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December 19, 2024

The Honorable Ambassador David Huebner, 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

Dear Chairperson Huebner and Honorable Commissioners:

On behalf of our client, Economic Security California Action[1], we write to express appreciation for the California Law Revision Commission's ongoing work on Study B-750, an ambitious and timely effort to examine and propose reforms to update California's antitrust laws. The Commission's and working groups' diligence and rigor in navigating these complex legal and economic issues are truly commendable. Given the progress demonstrated in the Commission's white papers and the reports of its working groups, we respectfully urge the Commission to issue interim recommendations on areas of consensus or near-consensus *now* while continuing to study more challenging topics.

[1] The following organizations have also endorsed this letter: American Economic Liberties Project; Consumer Federation of California; Democracy Policy Network; Institute for Local Self Reliance; 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 Commission and its working groups have already demonstrated that there are several issues that are ripe for legislative consideration and do not need to wait until further study is conducted for the Commission to recommend that the Legislature consider them. Those issues are discussed below. While the Commission may feel the need to extend its consideration of certain issues, a phased approach, which is consistent with the Commission's historical practices, would enable the Legislature to act swiftly where clarity and consensus exist and address critical gaps in California's competition laws while the Commission continues to consider other issues.

Offering recommendations to the Legislature at this juncture would also be appropriate given the potential for shifting enforcement priorities at the federal level. The recent election may well result in a change in federal legislative and enforcement priorities and a continued change in the makeup of the federal judiciary. Regardless of whether changes at the federal level are considered positive or negative, California's antitrust policies should not be dependent on potentially fluctuating federal priorities. Issuing recommendations now on consensus issues would allow the Legislature to act with the benefit of the Commission's guidance and expertise, would allow California to enact its own modern antitrust law that is enforceable in its state courts, and would ensure that essential improvements to California's competition laws are not delayed.

Finally, the sponsors of the legislation that authorized Study B-750 have made clear that legislators are unlikely to wait until the Commission completes the entire study before introducing state legislation to modernize state antitrust law. The Commission should provide the Legislature with recommendations now so the Legislature can take them into account.

I. Precedent for Interim Recommendations

The Commission has a history of issuing interim recommendations during the course of broader studies, thereby enabling the Legislature to take timely action while the Commission continues to work on long-term projects. Examples from prior studies underscore the feasibility and benefits of this approach, particularly when addressing complex areas of law such as antitrust law.

For example, Resolution Chapter 63 of the Statutes of 2014, No. 22, tasked the Commission with determining whether the Fish and Game Code should be revised for organization, clarity, and to make other technical improvements. When the Commission published its first report under that mandate the next year, the then-Chairperson explained that the scope of the project would require more time to complete, but that as the larger study proceeded, "some beneficial changes can be made more quickly." *Fish and Game Law: Technical Revisions and 20 Minor Substantive Improvements (Part 1)*, 44 Cal. L. Revision 21 Comm'n Reports 115, 117 (2015). In keeping with that approach, the Commission made interim recommendations while continuing to study the Fish and Game Code and periodically suggest further improvements and revisions for many years. *See Fish and Game Law: Technical Revisions and Minor Substantive Improvements (Part 3)*, Pre Print Report (February 2023).

Similarly, Government Code Section 71674 tasked the Commission with determining "whether any provisions of law are obsolete as a result of the enactment of" several statutes that restructured the California trial court system. As with the example of the Fish and Game Code revision, the Commission issued many reports in accordance with its statutory mandate between 2002 and 2023, in at least nine parts. *See* California Law Revision Commission, *Statutes Made Obsolete by Trial Court Restructuring (Part 9): Jurisdictional Classification of a Drug Asset Forfeiture Proceeding*, Pre-Print Recommendation (August 2022).

Likewise, in the 1960s the Commission issued a series of reports in response to the mandate it received under Resolution Chapter 42 of the Statutes of 1956 to determine whether the law of eminent domain should be revised to safeguard private property rights. Given the breadth and complexity of the topic, the Commission issued several interim recommendations in accordance with its mandate. *See, e.g., Recommendation and Study Relating to Evidence in Eminent Domain Proceedings* (October 1960); *Recommendation and Study relating to Taking Possession and Passage of Title in Eminent Domain* Proceedings (October 1960); *Recommendation and Study Relating to Condemnation Law and Procedure —Discovery in Eminent Domain Proceedings* (January 1963).

In short, this is not the first time the Commission has been tasked with the study of an area of law that is vast, complex, and requires study that may span many years. The Commission's past practice in similar circumstances has been to issue reports and recommendations to the Legislature as it arrives at consensus or identifies clear areas for improvement, as opposed to delaying any action—and thus depriving the Legislature of its insight and expertise—until all the Commission's work is complete.

Given the scope of the Commission's inquiry into California's antitrust regime, the time that has elapsed since the Commission began its work in this area, and the already excellent work the Commission and its working groups have done in surveying the field and developing recommendations, a similar approach is warranted here.

II. Areas Ready for Legislative Action

The Commission's working groups have identified several areas of consensus or near-consensus that are ready for legislative action. The Commission's release of recommendations on these issues now would enhance the clarity and enforceability of California's antitrust laws and empower the State to effectively tackle contemporary challenges. These issues are as follows:

A. Reaching Single Firm (Unilateral) Conduct

The Commission's work thus far has established that "the most glaring deficiency" in California's current antitrust law is that "California has no provision comparable to Section 2 of the Sherman Act," meaning "the Cartwright Act does not reach purely unilateral conduct." Single Firm Conduct Working Group Report at 1. Accordingly, California law is currently *less*

protective than federal law in prohibiting several types of single-firm conduct, including "unilateral refusals to deal, discrimination against rivals, tortious conduct that disrupts the ability of a rival to compete effectively, and sham litigation." Single Firm Conduct Working Group Report at 10. To remedy that shortcoming, the Single Firm Conduct Working Group has drafted potential legislative language that would extend the reach of California antitrust law to unilateral, anticompetitive conduct by a single firm.

Other working groups have concurred with the conclusion that reaching single firm conduct would not only bring California law in line with longstanding federal provisions but would also ameliorate some of the current issues California citizens face and address concerns that various working groups have raised. For example, the Competition and Artificial Intelligence Working Group endorsed the Single Firm Conduct Working Group's proposal, noting that it would "strengthen California law significantly and make it more effective than the federal antitrust law governing unilateral conduct," thus "increas[ing] welfare" and promoting innovation. Competition and Artificial Intelligence Working Group Report at 6. That working group also noted that the proposed language to extend the reach of antitrust law to single firm conduct would "apply to all firms and therefore automatically cover digital platforms, AI, and any other innovation that comes along in the future," thus protecting both "people and innovators better than a law targeted only at digital platforms or AI." *Id.* Likewise, the Technology Platforms Working Group acknowledged the Cartwright Act's failure to address single firm conduct and noted that, if the Legislature adopted the Single Firm Conduct Working Group's recommendations, this would circumvent precedent that has hobbled antitrust enforcement in the technology sector at the federal level. Technology Platforms Working Group Report at 7–8. And the Enforcement and Immunities Working Group embraced the proposal as well, noting that the Single Firm Conduct Working Group's proposed language "is true to traditional California policy purposes in its focus both on consumer harm and the seriousness of exclusionary effects on competitors." Enforcement and Immunities Working Group Report at 7.

As members of this Commission are no doubt aware, the Commission need not provide specific legislative language in its reports and recommendations to the Legislature. However, in this instance the Commission, through several working groups, has already done considerable research into the need for extending antitrust law to reach single firm conduct that would fill a critical gap in California's antitrust enforcement. Indeed, it has already drafted a legislative proposal that could serve as an important starting point for discussions in the Legislature. There is no reason for the Commission to keep its proposal away from the Legislature when it has the power to act now, and when allowing it to do so would not hamper the Commission's other important work in this area.

B. Codification of Presumptive Anti-Competitive Practices

The Commission's working groups have also reached substantial agreement on the need to codify specific anti-competitive practices already recognized as unlawful under existing state and federal case law. Practices such as tying arrangements, exclusive dealing, predatory pricing,

and sham litigation have been well-documented as harmful to competition and are currently addressed through case-by-case judicial decisions. *See* Single Firm Conduct Working Group Report at 9; Mergers Working Group Report at 11; Tech Platforms Working Group Report at 9; Enforcement and Immunities Working Group Report at 4. However, the absence of clear statutory guidance creates uncertainty for both enforcement agencies and businesses, leading to inconsistent application and protracted litigation. In that vein, the Single Firm Conduct Working Group's proposed language includes sections explicitly codifying as anticompetitive certain acts that are already violative of current law. *See* Single Firm Conduct Working Group Report at 15, 17.

Codifying these practices as presumptively anticompetitive would serve multiple purposes. First, it would provide clarity and predictability for market participants, reducing the compliance burden for businesses while enhancing deterrence. Second, it would streamline enforcement by creating statutory presumptions that shift the burden to defendants to demonstrate pro-competitive justifications. Finally, it would enable state courts to develop jurisprudence tailored to California's specific economic and policy landscape, free from the constraints of federal interpretations.

The Commission's study recommends that these presumptions be carefully crafted to reflect current economic realities, particularly in rapidly evolving sectors such as technology and healthcare. For example, tying arrangements in the digital platform economy often involve unique market dynamics that traditional antitrust principles may struggle to address. By codifying these practices and incorporating modern economic insights, the Legislature would equip enforcers with the tools necessary to effectively combat emerging forms of anti-competitive behavior. The Single Firm Conduct Working Group's proposed language offers the Commission an ideal framework to encourage the Legislature to codify California's antitrust common law to the benefit of both market participants and the general public.

C. Clarification of Key Legal Principles

Two other critical clarifications for the Legislature to consider have emerged from the Commission's study regarding California's antitrust doctrine. The first concerns the relationship between California antitrust law and federal precedent. The second addresses recognizing worker injuries as antitrust injuries. Both clarifications would ensure that California law fulfills its intended role of protecting competition regardless of how federal antitrust statutes are interpreted and enforced.

First, the relationship between California antitrust law and federal precedent has been a recurring source of confusion, particularly for federal courts. While interpretations of federal antitrust statutes, such as the Sherman Act, can be informative, they are not binding under the Cartwright Act. As multiple working groups have noted, courts have repeatedly affirmed this distinction, emphasizing the divergence between the legislative history of the Cartwright Act and that of the Sherman Act. In *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal.4th 1185 (2013), for

example, the California Supreme Court held that interpretations of federal antitrust law are at most instructive when interpreting the Cartwright Act. In *California v. ARC America Corp.*, 490 U.S. 93, 102 (1989), the U.S. Supreme Court explained that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies," and that the Sherman Act and Cartwright Act are not identical.

Despite these precedents, the Commission's working groups explained that many courts continue to conflate the two frameworks, which results in confusion and underenforcement. For example, the Enforcement and Immunities Working Group concluded that courts, especially federal courts, often incorrectly assume that the Cartwright Act simply mirrors federal antitrust law and are unfamiliar with the state law's history and purposes. The working groups agree that California's antitrust regime would benefit from legislative clarification that the Cartwright Act has a distinct legislative history, was intended to be interpreted more broadly, and draws on its own body of common law. This would ensure that judges look primarily to California precedents when interpreting the Cartwright Act.

Second, the Legislature should make explicit that injuries to workers from anti-competitive practices are cognizable antitrust injuries, so there is no need for disputes about this issue. The Concentration Working Group exhaustively catalogued the harms that concentration and undue market power can cause workers in the State. Concentration Working Group Report at 3–6. The working group's report explains that anticompetitive practices such as wage-fixing agreements or no-poach clauses harm not only consumers but also workers, who are directly impacted by wage suppression and restricted job mobility.

The Consumer Welfare Standard Working Group also observed that the central principles that lie at the heart of antitrust law include protecting labor markets from unfair competition. Consumer Welfare Standard Working Group Report at 8. The working groups have explained that explicitly recognizing worker injuries as cognizable injuries under antitrust law would align California with contemporary economic understanding, which sees labor markets as integral to competition policy. There is no reason to delay a recommendation that the Legislature consider explicitly including workers as protected parties under the Cartwright Act.

D. Providing for Merger Challenges and Pre-Merger Notification Requirements

Finally, the working groups' studies have identified another easily addressed shortcoming in California's antitrust regime: the absence of any explicit provisions addressing mergers. The Mergers Working Group observed that "at present the Cartwright Act … lacks a specific merger provision," which thus requires the Attorney General to rely solely on federal antitrust provisions, such as the Clayton Act, to block mergers that may be detrimental to competition. Mergers Working Group Report at 1. Forced reliance on federal law necessarily hampers antitrust enforcement in the State, given the restrictive nature of federal precedents that have accumulated over time.

The Mergers Working Group conducted a comprehensive overview of the differences between how California and federal law approach merger challenges and offered a range of options to address the current limitations on State officials' ability to ensure that anticompetitive mergers are adequately scrutinized and prevented. One of the easiest and least controversial options this group proposed is enacting notice requirements for mergers.

In 2023 California enacted AB 853, which created a merger notification regime for retail grocery and drug firms, an important first step in enhancing the State's ability to regulate anticompetitive mergers. However, the Commission's study identifies this narrow focus on retail grocery and drug firms as a missed opportunity to enhance oversight across a broader range of industries. Mergers in technology, healthcare, and other critical sectors often escape state-level scrutiny due to the absence of a general notification regime. Expanding these requirements would enable the Attorney General to review transactions that fall below the federal Hart-Scott-Rodino threshold but still pose significant risks to competition within California. Mergers Working Group Report at 17; Enforcement and Immunities Working Group Report at 12–13.

As the Mergers Working Group explained, moreover, states have a comparative advantage over the federal government in merger enforcement based on their "superior information about mergers and practices that affect commerce in their jurisdiction," their superior knowledge of "local businesses, their practices, and key individuals," and their ability to dedicate resources to mergers that federal agencies might not be able to. Mergers Working Group Report at 15. The Working Group has thus proposed both adding language to the Cartwright Act that would permit state officials to challenge mergers in state court, with all the attendant benefits of such an approach. *Id.* at 16. The Enforcement and Immunities Working Group echoed the importance of adopting a pre-merger notification law to ensure that California's antitrust framework is sufficiently robust. Enforcement and Immunities Working Group Report at 21.

* * *

For the reasons explained above, the Commission should act swiftly to make an interim recommendation to the Legislature on the issues discussed above so that the Legislature can benefit from Commission's excellent work and modernize California's antitrust laws for the benefit of all its citizens. Meanwhile, the Commission should continue its study of other antitrust issues.

Sincerely,

Scott A. Kronland

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cc: Economic Security California Action

American Economic Liberties Project
Consumer Federation of California
Democracy Policy Network
Institute for Local Self Reliance
TechEquity Collaborative
United Domestic Workers (UDW/AFSCME Local 3930)
United Food and Commercial Workers Western States Council (UFCW)
Writers Guild of America West