evidence, including any relevant qualitative evidence."

Discrimination

I was puzzled by the proposed Section 16731(b). Sometimes it will surely be desirable for a plaintiff to plead and then prove that a defendant is treating one firm more favorably than another: for example, to demonstrate the existence of harmful conditional dealing.[35] Why would the Commission want to preclude a court from holding that such a finding was legally significant? I would remove this paragraph.

Summary

As a result, I would remove paragraphs (a), (b), (c), (d), (f), (g), and (i) from the judicial guidance.

[33] Salop et al., *Rebuilding Platform Antitrust*, supra note 11, at 883 (indicating that *AmEx* "may be the worst antitrust decision in many decades").
[34] Tentative Recommendation, 21.
[35] *See* Francis, *Conditioning*, *supra* note 32, at 1965–70 (defining "conditional dealing" under Section 2).

January 12, 2026

Sharon Reilly
Executive Director
California Law Revision Commission
Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

Re: Comments on Study B-750: Antitrust Law (Single-Firm Conduct and Mergers & Acquisitions)

Dear Executive Director Reilly and Commission Members,

On behalf of the Bay Area Council (BAC), I submit these comments regarding the Commission's tentative recommendations for Antitrust Law reform. While we support efforts to protect fair competition, we are concerned that the recommended changes would, if adopted, produce real-world harm for consumers and businesses.

California's technology industry supports nearly 1.5 million jobs and accounts for nearly 8 percent of the state's workforce.[1] The industry's economic impact totals more than $620 billion[2] and is nearly 19 percent of California's total Gross Regional Product.[3] Our Innovation Ecosystem, which includes companies large and small, higher education and our venture capital community, has helped propel the state to be the fourth-largest economy in the world.

Our state's existing laws have served California's citizens well for more than one hundred years. Our businesses have grown alongside the state, making California a world leader in many fields, from technology, healthcare and entertainment, to emerging fields such as artificial intelligence, quantum computing and others. As the Attorney General's Office can attest, our state and federal antitrust enforcers have used our current laws to great effect to ensure California consumers receive the best products, in the greatest number, at the lowest prices. California also enjoys robust private antitrust enforcement.

Unfortunately, we are deeply concerned that the current proposals, specifically the new Single-Firm Conduct rules and the proposed M&A oversight framework, will inadvertently stifle California's innovation ecosystem.

[1] CompTIA: State of the Tech Workforce (2024).
[2] California Governor's Office of Business and Economic Development: High-Tech Sector Overview
[3] California Foundation for Commerce & Education: The Role of the Tech Sector in Shaping California's Economy (2024).

Single-Firm Conduct

The proposed departure from the federal Sherman Act creates significant legal uncertainty for high-growth companies. The proposal to lower market share thresholds to establish dominance ignores the reality of dynamic tech markets where market share can shift rapidly due to innovation rather than exclusionary conduct.

Proposed changes would prevent courts from considering benefits in one market to offset harms in another. For innovation companies, integrated platforms often provide free or subsidized services to consumers funded by different revenue streams. Prohibiting this balancing threatens the very business models that have lowered costs for millions of Californians.

Further, allowing direct evidence of market power to bypass traditional market definition increases the risk of "false positives," where pro-competitive, aggressive competition is mischaracterized as predatory.

Mergers and Acquisitions (M&A)

M&A is a critical exit strategy for many California startups. The Commission's proposals risk closing this vital path to liquidity and reinvestment. Replacing the federal substantial lessening of competition standard with a broader appreciable risk standard creates a California-only hurdle that may discourage domestic investment. Startups rely on being acquired by larger firms to scale their technologies. Making this process unpredictable will drive venture capital to other states.

Additionally, a contemplated state-level pre-merger notification system adds significant administrative costs and delays, particularly for mid-sized innovation companies that do not meet federal thresholds but may be captured by proposed state-level triggers.

We respectfully urge the Commission to maintain antitrust rule alignment with federal precedent. To ensure that legitimate innovations are not punished, the "as-efficient competitor" and "rule of reason" balancing tests should be reincorporated.

Moreover, before finalizing these recommendations, we request a formal analysis of how these changes will impact venture capital flows and startup formation in California.

California’s leadership in global technology is built on a predictable legal environment that rewards success. We believe the current proposals, while well-intentioned, risk trading long-term innovation for short-term regulatory ease.

Sincerely,

Peter Leroe-Muñoz
Sr. Vice President, Technology + Innovation Policy

January 12, 2026

Sharon Reilly, Executive Director
California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

Re: Tentative Recommendation on Single Firm Conduct

Honorable Chairperson Simpson and Commissioners,

On behalf of the coalition of undersigned organizations, including consumer, labor, and small business advocates, we write to applaud the Commission on nearing the conclusion of its extensive study of California antitrust law. The Commission's study has produced eight working group memoranda informed by the expertise of over 40 academics and practitioners, both public and private. Over three years, the Commission's study has elicited over 110 letters from trade groups, businesses, advocacy organizations, and interested members of the public.

The Tentative Recommendation on Single Firm Conduct reflects the broad scope of that input, as condensed by capable staff at the direction of the Commission. We now encourage you to finally adopt the Tentative Recommendation as is, thereby passing the torch to the legislature for further consideration.

In particular, we applaud the Commission for arriving at a Tentative Recommendation that:

- Distinguishes California antitrust law from federal law, rejecting proposals that would have thwarted reform by importing federal jurisprudence that has fostered an environment of under-enforcement and exacerbated the costs of under-deterrence;

- Nevertheless draws on *existing* language and best practices under federal and state antitrust law, rather than creating a wholly new standard that would risk uncertainty for businesses and potentially chill growth and innovation;
- Recognizes the unique evidence of anticompetitive conduct by large digital platform companies in the technology industry, without creating an industry-specific approach to antitrust scrutiny;
- Recognizes that *unilateral* restraints of trade can occur where a single firm possesses market power comparable to multi-firm restraints of trade, reflecting a longstanding holding of the United States Supreme Court in *Copperweld v. Indep. Tube Corp.*, 467 U.S. 752 (1984);
- Expressly prohibits illegal *monopsony* power, reflecting the universal understanding that illegal concentrations of corporate power also harm wages, working conditions, and job mobility;
- Codifies the prevailing standard under federal and state antitrust law against "cross-market balancing," or the trading of anticompetitive harms in one market for theoretical benefits in a separate market, which otherwise threatens the administrability of antitrust with boundless judicial discretion to grant "get out of jail free" cards to illegal monopolists;
- Preserves core limiting principles, like the substantial foreclosure test for prohibiting exclusive dealing, contrary to remarks of some commenters who have mistakenly represented that small firms without market power to unreasonably restrain trade might become targets of litigation; and
- Provides extensive judicial guidance to provide clarity to courts and enhance the reach of California antitrust law to stem conduct like predatory pricing and anticompetitive refusals to deal, which frequently appear across markets but have been rendered all-but-impossible to enforce against.

From the outset of its multi-year study, the Commission was charged with determining the best path forward for strengthening California's antitrust law amid a historic affordability crisis, extraordinary wealth inequality within the nation's richest state, and concentrations of power affecting healthcare, tech, food and agriculture, entertainment, consumer retail and various other industries. What emerges in the Tentative Recommendation is a thoughtful, balanced, and thorough approach to ensuring that the Cartwright Act is capable of addressing anticompetitive conduct as it occurs in 21st Century markets. The Commission has found broad consensus in support of this approach and for the notion that California antitrust law is "broader in range and deeper in scope than the Sherman Act." *Cianci v. Superior Court,* 40 Cal.3d 903, 920 (1985).

Despite the consensus approach of the Commission, we acknowledge that there remain disagreements among those who have submitted comments to the Commission. Such disagreements are inevitable, have been heard repeatedly by the Commission, and need not delay the Commission's final vote. We are nevertheless committed to good faith engagement with lawmakers and other stakeholders to resolve any remaining concerns over the legislative process.

Sincerely,

American Economic Liberties Project
California Nurses Association
California Association of Micro Enterprise Opportunity (CAMEO) Network
Consumer Federation of California
Democracy Policy Network
Economic Security California Action
End Poverty in California
Institute for Local Self-Reliance
Public Good Law Center
Small Business Majority
Teamsters California
TechEquity Action
United Domestic Workers, AFSCME Local 3930
United Food and Commercial Workers, Western States Council
Writers Guild of America West

Comments of

TechFreedom

Bilal Sayyed

On

The California Law Revision Commission's

Tentative Recommendation of a Single Firm Conduct Statute

January 14, 2026

TABLE OF CONTENTS

INTRODUCTION

TechFreedom[1] welcomes the opportunity to comment on the California Law Revision Commission's ("CLRC" or "Commission") tentative recommendation ("Recommendation") for the adoption of a state antitrust law directed at single-firm conduct.[2] We believe that antitrust enforcement grounded in well accepted economic analysis is preferred to ex-ante regulation of firms. We accept that enforcement of the antitrust laws consistent with main-stream (and, at times, developing) economic theory and analysis is consistent with free market principles, and enhances consumer welfare and the welfare of all market participants in the long run. If done consistent with protecting the competitive process and competition, and not merely protecting competitors, antitrust law enforcement supports a dynamic and innovative economy.

For those reasons, TechFreedom has followed the proceedings of the Commission closely. We recognize and compliment the efforts of the Commission's staff in managing the request of the California Legislature that the Commission consider revisions to California's antitrust laws. However, we do not agree with the position of the Commission articulated in the Recommendation.

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[1] Founded in 2010, TechFreedom is a nonprofit, nonpartisan think tank based in the United States. Bilal Sayyed, the primary drafter of this comment, is Senior Competition Counsel of TechFreedom. He teaches antitrust law as an adjunct professor (or its equivalent) at Antonin Scalia Law School, George Mason University (2011-2018, 2021-current) and at Sandra Day O'Connor Law School, Arizona State University (2026). He is presently a counsel at a U.S. headquartered law firm and was previously a partner in two other U.S. headquartered law firms. He is also the host of the Rethinking Antitrust podcast. He was Director of the Office of Policy Planning at the United States Federal Trade Commission (April 2018–January 2021) and was an Attorney Advisor to FTC Chairman Timothy J. Muris (June 2001-August 2004). As Director, he participated in the drafting of the Department of Justice and Federal Trade Commission Vertical Merger Guidelines (2020) and the drafting of the Federal Trade Commission's Commentary on Vertical Merger Enforcement (2020). He also led the FTC's Competition and Consumer Protection Hearings for the 21st Century. He can be reached at bsayyed@techfreedom.org.

This comment expresses the views of the drafter, in his role at TechFreedom. None of the positions should be attributed to any clients of the drafter's law firm or of entities that help fund TechFreedom. TechFreedom receives funding from foundations, associations, and individual firms, some of whom may be affected (or whose members may be affected) by a state single-firm conduct law that adopts or approximates the Commission's tentative recommendation. No person outside of TechFreedom staff has reviewed this comment prior to its submission, or directed or influenced any position expressed in the comment.

[2] Tentative Recommendation, Antitrust Law: Single Firm Conduct, California Law Revision Commission, December 2025, #B-750 ("Recommendation").

The Commission has not established a credible case for finding federal anti-monopoly law so deficient that a state law that is significantly inconsistent with federal law should be adopted. The Commission's Recommendation directs California's state courts to develop a body of state law that differs substantially from federal anti-monopoly law, including the Supreme Court's interpretation of Section 2 of the Sherman Act. This is intentional but the rationale for doing so is not supported by substantial and credible economic or legal analysis. This differentiation is likely to cause harm to California consumers and to firms operating in California because it will require for many firms the adoption of operational inconsistencies between their operations within and outside of California. The "balkanization" of California's energy markets – and the associated higher prices (and supply shortfalls) for energy products – is an example of the negative effects of requiring compliance with different state and federal laws, where state law is substantially more restrictive. This alone should be sufficient reason to reject the tentative recommendation.

But there are other reasons. The Recommendation does not distinguish between unilateral conduct that is a legitimate, welfare-enhancing form of competition and conduct that is anticompetitive. This is the issue that the federal courts must address, and "[w]hether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern."[3] The proposed directives to the California courts on interpretation or requirements of the proposed statutory language makes recognizing and implementing such a distinction harder.

- By directing the courts to reject the analytic framework developed in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985) ("Aspen Ski") and *Verizon Communications v. Trinko,* 540 U.S. 398 (2004) ("Trinko") (and, indirectly, *Pacific Bell Telephone v. Linkline Communications*, 555 U.S. 438 (2009) ("Linkline")), and by allowing (and perhaps directing) the court to find market power – not monopoly power – at relatively low market shares for restraints of trade, the guidance will require the courts to substantially expand a "duty-to-deal" (including a duty-to-license) well beyond the requirements of federal law. (An expanded duty-to-deal, or duty-to-license, requirement may have significant national security implications, if, for example telecommunications companies or semiconductor companies are required to license to rivals, including foreign rivals operating in California.) In instances where a firm operates at two levels of a production and distribution channel - for example, as a licensor of intellectual property and a downstream competitor to its licensee – the guidance will likely revive so-called price-squeeze cases at the state level and require courts to determine a fair price (or fair royalty rate) for finding

[3] United States v. Microsoft, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc).

liability or dismissing claims. This may also arise in general duty-to-deal or duty-to-license claims.

- By directing the courts to reject the analytical framework of *Brooke Group v. Brown & Williamson Tobacco,* 509 U.S. 209 (1992) ("Brooke Group"), the guidance will lead to significant confusion on when price and non-price discounting practices are merely competition on the merits or harmful to consumers. The directed guidance prohibits the use of a good rule, consistent with general principles of monopolization law – that the exercise or maintenance of monopoly power depends on material impediments to entry or expansion – and that is reasonably administered by courts in matters that meet the facts of *Brooke Group*, in the service of preventing the use of *Brooke Group* in other discounting cases (e.g., first-dollar loyalty discounts, bundled discounts) where it might be improperly applied (and where it does not, in fact, need to be applied).

- By directing the courts to reject the principles of market definition and competitive effects analysis in *Ohio v. American Express,* 585 U.S. 529 (2018) ("AMEX"), it would force state courts to apply an alternative and incorrect analysis in a market that is properly characterized as a multi-side platform market for simultaneous transactions, in the service of preventing application of AMEX in markets where *AMEX*, by its own terms, does not apply. In doing so, it ignores the economic realities of multi-sided platforms that support simultaneous transactions and will affect their operational viability.

We recognize that the holdings of *Brooke Group* and *AMEX* may not be applicable to situations that are factually distinct from the facts of those matters, and that there are situations where they have been incorrectly applied. But the requirement that state law must differentiate itself from existing federal law under the same facts is likely to force companies to operate differently in California than they do in other states. This seems unlikely to create benefits, overall, for California's economy, and likely to create costs. Where situations are factually distinct, it is unclear why that distinction should require abandonment of existing law that is not, in fact, controlling.

Having reviewed and considered the Commission's Recommendation and its justification, **TechFreedom believes that the Commission should not move forward with the Recommendation.** We believe that the federal antitrust laws are sufficiently flexible to identify and prohibit single-firm conduct that has, or is likely to have, anti-competitive effects. There is no reason for state law that differs from federal law. The Commission should not advance a recommendation to the legislature at this time. The Commission might suggest that the Office of the Attorney General of California be given sufficient funds to initiate appropriate monopolization claims under the federal antitrust laws and, through amicus filings, intervene in private litigation to encourage further development of monopolization law, including in a direction considered more favorable to plaintiffs (if that is the position of the OAG). The Federal Trade Commission and the Department of Justice participate as amici on a regular basis; to the extent California believes existing federal law should be clarified or corrected, the Legislature ought to fund an aggressive, thoughtful amicus program.

In the alternative, because the narrative discussion of antitrust law included with the Recommendation is, at best, incomplete with respect to the application of the Sherman Act to single-firm conduct, and may reflect the bias of the Single Firm Conduct Working Group, **the Commission should reconsider whether a state single-firm conduct statute is necessary to maintain competitive markets in California and convene a more balanced body of experts to advise the Commission, and, ultimately, the legislature.** [4] Reconsideration is necessary because the Recommendation does not present a complete and balanced discussion of the scope of federal anti-monopoly law, and the need, in many cases, to analyze both exclusionary (harmful) and efficiency (beneficial) effects.

The incomplete analysis of the need for a state single-firm conduct law may have influenced the comments of the public, and, if carried over to a final recommendation, will certainly affect the Legislature's evaluation of any final recommendation from the Commission. In undertaking a reconsideration, the Commission must initiate a comprehensive and more balanced review of federal anti-monopoly law and the economic analysis of single-firm conduct. The membership of the Antitrust Modernization Commission ("AMC"), its inclusion of a variety of perspectives on antitrust law, its process of soliciting input and holding organized hearings meant to engage with experts, and its drafting of a consensus report (with some separate statements noting disagreement with particular conclusions) represent a good model for a balanced and thoughtful reconsideration of state and federal antitrust law.[5] In particular, in any reconsideration of its current Recommendation, the Commission

[4] While most of the contributors to the single-firm conduct working group are known to and respected by the drafter of this comment, they are also largely of the same general viewpoint and perspective on the question of whether the courts have interpreted the scope of Sherman Act Section 2 too narrowly or placed inappropriate or too high burdens on plaintiffs. The Commission should designate as expert advisors to the Commission persons with a variety of perspectives. We recognize that the Commission has not accepted the statutory language proposed by the single-firm conduct working group. However, the Commission has accepted certain of the single-firm conduct working group's recommendations by including language that would direct state courts to not follow certain requirements of federal anti-monopoly case law.

[5] The AMC was a bi-partisan body. Commissioners were appointed: four by the President, four by the House of Representatives and four by the Senate. The President was not allowed to appoint more than two commissioners associated with the same political party. The Commission here could appoint a similar body to support its work with respect to single-firm conduct.

must consider and explain the efficiency losses and possible consumer harm from the adoption of draft guidance that directs the California courts to reject certain requirements or holdings of the Supreme Court's decisions in *AMEX, Trinko*, *Brooke Group,* and *Aspen Ski.*

We mean no disrespect to the Commission, the staff, or the many participants to the Commission's process. However, as the Commission must recognize, it is important that any recommendation to the Legislature be supported by a balanced, unbiased, and well-considered review of the scope, strengths, and limitations of federal monopolization law. The Commission's Recommendation does not presently meet that requirement, and, if enacted into law, would be a significant step backwards in distinguishing anticompetitive conduct from competitively neutral or competitively beneficial conduct.

I. Federal Antitrust Law Protects Firms and Persons Operating or Trading in California

There should be no confusion as to the reach of the federal antitrust laws. The prohibitions in federal antitrust law, including the Sherman Act's prohibition on unreasonable restraints of trade and monopolization, the Clayton Act's prohibitions on anticompetitive mergers, exclusive dealing and tying, and the Robinson-Patman Act's prohibition on price discrimination, can be enforced by private persons and firms (profit and non-profit) in California, and by the government of California, including for conduct having anticompetitive effects only in California. The interstate commerce requirement of the federal antitrust laws is easily met because most commerce or trade occurs in a manner sufficient to allow application of the federal antitrust laws to conduct with only intrastate effects (or where only intrastate effects are alleged).[6]

II. Government Success in Monopolization Cases Is Not "Rare"

The Commission supports the Recommendation for a California state single-firm conduct provision by claiming "successful challenges by the government against market malfeasants ... occur" but they are "rare and require considerable resources to surmount the hurdles favoring the status quo" and, perhaps unintentionally, suggests such successful cases occur only every 25 years or so.[7] The Commission's position is incorrect.

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[6] See Summit Health v. Pinhas, 500 U.S. 322 (1991); Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976); United States v. ORS, Inc., 997 F.2d 628, 629 n.4 (9th Cir. 1993) ("[t]o meet the effect on commerce test, the [plaintiff] need only allege that [defendant's] *business activities* have a substantial effect on interstate commerce, not the more particularized showing that the alleged illegal conduct has a substantial effect on interstate commerce.") (emphasis added).

[7] Recommendation at 7, citing U.S. v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) and United States v. Google, 2025 WL 2523010 (D.D.C. Sept 2, 2025).

Recent significant monopolization wins by the government, at different stages of trial, include: *United States v. Google*, 2025 WL 3496448 (D.D.C Dec. 5, 2025) (search remedy order aligned substantially with the government's request[8]); *United States v. Google, LLC*, 778 F. Supp. 3d. 797 (E.D. Va. 2025) (Google Ad-Tech liability); *U.S. v. Apple*, 2025 WL 1829127 (D. N.J., June 30, 2025) (denial of Apple's motion to dismiss); *U.S. v. Visa*, 788 F. Supp. 3d 585 (S.D.N.Y., 2025) (denial of Visa's motion to dismiss); *FTC v. Deere*, 2025 WL 1638474 (N.D. Ill., June 9, 2025) (denial of Deere's motion for judgment on the pleadings); *FTC v Amazon*, 2024 WL 4448815 (W.D. Wa., Sept. 30, 2024) (denial of Amazon's motion to dismiss monopolization claim); *United States v. Google, LLC*, 747 F. Supp. 3d 1 (D.D.C. 2024) (Google search liability); *FTC v U.S.A.P.*, 2024 WL 2137649 (S. D. Tx., May 13, 2024) (denial of USAP's motion to dismiss); *FTC v. Syngenta Crop Prot. AG*, 711 F. Supp. 3d 545 (M.D. N.C., 2024) (denial of Syngenta's motion to dismiss); *FTC v. Surescripts*, 665 F. Supp. 3d 14 (D.D.C. 2023) (summary judgment in the FTC's favor, finding that defendant had monopoly power); *FTC v. Shkreli*, 581 F. Supp. 3d 579 (S.D.N.Y., 2022) (judgment in favor of FTC); *McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015)) (affirming Federal Trade Commission opinion finding illegal monopolization by McWane).[9] (Private plaintiffs also have success.[10]) The agencies may also obtain settlements or other relief in significant monopolization cases in lieu of litigation (or after initiating litigation).[11]

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[8] DOJ Press Release, *Department of Justice Wins Significant Remedies Against Google* (Sept. 2, 2025).

[9] Many of the matters cited were initiated during President Trump's first administration and continued during President Biden's administration.

[10] *See, e.g.,* In re Google Play Store Antitrust Litigation, 147 F.4th 917 (9th Cir. 2025); Duke Energy Carolinas, LLC v. NTE Carolinas II, 111 F.4th 337 (4th Cir. 2024) (campaign of exclusionary acts); ViaMedia v. Comcast Corp., 951 F.3d 429 (7th Cir. 2020) (refusal to deal); Wacker v. JP Morgan Chase & Co., 678 F. Appx. 27 (2d Cir. 2017) (market manipulation); In re Actos End Payer Antitrust Litig., 848 F.3d 89 (2d Cir. 2017) (fraudulent FDA filing); Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264 (6th Cir. 2015) (tying); Z.F. Meritor v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012) (market share discounts); Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038 (9th Cir. 2008) (exclusive dealing, tying); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3d Cir. 2007) (reneging on FRAND commitment); Spirit Airline, Inc. v. Northwest Airlines, Inc., 431 F.3d 917 (6th Cir. 2005) (predatory pricing); Conwood Co. v. United States Tobacco Co., 290 F.3d 768 (6th Cir. 2002).

[11] See, e.g., Press Release, FTC Reaches Proposed Settlement with Surescripts in Illegal Monopolization Case (Jul. 27, 2023) and Stipulated Order and Permanent Injunction, FTC v. Surescripts (D.D.C. Aug. 9, 2023); Press Release, FTC Charges Broadcom with Illegal Monopolization and Orders the Semiconductor Supplier to Cease its Anticompetitive Conduct (July 21, 2021) and Analysis of Agreement Containing Consent Order to Aid Public Comment ("AAPC"), BROADCOM, FTC File No. 181-0205 (June 30, 2021); Administrative Complaint, ILLUMINA/PACIFIC BIOSCIENCES OF CALIFORNIA, FTC File No. 191-0035 (Dec. 19, 2019) (monopoly maintenance through acquisition of nascent competitor) and *Statement of Deputy Director, FTC Bureau of Competition, Regarding the Announcement that Illumina Inc. Has Abandoned its Proposed Acquisition of Pacific Biosciences of California* (Jan. 3, 2020); FTC Press Release, *Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It*

While the government does lose some of the monopolization matters it litigates[12] the complete record suggests the government is not simply pursuing easy-to-win matters, that the burden on the plaintiff is not too high, and that application of the Sherman Act is sufficiently broad that it does not constrain the government (or other plaintiffs) from reaching conduct that is likely to be anticompetitive.[13]

Any fair reading of the enforcement record of the government shows that Section 2 of the Sherman Act remains a significant check on unilateral anticompetitive conduct.

Illegally Maintained Its Monopoly of Specialty Drug Used to Treat Infants (Jan. 18, 2017); Press Release, *Supplier of High-Performance Polymer for Medical Implants Settles FTC Charges that it Monopolized Sales to World's Largest Medical Device Makers* (Apr. 27, 2016) and AAPC, VICTREX/INVIBIO, FTC File No. 141-0042 (Apr. 27, 2016); DOJ Press Release, *United Airlines Abandons Attempt to Enhance its Monopoly at Newark Liberty International Airport* (Apr. 6, 2016); Press Release, Cardinal Health Agrees to Pay $26.8 Million to Settle Charges It Monopolized 25 Markets for the Sale of Radiopharmaceuticals to Hospitals and Clinics (Apr. 20, 2015) and Statement of the Federal Trade Commission, CARDINAL HEALTH, FTC File No. 101-0006 (Apr. 17, 2015); Press Release, *FTC Settlement with IDEXX Restores Competition in the Market for Diagnostic Testing Products Used by Pet Veterinarians* (Dec. 21, 2012) and AAPC, IDEXX LABORATORIES, FTC File No. 101-0023 (Dec. 21, 2012); FTC Press Release, *Nation's Largest Pool Products Distributor Settles FTC Charges of Anticompetitive Tactics* (Nov. 21, 2011) and AAPC, POOL CORPORATION, FTC File No. 101-0115 (Nov. 21, 2011); Press Release, *Justice Department Reaches Settlement with Texas Hospital Prohibiting Anticompetitive Contracts with Health Insurers* (Feb. 25, 2011) (unlawful maintenance of monopoly power); Press Release, *FTC Challenges Intel's Dominance of Worldwide Microprocessor Markets* (Dec. 16, 2009) and AAPC, INTEL CORP., FTC File No. 061-0247 (Aug. 4, 2010); Press Release, *FTC Bars Transitions Optical, Inc., from Using Anticompetitive Tactics to Maintain its Monopoly in Darkening Treatments for Eyeglass Lenses* (Mar. 3, 2010) and AAPC, TRANSITIONS OPTICAL, FTC File No. 091-0062 (Mar. 3, 2010); Administrative Complaint, UNION OIL COMPANY OF CALIFORNIA, FTC File No. 011-0214 (Mar. 3, 2003) (alleging company gained monopoly power by defrauding the California Air Resources Board) and AAPC, UNOCAL (Jun. 10, 2005) (prohibiting enforcement of patent rights).

[12] *See, e.g.,* Fed. Trade Comm'n v. Meta Platforms, 2025 U.S. Dist. LEXIS 234933 (D.D.C., Dec. 2, 2025); Fed. Trade Comm'n v. Qualcomm, 969 F.3d 974 (9th Cir. 2020) (reversing district court decision finding liability); Rambus Inc. v. Fed. Trade Comm'n, 522 F.3d. 456 (D.C. Cir. 2008) (FTC's opinion finding liability rested on alternative grounds, one of which did not show a monopolization violation); United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003).

[13] The FTC does not enforce the Sherman Act directly, but violations of the Sherman Act are violations of the FTC Act. In each of the referenced FTC matters, the FTC pled illegal monopolization.

III. The Commission's Recommended Statute Creates a Broad Duty-to-Deal, Is Unnecessary as to Monopolization, and Unwisely Prohibits Cross-Market Balancing of Competitive Effects

A. The Commission's Proposed Statutory Language

The Commission's Recommendation is that the Cartwright Act be amended to add a new §16729. It would read as follows:

> (a) It is unlawful for one or more persons to act, cause, take or direct measures, actions, or events:
>
> (1) In restraint of trade; or
>
> (2) To monopolize or monopsonize, to attempt to monopolize or monopsonize, to maintain a monopoly or monopsony, or to combine or conspire with another person to monopolize or monopsonize in any part of trade or commerce.
>
> (b) As used in this section, "restraint of trade" shall include, but not be limited to, any actions, measures, or acts included or cognizable under Section 16720, whether directed, caused, or performed by one or more persons.
>
> (c) Anticompetitive effects in one market from the challenged conduct may not be offset by purported benefits in a separate market; and the harm to a person or persons from the challenged conduct may not be offset by purported benefits to another person or persons.

B. Proposed Statutory Language Creates a Broad "Duty-to-Deal" For Firms Unlikely to Have Monopoly Power or Any Credible Determination of Market Power

Section 1 of the Sherman Act and the Cartwright Act include a prohibition on joint conduct that unreasonably restrains trade.[14] Horizontal or vertical agreements that restrain trade unreasonably are reachable under either. Under some conditions, vertical agreements can restrain trade or can be exclusionary. Examples of such relationships include tying arrangements, exclusive dealing relationships, de-facto exclusive dealing relationships derived from loyalty programs, including loyalty rebates and quantity discounts, or discounts based on percentage requirement contracts. If such conduct unreasonably

[14] Cal. Bus. & Prof. Code §16720 (defining "trust" to include combinations of two or more persons to "create or carry out restrictions in trade or commerce"); §16726 (making every trust, except as provided elsewhere in the statute, "unlawful, against public policy and void").

restrains trade, it is prohibited by the Cartwright Act and Section 1 of the Sherman Act. If such conduct is exclusionary, it can be reached by Sherman Act Section 2.

The Commission, at draft §16729(a)(1), recommends the adoption of a new prohibition on single-firm conduct that unreasonably restrains trade.[15] The adoption of a single-firm restraint of trade prohibition rejects the federal courts' adoption of the *Colgate* doctrine over 100 years ago. In *United States v. Colgate,*[16] the Supreme Court recognized the general right of a person to exercise its own independent judgment or discretion as to parties with whom it will deal.[17] While this right is not unqualified,[18] it extends to a firm with monopoly power.[19] The *Colgate* doctrine is not offensive to existing California law: "California courts have adopted the *Colgate* doctrine for purposes of applying the Cartwright Act."[20]

The sole effect of draft §16729(a)(1) is to overturn or narrow the *Colgate* doctrine and create, under some potentially very broad and unclear conditions, a duty-to-deal (or duty-to-license). By adopting the language of Sherman Act Section 1's more expansive "restraint of trade" prohibition, draft §16729(a)(1) significantly narrows the right of a firm to "refuse to deal with whomever it likes ... independently." Proponents of §16729(a)(1) may argue that a refusal to deal will only be an unreasonable restraint if a firm has monopoly power. This is certainly not true under federal law where conduct that does not meet the requirements of a Section 2 claim can be successfully challenged under Section 1; tying and exclusive dealing are examples. Even that is a significant limitation of the existing right, which does not require a monopolist to deal with rivals or other persons, absent some additional factor.

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[15] Comments to the recommendation of proposed §16729(a)(1) indicate that the text's reference to restraints of trade should be read as limited to only those restraints that are unreasonable; this is consistent with the treatment of restraints by agreement. *See generally* In re Cipro Cases I & II, 61 Cal. 4th116, 146 (2015) ("the Cartwright Act … carr[ies] forward the common law understanding that only unreasonable restraints of trade are prohibited").

[16] 250 U.S. 300 (1919).

[17] *See also* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984) ("A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.")

[18] Aspen Ski, 472 U.S. at 599; Lorain Journal Co. v. United States, 342 U.S. 143, 153 (1951).

[19] Aspen Ski, 472 U.S. at 599 ("Ski Co., therefore, is surely correct in submitting that even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor.")

[20] Beverage v. Apple, Inc., 320 Cal.Rptr.3d 427, 437 (Cal. App. 2024), collecting California state cases.

The Commission cites *Copperweld Corp. v. Indep. Tube Corp.*,[21] for the proposition that a single firm exercising market power could restrain trade, suggesting this is an issue federal law has missed. The Commission does not note that the Supreme Court rejected applying Sherman Act Section 1 to such conduct for what seems a sensible reason:

> It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.[22]

The Commission is clearly setting up draft §16729(a)(1) to reach refusals to deal by a firm with market power and not monopoly power (which itself does not trigger a duty-to-deal or duty-to-license under Section 2). The Commission's recommendation goes further, as it can be read to limit the right of firms without any appreciable market power, to decide, independently, with whom it will deal. The judicial guidance included in draft §16731 appears to allow for a finding of illegality even in the absence of a finding of market power by a defendant.[23] This significantly expands the existing limitations of the *Colgate* doctrine,

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[21] 467 U.S. 752, 775 (1984). The Commission cites *Copperweld* for this proposition at footnotes 94 and 101 of the Recommendation. The Commission also cites *American Needle, Inc. v. Nat'l Football League* for this proposition, but fails to note that the Court indicated the defendant was not a single entity, but individual firms acting in concert. 560 U.S. 183, 186 (2010).

[22] Id. at 767-68 (omitting footnote).

[23] *See* proposed text of new Bus. & Prof. Code §16731 (i) ("California law does not require a finding of any of the following to establish liability [including that] a single firm has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act *or any specific threshold of market power*.") (emphasis added). Further, the comments to the proposed §16731's limitation on reference to federal case law that defines monopoly power using market share thresholds cite Fisherman's Wharf Bay Cruise v. Superior Court, 114 Cal. App. 4th 309, 339 (2003) favorably; there, in analyzing an exclusive dealing claim under the Cartwright Act, the court found that foreclosure of 20% of a relevant market "was enough to pursue an action against monopolist practices." This is confusing and may be read to suggest a 20% market share is sufficient to enable a firm to act with monopoly power.

We note generally that market power or monopoly power must be durable to raise justiciable concerns of anticompetitive behavior. Market power or monopoly power that is transient, or subject to effective challenge, and, as such, significantly may expand the conditions under which a firm may have a duty-to-deal (or duty-to-license).

Restrictive vertical policies adopted unilaterally – restrictions on distribution by territory, customer or brand, and restrictions on price and non-price terms, restrictions on licensing intellectual property – will fall within the scope of this provision. On the Commission's Recommendation, such policies will be subject to challenge and prohibition without a showing of monopoly power or any credible level of market power. (This is similarly true for policies adopted jointly, with upstream or downstream trading partners.) **This is a significant expansion of antitrust law, and directly inconsistent with federal law.** Even if a litigated claim fails, the adoption of a single-firm restraint of trade prohibition will lead to substantial litigation over independent decision not to deal with another firm.

C. Proposed Statutory Language is Unnecessary as to Monopolization

The Recommendation at §16729(a)(2) for a new anti-monopoly prohibition includes language consistent with Section 2's prohibition on monopolization, attempted monopolization, and conspiracy to monopolize.[24] It also includes a prohibition on monopoly maintenance, and includes a prohibition on acquisition or maintenance (or attempted acquisition) of monopsony power, and on combinations acting to acquire or maintain (or attempting to acquire) monopsony power.[25] These provisions are likely uncontroversial (without reference to the interpretative judicial guidance) but are unnecessary. Federal law already recognizes illegal monopoly maintenance as a violation of Section 2, although it is not specifically referenced in the statute.[26] (**The reference to maintenance of monopoly**

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is not "power" the antitrust laws should be concerned about. Transient market power, or even transient monopoly power, is consistent with competition on the merits and dynamically competitive markets.

[24] We do not understand the need for the highlighted phrasing in the proposed new statute: **to act, cause, take or direct measures, actions, or events.** It seems unnecessary and if it has no clear purpose is likely to be a source of confusion. §2 of the Sherman Act reads, in its entirety: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." 15 U.S.C. §2.

[25] Monopsony power is the exercise of monopoly power by a buyer or group of buyers.

[26] *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966) (the offense of monopolization requires proof of two elements including "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident"); United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (affirming district court's decision with respect to monopoly maintenance claim); United States v. Google, 747 F. Supp. 3d. 1, 107 (D.D.C. 2024) ("the court concludes that Google's exclusive distribution agreements have contributed to Google's maintenance of its monopoly power in two relevant markets").

and monopsony power in the proposed statute should be clarified to require harm to competition for an act to be illegal.) Federal law also recognizes that Section 2 applies to illegal monopsony, although monopsony is not referenced in the text of Section 2.[27]

We discuss the interpretative judicial guidance at proposed new §16731 with respect to the interpretation of the §16729 and §16730 in Section IV of this comment.

D. Proposed Statutory Language Unwisely Rejects Cross-Market Balancing of Competitive Effects

The Commission's Recommendation of new §16729(c) appears to affirmatively preclude courts from balancing anticompetitive effects in one market, no matter how small, with pro-competitive effects, no matter how large, in another market.[28] This is consistent with general principles of federal antitrust law and seems unnecessary to enshrine in a statute. (We believe this general principle needs substantial reform.[29]) But it also removes discretion from a court to engage in cross-market balancing when cross-market balancing may be sensible. While it is difficult to identify exact principles that should govern when courts (or agencies) should exercise their discretion in accepting such a trade-off, it is welfare decreasing to preclude such balancing in all instances, and there will likely be significant negative welfare effects if balancing is precluded in all situations. From personal experience, the possibility of

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[27] *See, e.g.*, Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co., 549 U.S. 312, 320 (2007) ("large-scale buying … may not … be used to monopolize"). The federal courts also recognize that buyers, acting jointly on the buy-side, can unreasonably restrain trade, in violation of Section 1. *See, e.g.*, Mandeville Island Farms, Inc. v. American Crystal Sugar, Co., 334 U.S. 219 (1948) (three refiners of sugar beets entered into a price-fixing agreement with respect to the prices to be paid to growers of sugar beets).

[28] We say appears to because the draft refers to "purported" benefits in another market. If this simply means that the courts cannot take account of, or should discount, benefits that are speculative or not shown to some level of certainty, we agree that such benefits cannot usually be used to offset more certain harms. (We would allow uncertain but large benefits in one market to trump certain but small harms in another market.) However, we note that it is rare that harms are proven to a high level of certainty; rather, they are uncertain or reflect some level of probability. If the Recommendation is expressing skepticism towards benefits that are generally accepted as associated with conduct that limits or prevents access to an asset (such as a refusal to license intellectual property) or customer (such as exclusive dealing contracts) or where markets are appropriately separately defined as one side and another of an intermediating platform, we disagree that such skepticism is warranted, and that skepticism should not be adopted into judicial guidance.

The identification, evaluation and probabilistic determination of benefits and harm from conduct or a practice under review should be symmetric. Anti-monopoly law should analyze the probability and magnitude of potential or actual harms and benefits symmetrically. A bias against the measuring or acceptance of efficiencies may, over time, lead to less efficient firms, and less efficient industry.

[29] John M. Yun, *Reevaluating Out-of-Market Efficiencies in Antitrust*, 54 ARIZONA STATE LAW JOURNAL 1261 (2022).

cross-market balancing acts as a discipline on prosecuting weak monopolization cases and monopolization cases that would expend scarce agency or judicial resources on conduct that, on balance, across markets (sometimes interconnected markets) is welfare-increasing overall.

It also does not reflect what experienced practitioners know – measurements of harm and benefit can be imprecise and may vary based on assumptions. Small errors that drive or determine the harm calculation can have significant effects. We believe that the federal antitrust agencies at least sometimes (and maybe more frequently) do not challenge conduct that causes a small harm in one market but that also creates substantial benefits in another market, in an exercise of prosecutorial discretion. The Commission's recommendation to prohibit of out-of-market balancing, if adopted, may pressure the California Attorney General to exercise its prosecutorial discretion more cautiously and proceed to challenge conduct that is, overall, welfare enhancing.

The prohibition would also prevent balancing harms and benefits across separate but interdependent markets involving multi-sided platforms. We recognize that the Commission wishes to narrow and perhaps eliminate the influence of the market definition adopted in *AMEX*. As we discuss below, we think this is a mistake, as it does not recognize the business and economic realities governing the operation of platforms that act as transaction platforms for simultaneous transactions. We also do not believe it is economically sensible to direct state courts to ignore the impact of the elimination of cross-market effects in markets that are interdependent, as in some (and maybe all) multi-sided platforms, even where each side of the platform is properly considered a separate market.

The anti-balancing language goes further: as drafted, a textual interpretation precludes intra-market balancing: the balancing of harm to one person against the benefits to another person in the same market. Proposed §16729(c) states, in part: "the harm to a person or persons from the challenged conduct may not be offset by purported benefits to another person or persons." The effect of this language may be to prevent a court's consideration of intra-market efficiencies in its analysis of single-firm conduct unless the defendant can show that every person potentially affected by the defendant's conduct is better off.[30] As a matter of proof, this will be impossible.

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[30] The Commission's comments indicate that balancing within a market is acceptable. However, the additional language prohibiting balancing across persons undercuts this assertion: "Subdivision [§16729](c) clarifies that anticompetitive effects may only be offset by benefits in the same market and *to the same persons* originally affected by the anticompetitive conduct." (emphasis added).

The Commission's failure to support the claim that "courts sometimes permit an anticompetitive effect in one market to be offset by a pro-competitive benefit in another"[31] shows how infrequent such cross-market balancing occurs in monopolization cases. But, precluding it by statute removes from courts the ability to exercise their considered discretion in situations where it might be justified.

We note too that the Commission's citation to the Supreme Court's view fifty-six years ago in *Topco* that courts (or maybe just the then nine justices of the Court) have an "inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another section" reflects lack of familiarity with the reality of improved models of measuring / predicting competitive effects of certain practices.[32] Legislatures should consider proposed statutes based on a current understanding of empirical and theoretical economics, and not on assumptions made over fifty years ago. Where it is useful for a court to exercise some discretion, and balance across markets, they should be allowed to; it does not seem to happen frequently, it is probably very rare, but under some conditions it might be appropriate. The Commission should not recommend precluding balancing in all instances. Nor should it attempt to define the criteria under which a court can use discretion.

IV. Draft Judicial Guidance at §16731 Rejects & Would Reverse Supreme Court Case Law That Protects the Competitive Process and Consumers

The judicial guidance at §16731 requires that state courts interpreting the statute depart from the analytic framework that the U.S. Supreme Court applied in *Ohio v. American Express*, 585 U.S. 529 (2018) (analysis of illegality of conduct by a two-sided transactional platform requires analysis of the effect of conduct on both sides of the platform); *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004) (antitrust law does not generally require a duty-to-deal); *Brooke Group v. Brown & Williamson Tobacco*, 509 U.S. 209 (1993) (single product primary line injury (or predatory pricing claim) requires plaintiff to show defendant priced below an appropriate measure of cost and has the ability to recoup losses); and, *Aspen Skiing v. Aspen Highlands*, 472 U.S. 585 (1985) (refusal-to-deal claim may require showing defendant's deviation from prior course of conduct, may require a showing

[31] Recommendation at 12.

[32] Recommendation at 12, note 104, discussing United States v. Topco Assocs. Inc., 405 U.S. 596 (1972).

that the defendant dealt with others but not the plaintiff, and/or in the alternative, that the conduct makes no economic sense).[33]

Although not recognized in the Recommendation, the holdings in *Trinko* and *Brooke Group* support the limitations on recognizing an illegal "price squeeze" articulated in *Pacific Bell Telephone v. Linkline Communications*, 555 U.S. 438 (2009) (where there is no duty to deal at the wholesale level and no predatory pricing at the retail level, a firm is not required to price both of these services in a manner that preserves its rivals' profit margins). Directing state courts to ignore the holdings in *Trinko* and *Brooke Group* has the effect of negating the decision in *Linkline*, and reviving price-squeezes as an antitrust claim at the state level.

The Commission's dismissal of these cases is not supported by any analysis or discussion of the benefits or costs of an alternative rule. Nor does the Commission provide any guidance as to what an alternative might be. Both are significant failures of the Commission's Recommendation. While we recognize that each of these cases have been criticized for making it hard for a plaintiff to obtain relief under Section 2, the Supreme Court's adoption of the relevant rules has a basis in protecting the competitive process rather than individual competitors. Disregard of these opinions and requiring the courts to develop new frameworks for evaluating certain conduct, where those frameworks clash with federal law, ignores the Supreme Court's emphasis on "clear rules in antitrust law."[34] We discuss each in turn.

A. Ohio v. American Express

In cases where a defendant's business is a multi-sided platform, the Commission's draft judicial guidance at §16731(f) directs the California state courts to: (i) not require harm to competition on more than one side of a multi-sided platform, or (ii) not require that the harm to competition on one side of a multi-sided platform outweighs any benefits to competition on any other side of the multi-sided platform, to show liability under the new single-firm conduct statute. The Commission describes this as a response to the decision in *Ohio v. American Express*, which it thinks is a "confusing precedent as to the amount and type of evidence needed to show harm in cases involving two sided platforms" and "used assumptions about the interconnectedness of the two sides that may not translate to market realities in other circumstances." [35]

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[33] We believe the draft judicial guidance directs state courts not to follow, rather than may choose not to follow, the cited decisions. Certain elements from various federal antitrust cases "do not need to be proved to establish liability." This is not an optional direction but a command. Recommendation at 14-15.

[34] Pacific Bell Telephone v. Linkline Communications, 555 U.S. 438, 452 (2009) ("courts are ill-suited to act as central planners, identifying the proper price, quantity, and other terms of dealing").

[35] Recommendation at 20.

The Commission misreads *AMEX*, and, acting on that misrepresentation, its interpretive guidance may solidify an incorrection approach to market definition and competitive effects analysis in matters involving multi-sided platforms. The Commission also misreads *AMEX* by failing to notice its limited scope. In *AMEX*, the Court "analyze[d] the two-sided market for credit card transactions as a whole" – and required the plaintiff to show an aggregate or net accounting of harms and benefits across the two sides of the single market to determine the reasonableness of the restraint at issue.[36] It did not require a plaintiff to show harm on both sides of the platform.

The Court's holding is clearly limited to two-sided transaction platforms that facilitate a single simultaneous transaction.[37] That the "assumptions of interconnectedness … may not translate to market realities in other circumstances" is correct.[38] However, the *AMEX* Court made clear to limit its holding to multi-sided platforms acting to facilitate a simultaneous transaction; it did not adopt a rule for situations other than that. Where the platform is not acting to facilitate a simultaneous transaction, a lower court is under no compulsion to accept *AMEX's* requirement to evaluate and "net" the competitive effects on each side of the platform. By its own language, *AMEX* does not apply beyond its setting; a court may or may not adopt it depending on its consistency with the business realities of another multi-sided platform. The Commission fails to explain why the *AMEX* holding is inaccurate for the market at issue in *AMEX* and its guidance would preclude the use of *AMEX* in a multi-sided platform market facilitating a simultaneous transaction.[39]

It is not clear from the Commission's Recommendation what is confusing about *AMEX*. But the Commission's discussion at footnote number 147 perhaps identifies it: "fundamental antitrust law precludes justifying harmful restraints in one market with justifications from outside the harmed market."[40] *AMEX* does nothing inconsistent with this "fundamental" point. *AMEX* did not involve two relevant markets, but one market with two-sides (that facilitated a simultaneous transaction). The Court was clear on this in *AMEX*: "For all these reasons, in two-sided transaction markets, only one market should be defined." … Accordingly, we will analyze the two-sided market [singular] for credit card transactions as a whole."[41] That is, as a **single** market. There was no cross-balancing. There was no

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[36] AMEX, 585 U.S. at 547.

[37] AMEX, 585 U.S. at 545.

[38] Recommendation at 20.

[39] Joshua D. Wright and John M. Yun, *Burdens and Balancing in Multisided Markets: The First Principles Approach of Ohio v. American Express*, 54 REV. OF IND. ORG. 717 (2019).

[40] Citing U.S. v. Topco, 405 U.S. 596 (1972), a district court, and a collection of information.

[41] AMEX at 456-457.

requirement to show harm on both (or all) sides of a multi-sided platform. The Court was also clear to distinguish multi-sided platform markets that fulfilled a simultaneous transaction from those that did not.

The Commission appears confused as to the scope or requirements of *AMEX*. It should not rely on that confusion to preclude the use of the holding of *AMEX* in *AMEX*-like situations. It should not forestall the development of competitive effects analysis in a two-sided platform market that may not be facilitating a single, simultaneous transaction based on its misreading of *AMEX*. The federal courts are not so clearly struggling with market definition and competitive effects analysis to require California courts to adopt a rule that does not fit every two-sided platform market and that would have the effect of stifling application of economic analysis to the definition of markets in matters involving platforms.

We have no doubt that the lower courts will sometimes misinterpret and misapply *AMEX*. This is not a feature (or bug) limited to antitrust cases, or to cases attempting to apply *AMEX*; it is a feature (or bug) of lower courts' interpretation of Supreme Court opinions generally. But the Commission's Recommendation (even if in final form it reflects a correct understanding of *AMEX*) would likely stifle development in the state courts while courts and economists are still exploring proper market definition and competitive effects analysis in matters involving multi-sided platforms or markets that are separate but interconnected. And it is clearly inconsistent with *AMEX*, which is not clearly incorrect and to many is correctly decided.

The Commission should abandon its draft judicial guidance with respect to market definition and competitive effects analysis in multi-sided platform markets.

B. Brooke Group v. Brown & Williamson Tobacco

The Commission's draft judicial guidance at §16731(c) would not require the defendant's price for a product or service to be below any measure of the costs to the defendant for providing the product or service to show liability for conduct alleged to violate the anti-monopoly provisions of the recommended new §16729/30. Nor would it require, in a claim of predatory pricing, that the defendant be able to recoup the losses it sustains from below-cost pricing of the products or services at issue (§16731(g)).

These two provisions would reverse the requirements of Brooke Group because they "have proven difficult to satisfy" and "reflect outdated thinking that pricing predation was irrational and [that] competition would enter the market during the recoupment period." Further, the requirements "make little sense when many digital products are offered for free or with very low marginal costs as the requirements immunize virtually all prices from predation claims." They also "fail to recognize that prices set about the defendant's costs can be anticompetitive."[42]

While we believe that the extension of *Brooke Group* to matters alleging harm from multi-product discounting practices or loyalty discount practices may not always applicable, we disagree with the Commission that *Brooke Group's* requirements should be abandoned even in cases alleging predatory pricing for a single product.

We note first that the recoupment requirement in a predatory pricing case is consistent with the general rule that a firm cannot likely obtain, maintain or exercise monopoly power for any material period if it cannot exclude firms from the relevant market (or from expanding in the relevant market). *Brooke Group's* requirement of recoupment is simply an application of the general principle that a monopolist must be able to exclude entry (or expansion), or entry (or expansion) of a sufficient scale, to obtain, exercise, or maintain monopoly power. A firm can only recoup its losses if it can exclude future competition, either fully or partially. Finding illegal monopolization where entry is easy is not consistent with the case law on monopolization, for monopoly power is "the power to control prices or exclude competition."[43] A monopolist cannot control prices if it cannot exclude competition. Abandoning recoupment abandons this general principle.

The Commission, however, makes recoupment unnecessary because predation, it says, can occur even if the defendant is not selling below cost.[44] Perhaps true, but nothing the Commission cites shows this is true. The same case – *ZF Meritor* – the Commission cites for this proposition recognizes that "it is beyond the practical ability of a judicial tribunal to ascertain whether above-cost pricing is anticompetitive *without courting intolerable risks of chilling legitimate price-cutting.*" Thus "to hold that the antitrust laws protect competitors from the loss of profits due to above-cost price competition would, in effect render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result."[45] **But the Commission recommends that state courts and Californians accept this perverse result.** And, for no apparent reason, as the *ZF Meritor* case shows.

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[42] Recommendation at 19.

[43] United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956).

[44] Recommendation at 19, footnote 143 (citing ZF Meritor, LLC v. Eaton Corp. 696 F.3d 254, 273 (3rd Cir. 2012)).

[45] ZF Meritor, LLC v. Eaton Corp. 696 F.3d 254, 273 (3rd Cir. 2012) (internal citations to *Brooke Group* and other cases omitted) (emphasis added).

In *ZF Meritor*, the court rejected the defendant's effort to require the plaintiff to show that the prices charged in its long-term agreements were predatory (when taking account of certain rebates). The court rejected this approach to determining the legality of the defendant's long-term agreements and evaluated them under the more qualitative analysis of exclusive dealing agreements. The court noted that "[a]lthough the Supreme Court has created a safe-harbor for above-cost discounting, it has not established a *per se* rule of non-liability under the antitrust laws for all contractual practices that involve above-cost pricing."[46] The court rejected the defendant's argument that its contracts must be evaluated under *Brooke Group.* Instead, it evaluated the plaintiff's claim alleging harm from above-cost long term agreements as a de facto exclusive dealing claim. The court found sufficient evidence to support the jury's verdict of Section 2 liability.

Where the *Brooke Group* test may not be applicable or administrable – bundled discounts (or pricing), loyalty discounts (or pricing), other multi-product and/or multi-period discounting (or pricing) programs – the courts can evaluate the plaintiff's claims as an exclusionary act (e.g., as an exclusive dealing requirement) rather than as predation claim subject to *Brooke Group*, or a modified *Brooke Group* test. *ZF Meritor* – an important case cited by the Commission – illustrates that an above-cost claim can be pled as exclusionary conduct. Many (and maybe all) above-cost pricing and discounting cases can be pled as exclusion/exclusive dealing cases and not subject to *Brooke Group's* price-cost test. This is how the FTC pled its monopolization claim against *Surescripts*.[47] However, the rule of *Brooke Group* is a sensible test for identifying predatory pricing cases involving a single product that are anticompetitive and distinguishing them from pro-competitive price discounting. The alternative creates an administrative morass and runs the significant risk of finding competition that is "on the merits" illegal.[48]

We refer the Commission to former Justice Stephen Breyer's admonition about accepting a rule that would allow a predatory pricing claim for above-cost pricing (as the Commission's Recommendation would do):

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[46] ZF Meritor at 278.

[47] Complaint, Fed. Trade Comm'n v. Surescripts, Cas. No. 1:19-cv-01080-JDB (Apr. 17, 2019) (alleging that Surescripts pricing for loyal customers was above cost, but exclusionary). After the FTC won summary judgment on the question of whether Surescripts had monopoly power, Surescripts settled. Fed. Trade Comm'n v. Surescripts, 665 F. Supp. 3d 14 (D.D.C. 2023) (summary judgment in the FTC's favor, finding that defendant had monopoly power); Press Release, *FTC Reaches Proposed Settlement with Surescripts in Illegal Monopolization Case* (Jul. 27, 2023) and Stipulated Order and Permanent Injunction, Fed. Trade Comm'n v. Surescripts (D.D.C. Aug. 9, 2023).

[48] *See, e.g.,* Utah Pie Co. v. Continental Baking Co*.* 386 U.S. 685 (1967).

> If a dominant firm's costs are lower than its competitors, if could use an above cost price cut to drive out competition. ... Why should the antitrust laws not forbid this potentially harmful behavior? Indeed, economists have identified this type of pricing behavior (and certain other forms of above-cost pricing behavior) as potentially harmful. Nonetheless, while technical economic discussion helps to inform the antitrust laws, these laws cannot precisely replicate the economists' (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts, and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. ... A price cut that ends up with price exceeding total cost ... is almost certainly moving price in the right direction (towards the level that would be set in a competitive marketplace)."[49]

The position of the Single-Firm-Conduct Working Group that "the continued usefulness of the federal predatory pricing rule is questionable" because there are products and services with "very low or zero marginal costs" does not support discarding *Brooke Group* for predation claims that do not have those same characteristics.[50] The position of the Working Group is itself questionable and not universally held.[51] It is also not necessary to condemn *Brooke Group* because it may not address anticompetitive above-cost pricing or discounting. It may simply require courts to apply, or not apply, *Brooke Group* where the relevant facts align, or do not align, with the facts of *Brooke Group*. Digital markets with low to zero marginal costs may make the below-cost requirement of *Brooke Group* in applicable or unworkable, but antitrust claims can be pled as exclusion or de-facto/de-jure exclusive dealing claims as in *ZF Meritor* and *Surescripts* (which involved digital (or electronic) records and transactions).

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[49] Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 233-34 (1st Cir. 1983).

[50] Recommendation at 19, footnote 142.

[51] See, e.g., Timothy J. Muris and Joseph V. Coniglio, *What Brooke Group Joined Let None Put Asunder: The Need for Price-Cost and Recoupment Prongs in Analyzing Digital Predation*, THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 35 (2020). Mr. Muris is a former Chairman of the Federal Trade Commission (June 2001-August 2004), a former Director of the FTC's Bureau of Competition (1983-1985), and a former Director of the FTC's Bureau of Consumer Protection (1981-1983). The working group's limited discussion of this issue is an example of where a less homogenous working group might have improved the recommendations or observations on the scope of federal anti-monopoly law.

For these reasons, the Commission should abandon its draft guidance directing state courts not to apply Brooke Group (or its recoupment and below-cost requirements).

C. Verizon Communications v. Law Offices of Curtis V. Trinko & Aspen Skiing v. Aspen Highlands

Judicial Guidance at §16731(a), (b) and (d) direct state courts to disregard the holdings in *Trinko* and *Aspen Ski* because they "restrict[ ] the universe of actionable refusal-to-deal claims" and "leave[] a large body of potential rivals and victims of anticompetitive refusals [to deal] with no remedy."[52] The Commission adopts the position of the 2020 Majority Staff Report and "recommends that [the California Legislature] … overrid[e] judicial decisions that have treated unfavorably essential facilities and refusal to deal-based theories of harm."

The Commission clearly intends its proposed state law to impose a duty-to-deal; what is unclear is how broadly this duty would reach. We do not support the Commission's position on *Trinko* and *Aspen Ski* and do not understand what, if anything, the Commission intends in their place. We have some questions:

- Does the Commission anticipate state courts will rely on the *essential facilities* doctrine to limit a duty-to-deal?[53] If so, it should say so, so it can obtain comment on the doctrine.[54] We disagree with adoption of the essential facilities doctrine[55], but it offers some limitation on a duty-to-deal requirement.
- Can an owner of an asset that is essential or subject to forced-sharing obtain an injunction for another party's misuse or partial misappropriation of the asset?
- Must an owner of an essential asset, or an asset subject to a duty to deal, maintain/improve that asset, and/or any assets that, while not essential, are complementary to the essential asset?
- If something other than "essentiality" is sufficient to require a forced dealing, what are those factors?
- Where there is a duty-to-deal, but the parties cannot agree on price or non-price terms of a deal, under what conditions, if any, is any obligation to deal extinguished?

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[52] Recommendation at 17-18.

[53] A leading case on the essential facilities doctrine is MCI Communications v. AT&T, 708 F.2d 1081 (7th Cir. 1983). The Supreme Court has never accepted the doctrine.

[54] See, e.g., Abbott (Tad) Lipsky, *Essential Facilities Doctrine: Access Regulation Disguised as Antitrust Enforcement*, THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY (2020); Abbott B. Lipsky, Jr. and J. Gregory Sidak, Essential Facilities, 51 STANFORD LAW REVIEW 1187 (May 1999).

[55] Bilal Sayyed, *Revival of the Essential Facility Doctrine Is Not Essential; Joint Agency Guidelines Will Better Strengthen Monopolization Law*, CPI ANTITRUST CHRONICLE (Apr. 2023).

- Where the parties cannot reach agreement, does the Commission anticipate court involvement (or arbitration) in setting price and non-price terms?
- If "course-of-conduct" is irrelevant, is the Commission recommending an intent-based standard?
- Does the Commission recommend the courts guarantee the seller/provider/licensor a certain return on its forced dealing?
- Does any duty-to-deal requirement apply to the licensing of, or access to, intellectual property?
- Does the Commission recommend that courts distinguish between unconditional and conditional refusals to deal?[56] Under what circumstances? And how? What makes a conditional refusal to deal?
- Under what conditions can a seller/provider/licensor be freed from an existing, forced relationship? Under what conditions, if any, can the duty to deal be extinguished?
- Does the duty to deal require dealing with "all comers" or are there conditions under which a late arriving party can be turned away?
- Can different parties to a forced dealing receive different terms? If so, under what conditions?
- Has the Commission considered the short-term and long-term costs (including incentive effects) associated with forced sharing of an asset?

D. Pacific Bell Telephone v. Linkline Communications

The Commission does not directly express hostility to the opinion in *Pacific Bell Telephone v. Linkline Communications*, but the Court relied on its earlier opinions in *Trinko* and *Brooke Group* to dismiss the plaintiff's price-squeeze claim. No *Trinko* and no *Brooke Group*, no *Linkline*, and a revival of the price-squeeze claim. A price squeeze case requires a court to "act … like a rate-setting regulatory agency, the rate setting proceedings of which often last for several years."[57]

A price-squeeze claim raises questions similar to those raised in the earlier discussion of predation claims and duty to deal claims.

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[56] See Daniel Francis, *Monopolizing by Conditioning*, 124 COLUMBIA LAW REVIEW 1917 (2024).

[57] Town of Concord v. Boston Ed., 915 F.2d 17, 25 (1st. Cir. 1990), quoted in J. Gregory Sidak, *Abolishing the Price Squeeze As a Theory of Antitrust Liability*, 4 JOURNAL OF COMPETITION LAW AND ECONOMICS 279 (2008); Eric Hovenkamp and Herbert Hovenkamp, *The Viability of Antitrust Price Squeeze Claims*, 51 ARIZONA LAW REVIEW 273 (2009).

- What is the right price (and other terms) at which to grant access to an asset?
- What is the appropriate profit margin for a downstream firm that relies on a downstream competitor for access to a necessary upstream input?
- How would revival of the price squeeze doctrine affect an integrated upstream monopolist's willingness to supply its downstream competitor with an important input?

E. Other Judicial Guidance at §16731

The Commission recommends at §16731(d) that courts not require a plaintiff show (or a court find) that a defendant's conduct makes no economic sense apart from its tendency to harm competition. The Commission's rationale for this position is that it is difficult to implement this test for anticompetitive single-firm conduct because of multiple motivations, and a need to distinguish legitimate profits from profits made by eliminating competition. We disagree with the Commission's understanding of the no-economic sense test and its general requirements.

Greg Werden, a scholar of antitrust law, defines the no-economic sense test as follows:

> If conduct allegedly threatens to create a monopoly because of a tendency to exclude existing competitors, the test is whether the conduct likely would have been profitable if the existing competitors were not excluded and monopoly was not created. If conduct allegedly maintains a monopoly because of a tendency to exclude nascent competition, the test is whether the conduct likely would have been profitable if the nascent competition flourished and the monopoly was not maintained.[58]

The Commission's explanation may be specious. It is clear from the entirety of the Recommendation that the Commission wishes to reverse through the adoption of a state law the "high value that [the Supreme Court has] placed on the right to refuse to deal with other firms." *Aspen Ski*, 472 U.S. at 601. The no-economic sense test respects this position but also articulates the conditions that may support a court imposing a duty to deal or finding a refusal to deal illegal. The test has been adopted by at least four circuit courts of appeal.[59]

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[58] Gregory J. Werden, Identifying Exclusionary Conduct Under Section 2: The "No-Economic Sense" Test, 73 ANTITRUST L.J. 413, 417 (2006).

[59] *See* St. Luke's Hosp., v Promedica Health Syst., Inc., 8 F.4th 479 (6th Cir. 2021); Fed. Trade Comm'n v. Qualcomm, 969 F.3d 974, 973-94 (9th Cir. 2020); Novell, Inc., v. Microsoft Corp., 731 F. 3d 1064 (10th Cir.

This acceptance suggests the no-economic sense test is (relatively) easy, not difficult, to implement and that it addresses competing impulses in antitrust law – the right of a firm not to do business with rivals and the desire to limit the anticompetitive consequences, if any, of that right. Under the no-economic sense test, the core question for the court is whether a defendant with monopoly power can show a legitimate business reason for a refusal to deal. It is a constraint on the general principle that a firm has no duty-to-deal with another. It is consistent with differentiating competition on the merits with anticompetitive conduct. The no-economic sense test can be used more broadly than to evaluate the legality of refusal to deal cases, but its most important contribution is to provide a framework for qualifying the right of a business to deal only with those it wishes to deal with.

The only plausible reason for directing a court to not consider the economic sense of a monopolist's refusal to deal is that it allows the court to impose or recognize a general duty to deal. **If the Commission wishes to recommend this – that the right not to deal is not extended to a monopolist (or, by the terms of the Recommendation, to a firm with market power) – it ought to be clear about it, and not hide it from the legislature. This appears to be the sole or primary purpose of the Recommendation.**

The Commission recommends at §16731(e) that courts not require quantitative evidence for proof of anticompetitive harm. We agree. But we believe the recommendation should be extended and not require quantitative proof of procompetitive benefits or efficiencies. Requirements to show harm and benefits should be symmetrical.

The Commission recommends at §16731(i) that courts not require a showing that a "single firm or person has or may achieve a market share at or above a threshold recognized under Section 2 of the Sherman Act or any specific threshold of market power." We believe this is a mistake. Market share screens are a valuable indicator of likely harm from horizontal and vertical agreements (or single-firm restraints) that exclude a competitor or that eliminate a competitor (e.g., a joint venture). Absent such screens, courts may be overburdened with cases unlikely to have merit. We also believe that the courts should require that a plaintiff show that any market power of the defendant be durable; courts should not be concerned about the temporary or transient exercise of market power.

The Commission recommends at §16731(j) that its proposed statute be interpreted to not require "a definition of relevant market where there is direct evidence of market effects or power." We do not object to this in principle but note that courts may overstate what constitutes direct evidence of market effects or power. Additionally, whether market power

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2013); Trace X Chem., Inc., v. Canadian Indus., Ltd., 738 F.2d 261 (8th Cir. 1984); William Inglis & Sons Baking Co., v. ITT Cont'l Baking Co., 668 F.2d 1014 (9th Cir. 1981).

is durable, or whether effects are, or are likely to be material, can turn on an understanding of whether there are firms that can expand, enter, or reposition in response to non-competitive pricing or attempts at foreclosure. Defining a relevant market may be helpful in identifying firms that are, and are not, realistic new entrants or capable of repositioning. That so few antitrust cases do not define a relevant market should suggest to the Commission that defining a relevant market is a useful analytic tool and should not casually be foresworn. In short, we believe that market definition remains an important component of competitive effects analysis that should not easily be ignored by courts.

V. The Commission Has Not Established That Federal Law is Insufficient To Protect Against Anticompetitive Single-Firm Conduct & Neglects The Welfare Effects of Repudiating Certain Supreme Court Precedent

The Commission has not established that "the antitrust laws have not kept up with modern developments" nor does it support its reference to "the widespread recognition of the increasing inadequacy of state and federal antitrust laws to assure free and fair competition."[60] We recognize that this belief exists, but this view is subject to significant dispute by experienced practitioners, enforcers, and academics. **A better reading of the enforcement record is that Section 2 of the Sherman Act remains a significant check on unilateral anticompetitive conduct.**

- "Beginning with the D.C. Circuit's landmark en banc decision in *Microsoft*, there have been [32] important federal court of appeals decision affirming judgments of Section 2 liability or allowing Section 2 claims to proceed [in the period up to early 2020]. ... In addition to these 32 federal court of appeals decisions, there have been scores or hundreds of federal district court decisions similarly allowing monopolization cases to proceed or finding liability at trial."[61]

"We believe that, as currently interpreted by the courts and employed by the antitrust agencies, the Sherman Act's prohibition is adequate to the task of preserving competition in the digital marketplace. Monopolization law has evolved to balance the real threats to consumers from the accrual of monopoly power through means other than competition on

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[60] Recommendation at 5.

[61] Statement of Daniel Crane, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, to the Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, U.S. House of Representatives (Apr. 17, 2020) at 2-3.

the merits and the harms that consumers also suffer when firms pull their competitive punches for fear of antitrust liability and treble damages."[62]

- "Over its century-long history, commentators have from time-to-time questioned whether antitrust could prevent and remediate harms posed by new types of industries and markets. Despite these doubts, antitrust has proven to be flexible enough to adapt to and handle new and challenging issues. ... [The *U.S v. Microsoft*] case teaches that under current antitrust law a dominant provider must maintain its position through legitimate competition on the merits, rather than through exclusionary conduct that has little or no purpose beyond disadvantaging rivals."[63]
- "[E]xisting antitrust statutes are optimal for addressing monopolistic conduct and potentially anticompetitive transactions. While some aspects of prevailing antitrust doctrine could be improved, the better approach is to rely on the federal courts to bring about such improvements as they adjust doctrines, in light of economic learning and market developments, through the incremental, common-law process."[64]
- "The antitrust laws as written are adequate to prevent anticompetitive monopolization, exclusionary conduct, and other harmful vertical conduct."[65]

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[62] Statement of Joshua D. Wright (former Commissioner, Fed. Trade Comm'n), James C. Cooper, and John M. Yun to the Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, U.S. House of Representatives (Apr. 17, 2020) at 6.

[63] Statement of Maureen Ohlhausen (former Commissioner and Acting Chair, Fed. Trade Comm'n) to the Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, U.S. House of Representatives (Apr. 17, 2020) at 4.

[64] Statement of Thomas A. Lambert, Wall Family Chair in Corporate Law and Governance, Univ. of Missouri Law School, to the Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, U.S. House of Representatives (Apr. 17, 2020) at 2.

[65] Joint Submission of Antitrust Economists, Legal Scholars, and Practitioners to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets, to the Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, U.S. House of Representatives, at 8 (May 15, 2020) (comments of 23 such individuals, including, among others, James Rill, former Assistant Attorney General, Antitrust Division, Department of Justice; Robert Willig, former Deputy Assistant Attorney General for Economics, Antitrust Division, Department of Justice; Deborah A. Garza, Chair, Antitrust Modernization Commission, and former Acting and Deputy Assistant Attorney General, Antitrust Division, Department of Justice; Maureen K. Ohlhausen, former Acting Chairman and Commissioner, Federal Trade Commission; Joshua D. Wright, former Commissioner, Federal Trade Commission; Abbott Lipsky, former Deputy Assistant Attorney General, Antitrust Division, Department of Justice and former Acting Director, Bureau of Competition, Federal Trade Commission; and Michael R. Baye, former Director, Bureau of Economics, Federal Trade Commission.)

The Commission in its draft directive guidance that California courts not follow the holdings of *Trinko* and *Brooke Group*, relies, in part, on the recommendations of the 2020 Majority Staff Report and Recommendations of the House Judiciary Committee on its Digital Markets Investigation ("2020 Report").[66] The 2020 Report recommended, among other things, "strengthening Section 2 of the Sherman Act, including by introducing a prohibition on abuse of dominance and clarifying prohibitions on monopoly leveraging, predatory pricing, denial of essential facilities, refusals to deal, tying and anticompetitive self-preferencing and product design" and "overriding problematic precedents in the case law."[67] Additionally, the 2020 Report recommended that Congress overrule, by statute, *AMEX, Linkline, Trinko* and *Brooke Group*, among others.[68]

The Commission's Recommendation aligns with many of the 2020 Report's concerns and proposals, including its proposed guidance that would direct state courts not to follow *AMEX, Trinko, Brooke Group,* and, by implication, *Linkline.* But the parallels between the 2020 Report and the Commission's Recommendation are not supportive of the Recommendation, but indicative of its weakness. The 2020 Report was subject to significant criticism as to the thoroughness and thoughtfulness of its conclusions and recommendations. We believe these criticisms are applicable to the Commission's Recommendation.

- The doctrinal reversals sketched ... at the Report's end have major implications for the entire U.S. antitrust system, not only its treatment of tech giants. These changes require deeper analysis and discussion. In this sense, the Report's final pages are not a conclusion but instead a beginning – the first draft of an agenda for new deliberations that consider the doctrinal, procedural, and institutional foundations of the U.S. antitrust regime. The alternative is that this was a list of long held aspirations of various groups but not thought out, in part because these are complex issues and to give them the treatment that they deserve would have required a series of hearings and submissions like the [Antitrust Modernization Commission].[69]

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[66] Recommendation at 17 (footnote 133), 19 (footnote 142).

[67] Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary (2020) at 20-21.

[68] Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary (2020) at 20-21.

[69] William E. Kovacic and D. Daniel Sokol, *Understanding the House Judiciary Committee Majority Staff Antitrust Report*, CPI ANTITRUST CHRONICLE (Special Edition) (Jan. 2021) at 18. Mr. Kovacic is a former Chairman (2008-2009), Commissioner (2006-2011) and General Counsel (2001-2003) of the Federal Trade Commission.

- The Report ... falls far short of its stated objectives of examining ... whether dominant firms are engaging in anticompetitive conduct and whether existing antitrust laws are adequate to address those issues. ... The Report seems to rest on the unstated assumption that aggressive conduct by a dominant firm to gain market share and revenues is anticompetitive when it harms rivals. That premise is inconsistent with existing law, and the Report nowhere addresses the difficult policy issues that need to be addressed in order to determine whether existing law is adequate or some other law would be better. Nor does the Report address the important issue of economic efficiency, which is central to antitrust law and policy and to economic welfare. ... The Report could have made a valuable contribution if it had addressed the issues raised by conduct that both excludes rivals and creates efficiencies [but] it ignored the efficiency part of the story and elided the critical antitrust question.[70]

- [T]he Staff Report ... exclud[ed] alternative perspectives and procompetitive justifications that might have led it to more balanced findings, conclusions, and recommendations.[71]

To the extent the Commission relies on the 2020 Report as supporting its case specific "reversals" or the insufficiency of existing federal anti-monopoly law, that reliance is misguided and misplaced. The criticisms of the 2020 Report are applicable to the Commission's Recommendation, as the Recommendation (including the underlying memos cited throughout) show no apparent inquiry into, and make no effort to understand and explain, the potential welfare effects of a "directed" reversal or abandonment of the holdings or requirements of *AMEX, Trinko, Brooke Group, Aspen Ski,* and, by implication, *Linkline.* The various working group reports are insufficient for this task, and the Commission's reliance on the working group reports appears selective.

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[70] Douglas A. Melamed, *A Missed Opportunity*, CPI ANTITRUST CHRONICLE (Special Edition) (Jan. 2021) at 7, 10. Mr. Melamed is a former Acting Assistant Attorney General for Antitrust, Department of Justice and Principal Deputy Assistant Attorney General for Antitrust, Department of Justice (1997-2000). Mr. Melamed was also a member of the Single-Firm Conduct Working Group.

[71] Andrew I. Gavil and Angel Prado, *Antitrust is Poised for Change: How Far Will it Go?*, CPI ANTITRUST CHRONICLE (Special Edition), 40 (Jan. 2021). Mr. Gavil is a former Director, Office of Policy Planning, Federal Trade Commission (2013-2014).

The Commission's assertion that the federal antitrust laws are insufficient to address anticompetitive single-firm conduct are inconsistent with the earlier but still relevant Report of the Antitrust Modernization Commission ("AMC") (April 2007).[72] The AMC was formed in 2002 by the Congress for the purpose of "exam[ing] whether the need exists to modernize the [federal] antitrust law and to identify and study related issues."[73]

In submitting its 2007 Report to the President and the Congress, the AMC summarized its conclusions as follows:

> [T]he Report judges the state of the U.S. antitrust laws as sound. Certainly there are ways in which antitrust enforcement can be improved. ... On balance, however, the Commission believes that U.S. antitrust enforcement has achieved an appropriate focus on (1) fostering innovation; (2) promoting competition and consumer welfare, rather than protecting competitors, and (3) aggressively punishing criminal cartel activity, while more carefully assessing other conduct that may offer substantial benefits. The laws are sufficiently flexible as written, moreover, to allow for their continued modernization as the world continues to change and our understanding of how markets operate continues to evolve through decisions by the courts and enforcement agencies. ... **[T]he Commission does not believe that new or different rules are needed to address so-called new economy issues. Consistent application of the principles and focus noted above will ensure that the antitrust laws remain relevant in today's environment and tomorrow's as well**.[74]

Notably, three of the four Supreme Court cases the Commission finds sufficiently objectionable to direct state courts not to follow – *AMEX* (2018), *Trinko* (2004), *Brooke Group* (1992) and *Aspen Skiing Co.* (1985) – had been decided at the time of the AMC's review of the antitrust laws (2004-2007).

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[72] *See, e.g.*, Comments by Deborah A. Garza, former Chair, Antitrust Modernization Commission, to the Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, U.S. House of Representatives (Apr. 20, 2020).

[73] Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, 116 Stat. 1856, 1857 (2002).

[74] Antitrust Modernization Commission Report and Recommendation, at i-ii (April 2007), https://digital.library.unt.edu/ark:/67531/metadc1228317/m1/3/ (emphasis added).

VI. Conclusion

We believe the Commission's Recommendations are not well considered. If adopted, they create a substantial divergence between federal and state law. They reject fixed rules that seem well-suited for certain conduct because they are administrable and understandable by courts and businesses: (i) a requirement for a below-cost price and ability to recoup in predatory pricing cases (where recoupment is, in practice, simply an analysis of the presence of factors impeding entry or expansion, and not a quantitative calculation); (ii) respecting the business realities in defining a market in the case of a multi-sided platform that intermediates simultaneous transactions; and (iii) limiting, to a substantial extent, any requirement that a firm deal with another and on what terms it must deal.

We do not doubt that simple rules can be misapplied into contexts in which they are not applicable. We have no doubt that simple rules may miss some anticompetitive conduct. But, the first limitation is easily resolved by courts, and the Commission has not shown that the second limitation is significant.

What the Commission recommends neglects former Justice Stephen Breyer's admonition that antitrust law must be administrable, justiciable, and understandable:

> We shall take account of the institutional fact that antitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. They must be administratively workable and therefore cannot always take account of every complex economic circumstance or qualification. ... They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings.[75]

The Commission Recommendation does not meet this test. It should be abandoned.

Respectfully submitted,
___________/s/___________
Bilal Sayyed
Senior Competition Counsel
TechFreedom
bsayyed@techfreedom.org
1500 K Street NW
Washington, DC 20005
Date: January 14, 2026

[75] Concord v. Boston Edison, 915 F.2d 17, 21 (1st Cir. 1990).

December 3, 2025

California Law Revision Commission
925 L Street, Suite 275
Sacramento, CA, 95814

Subject: Antitrust Proposals Harm California Consumers, Businesses, and Economy

Dear Chair and Honorable Members of the California Law Revision Commission,

We, the undersigned organizations and businesses, write to express our continued concerns regarding the California Law Revision Commission's (Commission) proposed changes to California's antitrust laws. We believe these proposals will cause significant harm to California's economic foundations and undermine California's innovation infrastructure at a time when global competitors are aggressively working to pull talent, investment, and emerging industries away from the state.

California's long-standing antitrust framework, aligned with the federal system, has successfully protected consumers while enabling businesses of all sizes to innovate, grow, and compete. The Commission's proposals depart from these evidence-based principles in several troubling ways:

Penalizing Success; Not Harmful Conduct:

The proposals equate market share with anticompetitive harm, disregarding that consumer preference often reflects legitimate competitive success. In healthy, competitive markets, a company's market share often reflects nothing more than consumer preference for a business that has offered a superior product or service. Under the proposals, even widely used, pro-consumer tools like loyalty programs could be treated as evidence of unlawful "dominance," abandoning decades of jurisprudence that targets harmful conduct rather than popularity or size achieved through legitimate competitive merit.

Prohibiting Everyday, Pro-Consumer Business Practices:

The Commission's framework would cast unwarranted suspicion on standard business practices that directly benefit consumers. Common strategies such as volume discounts, exclusive distribution/licensing, or integrated product ecosystems would be presumed unlawful regardless of their pro-competitive or pro-consumer effects. This would force companies to question routine, efficiency-enhancing activities and could lead to higher prices, reduced functionality, and fewer choices for Californians. Innovations that clearly improve care, such as companion diagnostics that help physicians identify the patients most likely to benefit from a company's treatment, could likewise be chilled or deterred.

Disregarding Effective Existing Law:

The current antitrust system has a robust and evolving body of case law that already addresses harmful conduct, including predatory pricing, exclusionary behavior, and anticompetitive bundling. Federal authorities are actively enforcing these laws, with nearly half the S&P 500 by market cap currently under scrutiny. The Commission has identified no concrete gap in existing law that would justify adopting an entirely new, untested state regime.

Threatening California's Investment Climate and Start-up Ecosystem:

The proposals introduce broad and costly legal risks that could deter companies, especially startups, from locating or investing in California. Early-stage firms may struggle to raise capital if routine go-to-market strategies such as partnering with larger companies, offering introductory pricing, or integrating with complementary platforms are treated as presumptively illegal. Investors may simply take their capital to states with clearer, more predictable rules. No other state has adopted a similar framework, and efforts to import European-style "abuse of dominance" standards have previously met strong, bipartisan opposition.

Cross-Sector Risks and Loss of Global Leadership:

Beyond individual firms, the proposals would destabilize the interconnected ecosystem that has made California the global hub of innovation and entrepreneurialism. The state's leadership across technology, digital services, healthcare and life sciences, clean energy, entertainment, and advanced manufacturing depends on collaboration, integration, and continuous innovation. By treating routine cross-sector partnerships, data sharing, product integration, and exclusive licensing as presumptively unlawful, the proposals would inject uncertainty into every major industry driving California's economy. This also risks ceding the state's competitive edge to other states and countries, particularly China, that are actively pursuing policies to attract California's talent, capital, and advanced industries.

For these reasons, we respectfully urge the Commission to reconsider and refrain from advancing proposals that would weaken the very principles of competition they seek to protect. California's innovative economy depends on a clear, predictable, evidence-based antitrust framework that focuses on actual consumer harm, not arbitrary thresholds, presumptions, or regulatory overreach.

We appreciate your consideration and stand ready to engage further as the Commission evaluates this important issue.

Sincerely,

Bay Area Council
California Building Industry Association
California Chamber of Commerce
California Life Sciences
Chamber of Progress
Civil Justice Association of California
Los Angeles County Business Federation
San Mateo County Economic Development Association
San José Chamber of Commerce

12.3.25

California Law Revision Commission
925 L Street. Suite 275
Sacramento, CA, 95814

Re: Concerns Regarding Proposed Single Firm Conduct Recommendation

Dear Chair and Honorable Commissioners,

We write on behalf of California Life Sciences (CLS), representatives of the life sciences industry, which directly employs over 400,000 Californians. CLS represents over 1,300 entities including pharmaceutical, biotechnology, medical technology, and academic research institutions across California committed to advancing innovation and improving health outcomes. The life sciences ecosystem consistently delivers life-saving treatments for patients around the world.

CLS wishes to share our concerns regarding the California Law Revision Commission's (Commission) proposed Single Firm Conduct recommendation presented in staff Memo 2025-44 and urge the Commission to not pursue antitrust policies that may compromise California's life sciences ecosystem. We have significant concerns that several elements of the recommendation would unintentionally disrupt critical components of California's innovation ecosystem, jeopardize patient access to medical advances, and create substantial uncertainty for companies engaged in research, development, and production in the state.

Below, we outline the most consequential issues for the life sciences community.

Overly Broad Definitions of "Restraint of Trade" and "Monopolization" Will Chill Innovation and Collaboration

The proposed language defines "restraint of trade" expansively and imposes liability for actions "cognizable" under existing law without requiring proof of market power, anticompetitive intent, or market effects. Life sciences research depends on partnerships between biotech, academic institutions, diagnostics companies, and manufacturers. These collaborations frequently involve coordinated conduct, exclusive arrangements, data-sharing, and resource pooling that could be misconstrued as restraints under the proposed framework.

Standard clinical trial partnerships, licensing discussions, co-development agreements, and supply-chain coordination could become litigation-exposed, discouraging companies from locating studies, manufacturing operations, or research and development (R&D) activities in California.

Prohibiting Courts from Weighing Competitive Harms and Benefits Will Produce Unintended and Harmful Outcomes

The proposal's prohibition on considering pro-competitive benefits in adjacent or complementary markets represents a significant departure from established antitrust principles. For decades, courts and enforcers have evaluated conduct by examining both its potential harms and its efficiency-enhancing benefits, recognizing that modern markets, particularly in life sciences, are highly interdependent.

In our sector, research and development, manufacturing, distribution, hospital contracting, and payer negotiations operate within a complex and interconnected ecosystem. Actions taken in one segment frequently produce beneficial effects in another, including lower costs, greater supply reliability, or improved patient access. Under the proposed standard, however, a contracting, distribution, or pricing practice that reduces costs for providers or improves affordability for patients could still be deemed unlawful if it produces even a marginal negative effect in any separate market segment.

Such a rigid approach would discourage efficiency-enhancing behavior, increase operational and administrative costs, and ultimately limit patient access to life-saving and life-improving therapies. Preventing courts from weighing real-world trade-offs, many of which directly benefit patients, risks producing precisely the opposite outcomes that antitrust laws are intended to achieve.

Eliminating Market Definition Requirements when Assessing Anticompetitive Conduct Will Create Significant Uncertainty for Innovators and Businesses

The proposal would further allow courts to find market power or anticompetitive conduct without first defining the relevant market whenever "direct evidence" is available. This change is especially concerning for the life sciences industry, where market structures are uniquely shaped by federal regulatory frameworks, scientific progress, and the specialized nature of treating complex or rare conditions.

FDA exclusivity periods, breakthrough designations, orphan drug pathways, and the inherently limited populations served by rare-disease therapies often result in small, highly specialized markets. As a result, companies may hold large market shares not because of exclusionary behavior, but because they have successfully delivered an innovative treatment where no alternatives previously existed.

Removing the requirement to define a relevant market before assessing conduct would create substantial uncertainty for innovators who operate in these highly specialized spaces. Firms could face allegations of market power or anticompetitive behavior simply because of scientific success, rather than any unfair or exclusionary tactic. This uncertainty may deter investment in high-risk research and development in areas of critical unmet need, to the detriment of patients who rely on continued biomedical innovation.

Broad New Standards for "Exclusionary Conduct" Threaten Standard Commercial Practices

The proposal lists several factors that courts may not require to establish exclusionary conduct, removing many guardrails that prevent false positives in antitrust enforcement. Common life sciences practices such as volume-based discounts, differentiated contracting, promotional pricing, and adjusting distributor relationships could be challenged as exclusionary even when economically justified.
As a result, pharmaceutical manufacturers, diagnostics firms, and device companies may face litigation simply for offering discounts, altering long-standing distribution pathways, or withdrawing from inefficient arrangements.

Life Sciences companies, like all companies, rely on the stability of consistent, objective, and established regulatory paradigms to operate effectively. We respectfully urge the Commission to revise the single firm conduct recommendation to avoid unintentionally discouraging R&D, diminishing patient access, and weakening the state's competitiveness at a time when other states and countries are aggressively courting biomedical innovation.

As our biotechnology companies continually evaluate worldwide investment decisions, California's antitrust regulatory ecosystem has previously encouraged them to invest in California because the state recognized the value of high-quality research and the jobs and tax revenue that comes when that research turns into locally manufactured products. This has kept California at the epicenter of the life sciences industry, birthing and sustaining thousands of companies, employing millions of Californians, and innovating countless products that save lives and revolutionize quality-of-life.

The life sciences industry provides a unique return on investment with respect to research and development. Nationwide, life sciences companies have collectively invested more than $1 trillion dollars in R&D since 2000, establishing the biopharmaceutical sector as the most R&D-intensive industry in the U.S. economy. The unprecedented single firm conduct recommendation proposed in Memo 2025-44 would upend that paradigm, saddling California life sciences companies with increased risks and costs that would force more of them to seek more stable regulatory environments out of state.

We appreciate the opportunity to engage in this process and welcome further dialogue. CLS is currently reviewing the recently published Memo 2025-52 containing the Draft Tentative Recommendation on Single Firm Conduct and intends to provide specific comments related to the recommendation before the January 9 deadline. If you have any questions, please feel free to contact me at schung@califesciences.org.

Sincerely,

Sam Chung
Senior Vice President, Government Relations
California Life Sciences