Comments of

TechFreedom

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On

The California Law Revision Commission's

Tentative Recommendation of a Single Firm Conduct Statute

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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 mainstream (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

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[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

[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.

[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

[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).

[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/__________
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[75] Concord v. Boston Edison, 915 F.2d 17, 21 (1st Cir. 1990).