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Comments of

TechFreedom

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On

The Final Draft Recommendation of the Staff
of the California Law Revision Commission
For A Single-Firm Conduct Statute

January 27, 2026

On January 14, 2026, TechFreedom[1] provided comments on the California Law Revision Commission's ("CLRC" or "Commission") tentative recommendation for the adoption of a state antitrust law directed at single-firm conduct. The staff of the Commission has rejected thoughtful criticism of its tentative recommendation without meaningful explanation or engagement.[2] The staff's Final Draft Recommendation is a very slightly modified version of the tentative recommendation. [3]

One concern of our January 14 comment was that the tentative recommendation requiring state courts not follow certain U.S. Supreme Court precedent created significant uncertainty in the analytical framework the state courts *should* follow in adjudicating a claim under the proposed statute. This comment proposes the Commission include in any recommendation to the legislature a requirement that courts adjudicate claims using the structured rule-of-reason and balancing framework articulated in *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001). There, the Federal Court of Appeals for the D.C. Circuit found Microsoft liable for violations of Section 2 of the Sherman Act.

In adjudicating the U.S. government's claims, the *Microsoft* court recognized that "the challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it." To do so, it relied on "several principles" developed over "a century of case law on monopolization:"

> First, to be condemned as exclusionary, a monopolist's act must have an anticompetitive effect. *That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice.* … The plaintiff … must demonstrate that the monopolist's conduct [ ] has the requisite anticompetitive effect. … If a plaintiff successfully establishes a *prima facie* case under [Section 2] by demonstrating an anticompetitive effect, then the monopolist may proffer a procompetitive justification for its conduct. If the monopolist asserts a procompetitive justification – a nonpretextual claim that its conduct is indeed a form of competition on the merits … then the burden

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[1] Please refer to footnote one in our submission of January 14, 2026. The author of this comment can be reached at bsayyed@techfreedom.org. This supplemental comment does not restate the concerns of our January 14, 2026 comment, but may be read in conjunction with that comment to understand the scope of our concerns.

[2] This has been a consistent practice throughout the Commission's consideration of this topic. Many of the persons commenting on the various draft proposals of the staff have spent their professional careers – private practice, academic, and/or government – focusing on the proper application of anti-monopoly law. The Staff and Commission failure to directly engage with and to merely dismiss with casual conclusory statements the constructive criticisms and concerns of persons with significant experience is extraordinary.

[3] See Study B-750, Staff Memorandum, First Supplement to Memorandum 2026-10, January 26, 2026.

> shifts back to the plaintiff to rebut that claim. … If the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit. … Finally, in considering whether the monopolist's conduct on balance harms competition … [the court's] focus is upon the effect of that conduct, not upon the intent behind it.[4]

We propose that the Commission recommend that any legislation that directs state courts to reject the "no-economic sense" test, and to reject the holdings and analytic framework of *Ohio v. American Express,* 585 U.S. 529 (2018); *Verizon Communications v. Trinko,* 540 U.S. 398 (2004); *Brooke Group v. Brown & Williamson Tobacco,* 509 U.S. 209 (1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985); and, indirectly, both *Pacific Bell Telephone v. Linkline Communications*, 555 U.S. 438 (2009) and *United States v. Colgate*, 250 U.S. 300 (1919), also require state courts to adopt the structured rule-of-reason and analytic framework of the *Microsoft* decision. The district courts in each of the Google "search" case and the Google "ad-tech" case applied the *Microsoft* framework, and both courts' found Google had engaged in illegal monopolization.[5]

To effectuate this judicial guidance, we propose the addition of a new subsection (k) to proposed Bus. & Prof. Code §16732:

> (k) In cases alleging a violation of harm under § 16731, state courts shall adopt a structured rule-of-reason analysis, balancing, with symmetrical treatment, the alleged or actual competitive harms and competitive benefits of the conduct under review, in determining liability of the defendant.

This judicial guidance will ameliorate some of the concerns raised by the staff's Final Draft Recommendation. However, we remain very concerned that the Commission's apparent determination to recommend the legislature untether state monopolization law from federal monopolization law will have significant negative effects on competition, innovation, and the

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[4] *United States v. Microsoft*, 253 F.3d 34, 45-47 (D.C. Cir. 2001) (internal quotations and citations omitted, emphasis added).

[5] See *United States v. Google, LLC*, 778 F. Supp. 3d. 797, 857-58 (E.D. Va. 2025) (Google ad-tech liability) (citing *Microsoft* for: (i) balancing of harms and benefits; (ii) the opportunity for the defendant to offer the procompetitive rationale for its conduct; (iii) requiring a monopolist's conduct to harm the competitive process (and not simply a competitor) and thereby harm consumers to be exclusionary; and, (iv) consideration of whether the defendant's conduct, taken as a whole, harmed competition and therefore harmed consumers); *United States v. Google, LLC*, 747 F. Supp. 3d 1, 106-07 (D.D.C. 2024) (Google search liability) ("The D.C. Circuit's decision in *Microsoft* explains how to evaluate claims of monopolization" and "the court structures its conclusions of law consistent with *Microsoft's* analytical framework.")

welfare of California's consumers. We continue to believe the staff recommendation should be rethought and in its present form should not be forwarded to the legislature.

Respectfully submitted,

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Date: January 27, 2026