ALTSHULER BERZON LLP
ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108
(415) 421-7151
FAX (415) 362-8064

January 21, 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 express our strong support for the staff recommendations presented in Memorandum 2025-11 regarding the above-referenced antitrust study. As we noted in our December 19, 2024 letter, the product of the Commission's expert working groups has been superlative. The recent staff recommendations, which are persuasively grounded and shaped by the working group reports and the staff's own comprehensive memoranda, reflect that excellent work. We believe the Commission should embrace the staff's recommendations and commend them to the Legislature.

[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; TechEquity Collaborative; United Domestic Workers (UDW/AFSCME Local 3930); United Food and Commercial Workers Western States Council (UFCW); and Writers Guild of America West.

We would also note that the staff recommendations align closely with the concerns we raised in our previous letter about the urgent need to update California's antitrust laws. As the world's fifth-largest economy, California cannot rely solely on federal law or federal law enforcement to protect competition within its borders. The staff memorandum recognizes that while federal antitrust enforcement has recently shown signs of renewal, these changes remain vulnerable to shifting federal priorities and judicial interpretation. California needs its own robust framework to protect workers, consumers, and businesses from anticompetitive conduct.

We are particularly encouraged by the staff's recognition that, as the working groups' reports make clear, simply importing federal standards would not serve California's interests. Decades of federal judge-made jurisprudence increasingly unmoored from the animating history of antitrust law have weakened antitrust enforcement, making exclusive reliance upon federal doctrines inadequate to the task of challenging anticompetitive conduct and mergers. The weakness of these judge-made standards has prompted bi-partisan, cross-ideological cries for reform. The staff's recognition of these shortcomings and recommendation to develop California-specific standards while still selectively drawing on useful federal law offers a pragmatic path forward that would provide courts with familiar reference points while avoiding the federal precedents the Commission's experts highlighted as outmoded and ill-suited to promoting the health and vibrancy of California's economy.

We strongly support the following specific staff recommendations:

- Add provisions addressing single firm conduct with a California-specific standard that selectively draws on federal law while maintaining independence from federal precedent. This approach would fill the most significant gap in California's antitrust framework while avoiding the limitations that federal courts have placed on Sherman Act Section 2 enforcement. The staff correctly recognizes that a majority of states offer their citizens such protection and that Californians should not be outliers. There is, respectfully, no sound public policy to deny Californians this protection.

- Integrate some elements of what has been labeled an abuse of dominance standard into the single firm conduct provisions. Adopting a single firm conduct law would not be productive if it is shackled to the very federal case law that has prevented effective federal enforcement of antitrust law and prompted the cries for reform in the first place. Elements of what has been referred to as an abuse of dominance standard would provide enforcers with additional tools to address anticompetitive conduct by dominant firms, particularly in cases where traditional monopolization analysis might fall short. The staff appropriately suggests developing clear criteria for identifying dominant firms and specific prohibited practices, rather than adopting a vague standard. To further support this approach, we would encourage the Commission and staff to explicitly clarify in code that the following practices as presumptively unfair or harmful when undertaken by single firms with significant market power:

- Self-preferencing of a firm's own products or services, which can unfairly disadvantage competitors and reduce consumer choice.
- Predatory pricing and below-cost sales intended to drive out competitors.
- Exclusive dealing arrangements that foreclose competition by preventing competitors from accessing necessary customers or inputs.
- Refusal to deal with competitors when essential facilities or infrastructure are involved.
- Tying arrangements that force customers to purchase unwanted products or services.
- Killer acquisitions of nascent competitors that eliminate potential future competition.
- Use of non-compete agreements or no-poach provisions that restrict worker mobility and suppress wages.
- Discriminatory access to essential platforms or infrastructure that disadvantages competitors.
- Misclassification of workers as independent contractors.

These specific codifications would provide clear guidance to courts and businesses while preserving flexibility for addressing new forms of anticompetitive conduct as markets evolve. Importantly, these presumptions would not, as we are proposing them here, enact per se violations, but would shift the burden to defendants to justify their conduct when they possess significant market power.

- Adopt merger approval and premerger notification requirements with appropriate funding for enforcement. This would give California authorities the ability to review and challenge mergers that may harm competition within the state, rather than relying solely on federal enforcement. A state-specific merger review process is especially important given that federal agencies can only investigate a small fraction of reportable mergers.

- Implement both the "appreciable risk" of materially lessening competition" and "public interest" standard for proving harm in merger reviews. Both standards are familiar to courts and antitrust enforcers and would enable California to challenge potentially harmful mergers before damage to competition becomes certain and irreparable. This approach better reflects the Clayton Act's original incipiency standard and would help prevent further market concentration. (See, for example, proposed statutory language from the Working Group Report on Single Firm Conduct: "(b) Conduct, whether by one or multiple actors, is deemed to be anticompetitive exclusionary conduct, if the conduct tends to (1) diminish or create a meaningful risk of diminishing the competitive constraints imposed by the defendant's rivals and thereby increase or create a meaningful risk of increasing the defendant's market power, and (2) does not provide sufficient

benefits to prevent the defendant's trading partners from being harmed by that increased market power.")

- At the outset, adopt a comprehensive and harm-centric approach to regulating single firm conduct across all industries. This approach recognizes that while certain sectors of the economy, such as digital platforms, pose unique challenges, the fundamental principles of protecting market participants from unfair conduct should apply consistently across the economy, and leaves room for the Commission to continue to propose sector-specific solutions as it continues its work on these essential topics.

As the staff memorandum notes, there are several areas where simply codifying existing case law – both California cases applying California law and federal cases applying federal and California law – will facilitate enforcement and so improve protection for Californians just by bringing clarity to statutes. Our prior letter agrees with that assessment as well. In keeping with that paramount interest, we strongly urge the Commission recommend explicitly codifying key aspects of current caselaw that differ from federal interpretation, including:

- Recognition of harm to *workers and labor markets* as cognizable antitrust injury. This is particularly important given the growing body of evidence showing how market concentration and employer monopsony power can depress wages and working conditions.
- Standing requirements that allow indirect purchasers to sue the single firm (*see, e.g.* CA Bus & Prof Code sec. 16750). California has long recognized the importance of allowing indirect purchasers to seek remedies for antitrust violations, and this principle should be clearly codified.
- Consideration of non-price effects such as quality, innovation, and privacy. Modern markets, particularly in the digital economy, compete on many dimensions beyond price, and California's antitrust framework should explicitly recognize these factors.
- Recognition of monopsonies should be subject to the same standards as monopolies. This is especially crucial for protecting workers, suppliers, and small businesses from exploitation by dominant buyers.

We also encourage staff, in drafting recommendations, to consider whether legislation should integrate both (1) an analog to the Clayton Act that enumerates clear standards for specific types of illegal single-firm conduct; and (2) a more robust analog to the Federal Trade Commission Act that empowers the Department of Justice to define novel unfair methods of competition. Both frameworks would require explicit legislative definitions to ensure predictable adjudication. These frameworks were used for decades in the United States and are therefore unlikely to either disrupt California's enviable innovation economy or create significant legal uncertainty. Instead, they would create clear rules of the road that would allow workers, consumers, and businesses to access fair and open markets.

As discussed in our prior December 19, 2024 letter, the Commission can authorize staff to move forward with drafting the specific proposals discussed in the staff report for the Commission's consideration while the Commission continues to study other issues, including the possibility of industry-specific regulations, that may require further study. Further, neither the Commission nor its staff need propose specific legislative language to the Legislature to begin resolving these important problems. We therefore urge the Commission to act swiftly so that Californians and the Legislature can benefit from its excellent work.

We applaud the Commission's continued work on this crucial initiative and look forward to reviewing the specific recommendations put forward as this process continues.

Sincerely,

Scott A. Kronland

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cc: Economic Security California Action

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Writers Guild of America West