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March 28, 2025

The Honorable Xochitl Carrion, Chair,
and Honorable Commissioners
California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, CA 95814

Re: Antitrust Law – Study B-750 Support for Staff Recommendations

Dear Chairperson Carrion and Honorable Commissioners:

On behalf of our client, Economic Security California Action[1], we write to comment on the staff recommendations presented in Memorandum 2025-21, "Draft Language for Single Firm Conduct Provision," regarding the above-referenced antitrust study. As a threshold matter, we would like to commend the staff on their continued excellent work regarding this ongoing study. The most recent memorandum carefully and clearly lays out the various paths the Commission may take as it modernizes California's antitrust law, and offers sound considerations regarding each approach. The staff's work is scholarly, solidly grounded in law, logic, the expert reports,

[1] The following organizations have also endorsed this letter: American Economic Liberties Project; California Nurses Association; Consumer Federation of California; Democracy Policy Network; Ending Poverty in California; Institute for Local Self Reliance; Rise Economy; Small Business Majority; Service Employees International Union of California (SEIU); TechEquity Collaborative; United Domestic Workers (UDW/AFSCME Local 3930); United Food and Commercial Workers Western States Council (UFCW); and Writers Guild of America West.

the public comment in the record, and, in the end, persuasive. Indeed, we agree with much of what the staff has suggested.

Our client and the endorsing organizations listed in the margin urges the Commission to:

- Adopt and recommend to the Legislature the approach presented as Option Two in the staff memorandum;
- Reject Options One and Three; and
- Adopt and recommend to the Legislature the Enhanced Purpose Statement, Statement Rejecting Federal Principles, and Statement Rejecting Federal Precedents.

***First,* we urge the Commission to adopt and recommend to the Legislature the approach identified as Option Two**. Option Two reifies the principle that "the Cartwright Act is broader in range and deeper in reach than the Sherman Act."[2] It does this by including Option 1, simply codifying already-recognized prohibitions against "restraints of trade" seen in both the Cartwright and Sherman Acts[3] and in other states' laws,[4] and simply cross-referencing Business and Professions Code section 16720, which already lists some restraints of trade. We support staff's suggestion to codify these authorities in a free-standing statute as proposed by Option Two to supplement authorities in the Statement of Purpose, the Findings and Declarations, and the body of the proposed legislation.[5]

Option Two will accomplish the goals of separating California antitrust law from the flaws in the federal Sherman Act, enacting familiar and clear rules of the road for market participants sounding in already-existing laws and principles, all while avoiding a "new, untested antitrust framework [that] could be risky and invite uncertainty."[6]

***Second,* we urge the Commission to reject Options One and Three.** By contrast to Option Two, these Options have significant shortcomings, as the staff memorandum notes. Option One proposes reforming California law so the Cartwright Act would prohibit monopolies and monopsonies by one corporation. That is necessary, but—as highlighted by staff, numerous public commentators, and every expert report—woefully insufficient, for two reasons: (i) Standing alone, it fails to address the third request of ACR-95[7]; and (ii) It is

[2] *See State of California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal.3d 1147 (1988).
[3] *See* Staff Memorandum 2025-21 at 2-3 ("combining [Option 1] with a prohibition on 'restraints of trade,' a phrase used in both the Cartwright Act and the Sherman Act § 1.").
[4] *See* Staff Memorandum 2025-21 at 4 ("This approach borrows from other states that have both a SFC provision banning restraints of trade in addition to the core ban on monopoly conduct.").
[5] *See* Staff Memorandum 2025-21 at 3 ("The Commission should consider whether to include some or all of the language in statute rather than proposing it as findings and declarations.").
[6] See Staff Memorandum 2025-11 at 7.
[7] "Whether the law should be revised in any other fashion such as approvals for mergers and acquisitions and any limitation of existing statutory exemptions to the state's antitrust laws to promote and ensure the tangible and intangible benefits of free market competition for Californians"

inconsistent with what the Commission endorsed in January[8] because, without more, courts would interpret this solitary change as the Legislature endorsing the inadequate federal antitrust law *status quo* that prompted ACR-95 in the first place, which every expert white paper urges be reformed.

Indeed, changing California law to outlaw anticompetitive conduct by a single corporation but shackling California judges with the same federal jurisprudence that, one way or another, has been spotlighted as lacking by your experts, would fail, as urged by the Legislature in ACR-95, to "revise" California's law to "promote and ensure the tangible and intangible benefits of free market competition for Californians."

For different reasons, we recommend rejecting Option Three. According to staff, "[w]hile Options One and Two rely heavily on using existing underlying antitrust terms and principles governing the analysis of restraints of trade and monopolistic behavior, Option Three uses new terminology and a different analytical framework" drawn from one of the expert reports.[9] In our opposition to this Option, we are in apparent agreement with some business public commentators. ("Some business groups have commented that the first prong's focus on harm to competitors will incentivize litigation by disappointed rivals, and the protection of competitors may detract from the goal of protecting consumer welfare.")[10]

As the staff memorandum notes, while the Option would offer a "clean break" from current law, it would inject different—and not necessarily better—uncertainty as to how to measure the benefits or burdens of certain challenged conduct, what burdens of proof to apply in certain cases, and to what extent existing antitrust doctrine, such as the rule of reason analytical framework, applies.

For instance, covenants are generally prohibited when they restrict anyone from "engaging in a lawful profession." If plaintiffs were forced to instead use the procedure set out in Option Three, they not only would have to demonstrate that they are prohibited from engaging in lawful competition, but also that the covenant itself reduced the competitive incentives of their counterparty's rivals and that the covenant does not create offsetting benefits to any number of possible trading partners. These requirements are unnecessarily burdensome, would balloon the cost of every litigation by millions of dollars, and could make even routine violations take years to litigate. Indeed, such a procedure would replicate the inequities that currently plague federal antitrust law. The procedure would deprive California law of its existing clarity while denying access to justice to Californians who have neither the time nor the wealth to engage in prolonged litigation. Instead, California would be better served by codifying many of its existing standards into a comprehensive single-firm conduct statute and providing judges and the Office of the

[8] *See* Memorandum 2025-12, California Law Revision Commission Draft Minutes, January 23, 2025, at 4 ("The Commission voted to approve the staff recommendation that California adopt its own single firm conduct provision, different from federal law.")
[9] *See* Staff Memorandum 2025-11 at 5.
[10] *Staff Memorandum* 2025-11 at 6 (citing a Chamber of Commerce public comment).

Attorney General with the tools to craft efficient procedures to address novel methods of competition. That is what Option Two proposes.

***Third,* we urge the Commission to adopt and recommend to the Legislature the Enhanced Purpose Statement, Statement Rejecting Federal Principles, and Statement Rejecting Federal Precedents.**[11] These provisions are all grounded in current law, will provide crucial guidance to courts about how to adjudicate Cartwright Act cases, provide clarity, consistency, and fairness in the application of the law as a result, and, consistent with every expert white paper, guarantee that California's antitrust law is of independent force and effect and not destined to follow the federal jurisprudence that has become increasingly hostile to meaningful antitrust enforcement.

The Enhanced Purpose Statement appropriately and accurately catalogues the broad scope of harms that can result from anticompetitive conduct, including harms to workers, consumers, and small businesses. This comprehensive view of competition law is essential for addressing the full range of anticompetitive practices in today's economy.

The Statements Rejecting Federal Principles and Statements are all grounded in and inspired by the comments in the expert white papers before you and, as explained in those papers, are particularly important given the problematic evolution of federal antitrust law over recent decades. By explicitly rejecting the "false positives" framework and the presumption that vertical arrangements and unilateral conduct are unlikely to harm competition—a federal judge-made presumption that, at best and as explained in the expert reports, has proven questionable in our monopoly-dominated economy—the Commission can prevent these flawed principles from being incorporated into and hence eventually eroding California's ability to protect competition effectively and independently, for the benefits of its own residents, consumers, workers, and businesses.

Thank you again to both the Commissioners and the Commission staff for their excellent work on this important issue. We look forward to seeing the additional recommendations from the Commission as this process continues.

Sincerely,

Scott A. Kronland

Scott A. Kronland

[11] The Basic Purpose Statement contained in the Staff Memorandum is too general and cryptic to provide useful guidance to the courts.

cc: Economic Security California Action

American Economic Liberties Project
California Nurses Association
Consumer Federation of California
Democracy Policy Network
Ending Poverty in California
Institute for Local Self Reliance
Rise Economy
Small Business Majority
Service Employees International Union of California (SEIU)
TechEquity Collaborative
United Domestic Workers (UDW/AFSCME Local 3930)
United Food and Commercial Workers Western States Council (UFCW)
Writers Guild of America West